Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Legal Services Commission: Future Status

20 June 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Stewart Dickson
Mr Alex Easton
Mr Tom Elliott
Mr Seán Lynch
Mr Alban Maginness
Mr Patsy McGlone
Mr Jim Wells

Witnesses:

Ms Carol Graham	Department of Justice
Mr David Lavery	Department of Justice
Mr Mark McGuckin	Department of Justice

The Chairperson: I welcome David Lavery, who is the director of access to justice; Mark McGuckin, who is the director of justice delivery; and Carol Graham, who works on the reform programme. All three are from the Department of Justice (DOJ). This session will be recorded by Hansard and published in due course. David, I will hand over to you to take us through the results of your consultation.

Mr David Lavery (Department of Justice): I welcome the opportunity to present to the Committee the response to the public consultation exercise on the future of the Legal Services Commission. I would also like to take the opportunity this afternoon to outline the Minister's proposed way forward.

As the Committee will be aware, one of the Minister's first decisions following the devolution of justice was to establish a fundamental review of access to justice in Northern Ireland. The report of the access to justice review was published in September 2011, and the Minister has accepted its principal recommendations. Subject to the views of the Assembly, these effectively set out the future direction of legal aid reform in Northern Ireland. One of the principal recommendations of the access to justice review was that the Northern Ireland Legal Services Commission should cease to be a non-departmental public body (NDPB) and that its responsibilities should transfer to a new legal services agency in the Department of Justice. The intention is that such a move would bring about improved governance as well as a number of efficiencies in the administration of the legal aid system. A similar change has taken place in England and Wales, where the commission moved to become an agency of the Ministry of Justice.

One of the issues flowing from the access to justice review was about how best to secure the independence of decisions relating to the granting or refusal of civil legal aid once the commission becomes an agency of the Department. The recently concluded consultation process addressed that issue. Our proposal is that the chief executive of the agency will become a statutory officer, whose decisions will be independent from any influence or interference by the Department. That arrangement was recommended by the access to justice review and appears to be working well in England and Wales, where it has also been adopted.

The consultation closed on 22 May, and we received 17 responses. The proposed new arrangements for dealing with legal aid applications or for appeals where legal aid is refused attracted a number of comments. Consultees responded positively to our proposal that, in future, reasons will have to be given where civil legal aid is refused. That should improve decision-making and will give applicants for legal aid an opportunity to address the reasons for refusal. Because of that, it may be that the need to appeal will be reduced in a number of cases. Some consultees were, however, concerned about our proposal that an appeal on a refusal of legal aid would be dealt with by only one person. At present, appeals are heard by a panel comprising five members. Some consultees argued that appeals should be heard by a panel and that it should include a practising lawyer. We have reviewed our proposals in light of these responses, and we now propose that appeals on the refusal of civil legal aid should be dealt with by a panel comprising three persons, one of whom will be a lawyer. We think that is an improvement on our original proposal and it will also help to strengthen the independence of the decision-making process.

We have also proposed that appeals should be dealt with on paper without the need for a hearing. At present, appeals often involve a hearing with oral representation. Although some consultees have questioned that change, we are satisfied that a paper-based process will be appropriate in the majority of cases. Having said that, we intend to make provision for oral representation in cases involving exceptional circumstances or novel or contentious matters. We consider that this should go a long way toward meeting consultees' concerns.

Overall, we believe that our revised proposals address the greater number of issues raised in the consultation and that the new arrangements will be robustly independent, administratively straightforward and proportionate to the issues involved.

In light of the consultation process, our Minister has formally decided to give effect to the access to justice review recommendation on the future of the commission. The Minister is keen to move forward as quickly as possible, so that the new agency can contribute to the wider agenda of legal aid reform. This change will require primary legislation and, subject to the views of the Committee this afternoon, the Minister proposes to seek Executive approval to begin the preparation of a new legal services agency Bill. The Bill will replace the commission with a new legal services agency. It will also give effect to the guarantee of independence that was discussed in the recent consultation paper. Subject to the Assembly's approval, the Minister's intention is that the Northern Ireland Legal Services Commission will close in June next year, and its functions will transfer to the Department of Justice to be discharged by a new legal services agency. The change to an agency also requires the approval of the Department of Finance and Personnel (DFP), and a business case is being prepared for that purpose.

We believe that early progress on this issue will provide renewed momentum for the important task of reforming the legal aid system in Northern Ireland. That concludes my introductory remarks. My colleagues and I are happy to address any questions that the Committee may have.

The Chairperson: Thank you for that presentation. Have you estimated what the cost savings would be if this was to go through? Would there be a cost saving? Will you get a more efficient organisation?

Mr Lavery: The access to justice review certainly anticipated cost savings. The commission ceasing to be an NDPB and the establishment of an agency would obviously lend itself to a shared services model. So, instead of the commission having its own in-house finance, human resources, IT and accounting, a lot of that could be plugged into the shared services environment that is becoming the norm, not only in the Department of Justice but the whole of the Northern Ireland Civil Service.

Another anticipated saving would be from another recommendation of the review, which is that the responsibility for policy on legal aid be vested with the Department of Justice and not with the commission or agency. The agency in the future will be more about processing applications for legal

aid and payments for legal aid work done. It will not need capacity to deal with policy and that sort of area of work.

A further saving, in the sense that it would be a reduction of the top-level cost, may be an adjustment in the position on VAT, but that is still being discussed with DFP and the relevant resources. There is a technical reason why VAT could be recovered, if this is an agency of the Department, which would also affect the top line, if you like.

Mr A Maginness: I welcome the changes to the proposals that the Minister intends to bring in, particularly on the appeals for legal aid, which I think is very sensible. I know that such decisions must be made on merits, but what does that mean in real terms? Is it an opinion put forward by counsel or a solicitor, in which they say that this is, prima facie, a meritorious case? What criterion is used?

(The Deputy Chairperson [Mr McCartney] in the Chair)

Mr Lavery: Although we have not yet worked through the detail, the current arrangement is that legal aid applications in difficult cases are often supported with counsel's opinion and, in practice, with written opinions. I imagine that the paper-based process — the initial application — may still feature that. The changes that we are making are to the next stage. If the application for legal aid is turned down, the first difference will be that detailed reasons for the refusal of legal aid will be given. There will be an opportunity to address those reasons, rather than appeal to a panel. There will still be a review process that you can go through.

Mr A Maginness: The point that I am trying to make is that, if the solicitor — or indeed the panel or the adjudicator — says that the case, prima facie, is meritorious, but it does not go to the other level, which is that it will probably succeed, what criteria will be applied?

Mr Lavery: I do not really anticipate a change in the criteria for qualifying. The basic architecture will remain as today. One would have to satisfy a financial eligibility test and a merits test. The criticism that is often made of legal aid is that you hear only one side of the case when it is an application for legal aid. There is no rebuttal. The threshold has to be set high enough not to let a hopeless case through but not so ridiculously high that you are pre-judging the case.

Mr A Maginness: It is important to look at that. You could say that a case, prima facie, is meritorious, but if the solicitor or barrister was then asked whether the case was likely to succeed, it might be a different answer in those circumstances.

Mr Lavery: In my experience, every case that gets legal aid is a sure-fire win until it meets the other side of the case. It is an interesting point. It is something that we obviously want to look at.

Mr A Maginness: It would keep out cases that are meritorious on paper but, in reality, do not really have a chance of succeeding.

Once the cases are presented on paper to the agency, are they looked at by an individual or a panel?

Mr Lavery: The initial consideration of the application is by an individual.

Mr A Maginness: Does that individual decide yes or no?

Mr Lavery: They can decide yes, in which case the legal aid certificate is issued. It can be a limited or qualified certificate, as you know, to take certain steps in the proceedings. If they say no, they will have to give reasons. We hope that that will allow applicants to address the reasons for refusal and possibly resubmit. There has to be a further recourse to an appellate stage. We are suggesting, having listened to consultees, that that should still be a panel-based process. There would be a legal representative on the panel. The panel has come down in size over the years. It used to be seven, and now it is five. We suggest that three is proportionate. Although that would be a paper process without an automatic right of representation, we suggest that the right of representation be there where the case requires it. The model that we propose is probably more proportionate, and ought to lead to better decisions at each stage.

Mr A Maginness: Just one other point. Do you have any idea of what the commission's annual running costs are?

Mr Lavery: Grant in aid is around £7 million. That is the figure that I clutch out of the air.

Mr A Maginness: That is quite substantial. What sort of saving do you estimate in relation to that £7 million? You might not be able to give a precise figure, but maybe you might have a percentage in mind.

Mr Lavery: I certainly do not have one in mind. I will ask Mark to comment.

Mr Mark McGuckin (Department of Justice): There will be some savings identified that will be delivered upfront in terms of changing the structure, as David said in his introduction; stripping out some of the costs through shared services; looking at the size of the appeal panel and how it works; and reducing the number of appeals because you get the right decision earlier in the process. Those are fairly modest cost savings. Part of the process, once it is an agency, will be to start looking at the internal processes, the way that they run cases, the way that the decisions are made, and improving the efficiency of that. If you do some very rough and crude comparisons with England and Wales and with Scotland, you will find that we are a bit more expensive here. Therefore, there is some headroom in there to drive it down. The initial costs of the business case will be made, but the initial cost savings will be relatively modest. However, we hope that that will be the start for a programme of work that will drive the cost down further.

Mr A Maginness: The problem as I see it is that you carry out this change — a fairly radical change — in status, and yet the savings are quite modest. That is the problem that besets the Committee in considering the change.

Mr Lavery: One thing that we are committed to, and the commission is committed to, is a staffing review, just to look at what the size and shape of the organisation should be for the future, because its role will have changed quite a bit. There is no getting away from the fact that it costs considerably more to run than the old legal aid department of the Law Society, which was the administrative body until 2003.

Mr A Maginness: Why was that? The Law Society was running the legal aid system at a relatively modest cost in comparison to this brand spanking new commission.

Mr Lavery: I suppose the Law Society had very little to do with legal aid policy. The commission was set up to do more than just grant legal aid and pay bills, which was really its core mission when it was the legal aid department of the Law Society. It was given additional responsibilities and a lot more staff with different skill sets. Frankly, that has only been a qualified success, and the report of the access to justice review said that it was more appropriate that policy work be done by a Department, under the direction of a Minister who was accountable to the Assembly. I suppose, in a way, it was almost like a direct rule solution at the time.

Mr A Maginness: What about giving it back to the Law Society?

Mr Lavery: That is an option that we have not considered, I have to say. Accountability is the issue that we are probably trying to get to here. It is a big bill for the taxpayer in Northern Ireland.

Mr A Maginness: It is very big.

The Deputy Chairperson: Stewart. You had not indicated?

Mr Wells: It was me.

The Deputy Chairperson: Sorry, Jim. My apologies.

Mr A Maginness: It is Jim's favourite subject.

The Deputy Chairperson: From architects to lawyers.

Mr Wells: I am going to miss the Legal Services Commission. I was convinced that I should have been a QC and done law, but now I am convinced that I should be an architect. QCs are paid a paltry salary in comparison to our consultant architects. You learn something all the time.

I do not think that anyone will mourn the demise of the Legal Services Commission. It has proved to be quite expensive. As I said, it seems to have spent its entire life shovelling vast quantities of taxpayers' money into the pockets of highly paid QCs and barristers. At one of the previous meetings, you mentioned the fact that the accounts of the Legal Services Commission have not been signed off in quite a few years. Has that been resolved, or will it be resolved before the change?

Mr Lavery: They have been signed off, but they have been qualified on each occasion. Along with the sun setting on the commission as an institution, it will probably set on a set of qualified accounts, because the nature of the qualification is almost systemic. One of the issues is about fraud and the adequacy of measures to demonstrate that there is no fraud in the legal aid system, and the other issue relates to provisions. I could not be confident that, at the point when this becomes an agency, the final set of accounts will not be qualified. In fact, I think it more likely than not that they will continue to be qualified until the conclusion of the commission's life.

One could readily see the qualification in relation to provisions being removed reasonably soon, because as you know, and as you will see at next week's Committee meeting, we are moving to a standard fee approach for paying legal aid work. So, it is much easier to calculate future liabilities and provisions when it is simply a function of a standard fee and the number of cases you have. The fraud aspect, or qualification, is more challenging, but it is being addressed vigorously by the commission. That will be something to which the agency will have to be particularly attentive.

Mr Wells: Does that not mean that you are basically saying that this will not be resolved before dissolution, as it were? There is always going to be a question mark over the operation of the Legal Services Commission, because these issues were not resolved. It is like the European Commission's accounts having been qualified for decades. There is always a feeling that there is unresolved business. Are you then transferred into the Department? Will accounts as such be prepared for the agency within the Department?

Mr Lavery: I will ask Mark to address that.

Mr McGuckin: As an agency, it will produce its own separate set of accounts within the Department accounts. There is a slightly different accounting mechanism for them, and they become much closer and linked clearly with the Department's accounts, but, as an agency, they do produce their own set of accounts for that business area. That is one of the advantages of setting it up as an agency rather than just pulling it straight into the Department as a division or a directorate.

Mr Wells: I assume that you want to start off on the basis that you do not want a continuation of the problem that has bedevilled the Legal Services Commission. In other words, you will have that resolved, and we will not be sitting here in two years' time and finding out that there were qualifications to the agency's accounts.

Mr McGuckin: Certainly, we will want to take measures to avoid qualifications in the future, but, as David pointed out, there are a number of issues leading to that qualification on which substantive work needs to be done to address them and to get the assurance that is required. That work has started with the commission. It may not be complete by the time that the agency is created, but it will be continued with the agency. We hope to remove any cause for qualification as quickly as possible.

Mr Lynch: I have one question. You said that oral representations would be made only in exceptional circumstances. What would be the criteria surrounding those exceptional circumstances?

Mr Lavery: We are still developing those. I think it is important that the applicant, his or her self, has an opportunity to assert that it is an exceptional case, and that it is not left to the agency to make that decision, although it should also be possible for the agency to acknowledge that a case has some exceptional feature. Mark, do you want to say anything further about design?

Mr McGuckin: A basic building block of this is that, currently, 67% of applications for civil legal aid are approved on first submission. So, you are dealing with a subset of applications that come in. We hope that, through the process of review and of giving reasons why that refusal occurred in the first

instance, people will be able to make a better application and address the causes for the refusal, and it will go through. You then get down to the stage where it is a contentious case, a complex case or a case with some novel issues associated with it. It would be in those circumstances that you would seek to have an oral representation in relation to that particular application for civil legal aid. Most things will be relatively straightforward on the merits, looking at the particular scheme that is involved and the case that is before you. You can do it on paper. It saves a hell of a lot of time and a hell of a lot of disruption for people if they do not have to appear on a Friday afternoon to make representation. Currently, an awful lot of cases will be seen by the panel in advance, and they will not actually get to the stage of oral representation being required. It is only in those novel, complex, contentious issues that we feel there would be any need for an oral representation. We will develop and review that as practice gives us experience in the new operational arrangement.

Mr Lynch: Do you have an example of "novel" and "complex"?

Mr McGuckin: Not personally.

Mr Lynch: It is vague.

(The Chairperson [Mr Givan] in the Chair)

Mr Lavery: I was trying to think of an example when Mark was speaking and I could not, but you do encounter situations where somebody wants to bring a civil action asserting a right that, until now, has not been acknowledged by the courts, but maybe there has been some decision in Europe that allows you say that we need to revisit that. That would be novel or contentious, I imagine. The law does not stand still; there are always changes. If something has a new dimension — a decision from a European court is the one example that comes to mind — I imagine that the decision might initially be based on the conventional understanding, but the applicant might say, "Actually, they have not considered this new development, and I want to make representations regarding why we think the case should have legal aid". I cannot give a better example, but it is the sort of context in which there is something new and unusual — a new type of claim that could not be brought in the past but, for some legal reason, now can be brought. That is the sort of thing I imagine.

Mr McCartney: I think you said that 67% are successful.

Mr McGuckin: Currently, at first application.

Mr McCartney: Of the 32%, how many appeal, and how many of those are successful?

Mr McGuckin: That is a statistic that I would like to get to, as well. Unfortunately, we have had some difficulty getting details of the number who actually appeal. Some might go away, some might submit what seems to be a fresh application, because it looks different, and you will get some genuine appeals going through, a number of which will be successful. It is difficult to make a direct link after the first refusal, in the current arrangements, with what happens after that.

Mr McCartney: It is more for the future, but as you are making up your mind about whether it should be a paper appeal or an oral appeal, those numbers will be key. That may be something that we should try to fix down for the Bill.

The Chairperson: There are no other comments from any other members, so thank you very much. Members, are we content for the Minister to go ahead and draft the Bill? There will obviously be the scrutiny process to go through.

Members indicated assent.