Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT (Hansard)

Civil Legal Aid Funding Code

7 October 2010

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Lord Morrow (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Lord Browne
Mr Thomas Buchanan
Mr Tom Elliott
Mr Paul Givan
Mr Alban Maginness
Mr David McNarry
Mr John O'Dowd

Witnesses:
Mr Paul Andrews) Legal Services Commission
Dr Theresa Donaldson)

The Chairperson (Lord Morrow):

I welcome Paul Andrews, chief executive of the Legal Services Commission and Theresa Donaldson, director of civil policy and service delivery in the commission. I ask you to make your presentation, please. Mr Andrews, are you starting off?

Mr Paul Andrews (Legal Services Commission):

I shall certainly open the batting. We have met most of the Committee members before, so I shall

dispense with the introductions.

The commission is conscious that considerable work has been done to develop a funding code that is intended to determine whether applicants should receive civil legal aid. However, as that work began before devolution, this will be the first occasion when this Committee will have the opportunity to consider this important issue. Accordingly, the commission views this briefing as part of a process of consulting with the Committee on the funding code.

In addition, as the funding code is one element of the overall reform of civil legal aid, there will be other opportunities to consider the funding code as it interacts with other proposals that will be brought to the Committee. As such, we view this as the start of the process rather than the end of it. Indeed, subject to the outcome of some research that we are conducting on financial eligibility, the commission may amend the funding code to include mediation as a specific level of service.

We provided a succinct briefing paper, which pointed Committee members to the core consultation documents and the impact assessments. Those documents include the various responses to the previous consultation exercise on the criteria and procedures for the funding code. I trust that the Committee will be content for the commission to publish those responses, together with the commission's own view so as to inform consultees of our thinking.

I thought that the Committee might appreciate a practical overview of the funding code before we turn to the consultation responses. With that in mind, I thought that I should describe in rather simple terms how legal aid works at present, the component parts of the funding code, the added value that we trust the funding code will bring and some of the key issues that are emerging for consultation. I hope to do that at something of a canter, because I do not want to monopolise the time that is available.

With the Committee's permission, I will deal first with the current system. There are three basic levels of service. The first of those is the legal advice and assistance scheme, otherwise referred to as the green form scheme, under which a solicitor is required to establish the applicant's financial eligibility for assistance before providing advice on any point of Northern Ireland law. Advice up to the value of £88 can be provided without recourse to the commission. Last year, claims were submitted for some 32,000 instances of advice.

Secondly, there is an assistance by way of representation (ABWOR) scheme, which is an extension of the advice and assistance scheme and allows for a solicitor to institute proceedings on behalf of the assisted person. For administrative purposes, the scheme is divided in two. One section deals with civil matters, primarily non-molestation orders in the Magistrate's Court, while the other deals primarily with applications made under the Children Order (Northern Ireland) 1995 in the family proceedings court. Although a solicitor will determine the financial eligibility of the applicant, the commission will grant funding. Last year, some 6,800 certificates were granted across that business area.

Finally, there is full civil legal aid, which deals with representation in the County Court and in the High Court. It provides funding for a solicitor or a barrister to act in a case. The commission subjects applications to a financial means test and then determines whether the applicant meets the merits test. Last year, some 8,300 certificates were granted for civil legal aid.

The commission regards that arrangement as somewhat outdated. Its primary focus is on lawyers and courts, and it has to apply a one-size-fits-all test to applications. Thus, the current schemes do not encourage mediation or alternative dispute resolution mechanisms, nor do they distinguish between cases in the same category to ensure that priority funding is given to appropriate cases.

As I mentioned in a previous evidence session, legislation requires the commission to develop a funding code to determine applications for funding. The funding code was originally developed in England and Wales to ensure that funding is targeted at those areas and cases that are deemed to have the highest priority, thus assisting those in greatest need. As I indicated previously, the commission has not slavishly followed the English code, yet it is satisfied that the principles that underpin that code are equally applicable in Northern Ireland.

The starting point for the funding code is to establish priority areas that will attract funding. Our briefing paper sets out the current description of those priority areas, and the commission wishes to hear the Committee's views on the appropriateness or otherwise of the draft priorities. The Minister has not formally adopted the priorities at this point, but, for current purposes, we view them as a working draft.

The funding code has two statutory elements. The first is the criteria, which establish the level of service that will be available and describe the factors that will determine whether applications should receive funding. The second element concerns procedures and governs how applications are to be submitted and processed. The funding code, that is both the criteria and procedures, will undergo full scrutiny because it will be subject to the affirmative resolution procedure when first made. An Internet link to the consultation documents on those criteria and proceedings is provided in our briefing paper. For the sake of completeness, I should add that funding code guidance will outline to applicants the process that the commission will apply in determining their application. That guidance will be made available to practitioners for comment before the code is implemented.

I should also draw the Committee's attention to our briefing paper's summary of the range of services that would be available under the funding code. I must confess that, in trying to set out the services and cross-reference them to the existing scheme, it uses some jargon, for which I apologise; however, it is difficult to summarise two entirely different systems on one page.

The Committee will note that the funding code introduces a greater range of services than is currently available. In part, that is to provide greater focus on family court business and to ensure that there is a mechanism to enable the merits of a case to be properly investigated before full representation is granted. The range of services reflects the principle that customer focus and cost-effective solutions can be delivered by providers other than the legal profession. In due course, the commission wishes to see the development of a mixed-provider model in which voluntary sector providers can provide legal help in areas in which they specialise.

The Committee will also note the equality impact assessment and the regulatory impact assessment conducted on the funding code. The equality impact assessment identified either no impact or a positive differential impact. Those impact assessments are also dealt with in the briefing paper. The funding code should deliver a range of benefits, namely: targeting of limited resources on priority cases; ensuring that decisions are made on a private paying client basis; managing high cost civil cases; and providing appropriate services to the maximum number of individuals.

The funding code will include an assessment of the prospects of success of a case as well as a cost/benefit ratio of legal costs to damages, if applicable. That is intended to ensure that public

money is spent on cases with realistic prospects of success and on cases in which the benefit secured is in excess of the cost incurred in pursuing that benefit.

In conclusion, I will refer to the responses to the consultation that took place last June. I do not propose to go through the individual responses, other than to note that, in the main, the responses were constructive and broadly supportive. The briefing paper sets out the responses to the consultation, together with the commission's detailed response.

There are perhaps two themes in the responses that merit particular comment. The first is in respect of money damages claims, particularly actions brought in the County Court. The Committee will note the opposition expressed to the commission's proposed approach to accommodating money damages cases. The commission remains of the view that such cases should not be a funding priority, but it also accepts that a mechanism is required, whether as part of the legal aid system or not, to enable individuals to bring and defend claims. The commission is in detailed discussions with representatives of the Law Society and the Bar Council, and it is currently exploring options to enable those cases to be supported. The discussions are at an advanced stage, and detailed research has been undertaken to inform them. I am not in a position to say that we have found a solution, but I can assure the Committee that all parties are making every effort to do so.

The second theme relates to cases involving domestic violence. The point made in some of the responses is that the financial eligibility threshold for legal aid can prevent some victims of domestic violence from accessing the courts. Technically speaking, that issue relates to financial eligibility and not the funding code. However, the Committee may wish to note that the commission has already decided to address that concern in its reform of financial eligibility. Indeed, the commission is anxious to move quickly to address that issue, and the Minister had indicated that he is open to bringing forward an earlier solution if possible. The commission has been working with the Northern Ireland Courts and Tribunals Service, and it is hopeful that it will be possible to recommend a way forward to the Minister shortly. No doubt the Committee will be briefed on that matter if such a solution emerges.

I fear that my promised canter has turned into something of a leisurely stroll, for which I apologise, but I thought it might be of assistance to the Committee to have an overview of what is a relatively technical issue. Perhaps at this time Theresa and I should invite questions on the code

and the consultation responses.

The Chairperson:

Thank you, Mr Andrews. In what way will the proposed funding criteria protect the principle of access to civil legal services?

Mr Andrews:

It will do so in two ways. First, the funding code as originally designed was not intended to be a cost-saving mechanism at all. It was meant to be a mechanism that directed the available resources at the most important and most vulnerable cases. If members have time to look at the very detailed regulatory impact assessment of the proposals, they will see that it indicates that there will be little impact on access to justice. In fact, it suggests that there will be increased access in some family matters. If implemented, there would be a reduction in access for money damages claims, but, as I have already mentioned, work is in hand to try to find a solution to that.

We are not expecting, nor are we forecasting in our budget, that the proposals will reduce access to justice. They will seek to focus access to justice and try to develop alternative ways of delivering it. At present, the commission cannot directly fund mediation and alternative dispute-resolution mechanisms. It is in everyone's interests that an option is available to individuals that is less traumatic than having to go through court proceedings and more cost-effective in delivering solutions to their problems.

The Chairperson:

If I picked you up right, you said that you seek to focus access to legal aid services.

Mr Andrews:

Indeed, Chairperson, the reason being that the current legal aid scheme, certainly in its civil manifestation, is a very broad and undiscriminating church. Effectively, all full civil legal aid cases, which may come before the County Court or the High Court, are treated alike. A case that has a relatively modest impact in respect of the cost of pursuing it is treated in exactly the same way as a case that has a fundamental impact on an individual. The funding code seeks to ensure that the most pressing cases are the ones that attract funding and that there is no suggestion of cases that would perhaps meet with public concern as to why they were funded in the first instance.

The Chairperson:

Do you have the figure for the budget for civil legal aid last year?

Mr Andrews:

I do. I will give it you in rather global terms. It can be broken down in quite a detailed way, and, of course, we are happy to provide a more detailed analysis to the Committee. Payments for the legal advice and assistance scheme were £3·5 million; payments for the non-molestation aspect of the ABWOR scheme were £1·8 million, while payments for the other aspect, primarily children's cases, were £5·5 million; and full civil legal aid expenditure was £26 million. The Committee might be interested to note that, of that £26 million, slightly more than £16 million was spent on matrimonial cases — I use that term in its widest context — which include children as well as family matters; £2 million was spent on money damages; something similar was spent on judicial reviews; and £5 million dealt with a range of cases that are not easily classified.

The Chairperson:

So, it is £26 million and £5·5 million. What was the first figure again?

Mr Andrews:

Expenditure was £3·5 million for the advice scheme and £1·8 million on the non-molestation aspect of the ABWOR scheme, which gives a total of £36·9 million.

The Chairperson:

How much of that was spent on administration?

Mr Andrews:

None of it was spent on administration. That was purely the cost of providing the service.

The Chairperson:

So administration is on top of that.

Mr Andrews:

Indeed.

The Chairperson:

What was that figure?

Mr Andrews:

I do not have a figure for administration of civil legal aid exclusively. I mentioned at our last meeting with the Committee that the figure was something like £7·6 million for all the services that we provide, which, of course, include criminal legal aid. I will try to get the figure for you if that would be of assistance, Chairperson.

The Chairperson:

It might be, because you would not want us to confuse the figure of £7 million with figures that are part of the £36·9 million.

Mr Andrews:

It is not such a figure.

The Chairperson:

It would make for very bad reading if the figures were confused.

Mr Andrews:

It would.

The Chairperson:

What savings do you envisage in the civil legal aid budget?

Mr Andrews:

As I said at the outset, the funding code was not designed as a cost-saving mechanism originally. It was designed as a way of trying to ensure that funding was focused more appropriately on the most deserving cases. However, there are some cases outlined in the impact assessment that may be of assistance to you. I am disappointed that Mr McDevitt is not here to hear some quantitative analysis.

Mr McNarry:

Go on, hurry up, before he comes back. *[Laughter.]*

Mr A Maginness:

He is definitely away.

Mr Andrews:

The regulatory impact assessment suggests that a full implementation of the code would reduce the costs of the legal aid fund — not of the commission — by £361,000 per annum, a 1·8% saving on current levels. As I said, the funding code was not designed in the first instance to reduce funding. However, I should add that, if we have a very difficult financial settlement — as is anticipated in the current economic climate — the funding code will allow us to have levers to amend criteria in such a way that enables us to live within the budget provided. That is not available under the current legal aid arrangements.

The Chairperson:

My next question may not be relevant now, because you said that the code is not about saving money. I was going to ask about how much thought has been given to limiting the costs of the final value of claims, but if that is not what the exercise is about, you will obviously have given it none. Is that right?

Mr Andrews:

Well, you would expect me to have given some thought to the matter in the current economic climate, and I have. In effect, there are two ways to reduce the civil legal aid budget. First, you can reduce the scope of it so that you deny people the opportunity to bring cases forward. Secondly, you could limit the amount of money that you are prepared to pay for individual cases. However, you will probably need to use a combination of those levers to ensure that a sufficient number of people are available to provide the services that are deemed necessary. Nevertheless, under the scheme, those are the only two levers that are available.

Another variation, which is a matter that we will come back to on another occasion, would be to increase revenue streams to the legal aid fund. We touched on that point at the last Committee meeting, when we discussed a statutory charge whereby legal aid would be viewed, in effect, as a loan. Consequently, for people who secure significant sums of money and whose costs are not met in full by their opponent, the damages or property that they recover would be used to reimburse the legal aid scheme.

The Chairperson:

The Bar Council has suggested that the money damages proposals would seriously impair access for individuals. Will you comment on that?

Mr Andrews:

Perhaps an illustration will help. I appreciate that some members are particularly well versed on the subject, but this may be of general assistance. The funding code proposes that, in order to fund a case, there has to be at least a moderate prospect of success, which is defined in the criteria as a 50% to 60% likelihood of winning. In such a case involving money, the funding code requires damages that are at least four times the cost of the case. That requirement tapers as success rates improve. Nevertheless, I will use that figure to illustrate a County Court action, in which costs are prescribed by County Court scale costs. In taking an action, you would know that, if the claim is between £7,500 and £10,000, your costs would be £2,300. That means that no case with a value of less than £9,000 could be funded under those criteria. That is the basis on which the Law Society and the Bar Council make that argument.

The commission accepts that that is factually the case; however, we would make two points in response. First, as I said in the previous evidence session, a legal aid certificate provides someone with an indemnity policy, because, if they lose their case, there is no exposure to them and almost no exposure to the legal aid fund. However, there would be an exposure to other authorities, whether they are public authorities or even insurance companies, which have to bear their own costs. Secondly, there is a practice known as nuisance value settlement, where an economic decision is taken to settle a claim for a certain value in order to make it go away. Legal aid should not be about funding that type of case. It should be about funding appropriate cases in which there is significant value. In other words, if, as a private client, you are told that in order to get x number of pounds, you have to spend y pounds, would you make that decision?

Having said that, the commission takes access to justice seriously, which is why we are engaging positively with senior representatives from the Law Society and the Bar Council to see if there is an alternative way so that, in the first instance, a mechanism exists to enable people to bring forward lower-value claims, which are, nonetheless, important to them. We hope to reach a resolution on that. Furthermore, when you come to discuss the justice Bill, which I heard you mention earlier, you will find that it includes a clause to enable the legal aid fund and other

entities to establish a contingency legal aid fund that sits outside the normal scope of legal aid. So, a number of areas are being explored.

The Chairperson:

You say that there has to be a 50% to 60% chance of success. Who makes that assessment?

Mr Andrews:

In the first instance, the lawyer who brings the case has to present an argument based on the evidence that he or she has gleaned on the likelihood of that case being successful. Staff in the commission who are experienced adjudicators will then have to satisfy themselves that that is a reasonable estimate of the prospects of success. That is beginning to happen, and solicitors are already submitting those estimates. They might not do that in the percentage terms that we have talked about, but they might say that a case has a very good prospect of success and that there is no obvious weakness. Our adjudicators will make an assessment of that.

If there is concern that the prospects of success are not sufficiently clearly defined or, indeed, convincing, consideration can be given to a concept called investigative help, whereby a small amount of money can be set aside to ensure that funding is not granted on a wide-scale basis for a case that is unlikely to last very long. Therefore, there are a number of mechanisms in the system, including the professional judgement of the lawyer, the assessment of experienced adjudicators in the commission and a mechanism whereby they can say that they do not quite see the case in that way but that they recognise that there is potential value in it and will allow some scope for investigation until they are persuaded that it is appropriate to grant funding to it.

The Chairperson:

So the lawyer puts up an argument for funding a case in which he will be the centre of attraction?

Mr Andrews:

I would hope that the client is the centre of attraction. That is who we fund.

The Chairperson:

It will be the lawyer who will get paid.

Mr Andrews:

The lawyer will get paid, but the client should be the centre of attraction.

Mr McNarry:

That was most interesting. The commission has done a very important piece of work. How is the commission funded?

Mr Andrews:

Historically, it was funded by the Lord Chancellor through his agency, which, at that time, was the Northern Ireland Court Service. On devolution, the funding responsibility transferred to the Department of Justice. Effectively, for practical administrative purposes, the Northern Ireland Courts and Tribunals Service — I must learn to call it that — is the conduit through which the funding comes this year. However, we expect that to be normalised next year and that the commission will be a non-departmental public body of the Department of Justice.

Mr McNarry:

Effectively, we pay for it.

Mr Andrews:

You have that privilege, Mr McNarry.

Mr McNarry:

We will find that out later as we get to know you. I hope that it is as good as it seems.

You seem to have accepted the criticism that you had not conducted research into the legal aid needs of children and young people, and you seem to be telling us that that was dealt with by engaging a consultant — you did not tell us the cost, which may or may not be relevant — to profile the needs of children and young people. You said that you hope to have a report by autumn 2010. Have you got that?

Dr Theresa Donaldson (Legal Services Commission):

Yes; we engaged with an academic who works at the Institute of Child Care Research at Queen's University. Universities charge full economic costs. The report cost us less than £10,000. She has engaged with a wide range of organisations that work directly with children and young people

and has focused on the legal needs of children and young people. We have just received a copy of the report. It is with the commission at the minute, and it will certainly be made available to the Committee.

I have had a quick look at the report, and it will be of interest to other organisations because it identifies gaps in the awareness that children and young people have of their rights. That makes it difficult for them to identify their legal needs. We anticipate that organisations such as the Commissioner for Children and Young People and the Children's Law Centre will be very interested in the work that that academic has undertaken.

Mr McNarry:

Assuming that you think the findings of the report are acceptable and worth pursuing, when do you think they can be implemented in this code of yours?

Dr Donaldson:

The top priority of the code is special Children's Order proceedings, so, in effect, we are saying that children are the top priority, and we are not anticipating that that —

Mr McNarry:

I take it that you have made children a top priority anyway and that the report is now going to redouble the emphasis on that priority.

Dr Donaldson:

Yes. The report will highlight the gaps in provision, and not just for our organisation. The budgetary points are well made; we are well aware that we live within tight financial constraints. However, the issue is how other organisations, including voluntary organisations, can apply their resources. As the previous witnesses emphasised, it is important that we all work together as a network of organisations to ensure that we are maximising our resources to meet the needs of children and young people. I have had only a brief look at the report as it has just arrived, but that is how I would see it being used.

Mr McNarry:

When you have decided on the report, could you share it with the Committee?

Dr Donaldson;

Absolutely.

Mr McNarry:

Will you also share with the Committee what you intend to with it?

Mr Andrews:

There are two points there. By statute, a particular emphasis is given to certain Children's Order proceedings that involve care and supervision, where the state is intervening and removing children from their home environment. In those circumstances, the child and the parents get legal aid irrespective of the means and merits test; it is an automatic given under the current legislation. That arrangement is important, and we replicate it in the funding code. However, in considering the analysis that is provided to us, we will ask whether we can do things under the current system without waiting for the funding code, important though it may be. We do not want to have to wait until the process reaches a conclusion. If there are points that we can take up and deal with now, we will do that.

Occasionally, we get applications that are probably, in our view, from the wrong person. An application may be put forward in the child's name when it should have been put forward in the parent's name. There may be a reason why it is in the child's name; it is probably because the parent would be financially ineligible. Those are matters on which the High Court has pronounced recently.

Mr McNarry:

I can see all of that, and it is very helpful, but that is not what I need to be sure about. When you were putting the code together, it had to be pointed out to you that you had made an omission. In my opinion, that was quite a serious omission. I am grateful and glad that you have now accepted that there was an omission, and we will move on from that. You have the information and you will share it with us. We will see then where we are going on this very important issue.

Mr Andrews:

We appreciate that.

Mr McNarry:

Correct me if I am wrong, Mr Andrews, but when you were talking to the Chairperson about money, you said that, given the anticipated change in financial circumstances, the legal aid criteria would have to live within the budget. I am not clear about the extent to which the policing and justice budget is ring-fenced. I am not even clear in my mind that this part of the policing and justice system would be included in the ring-fenced arrangement. I do not think that this issue was very advanced when that arrangement was agreed. Anyhow, the code is going to come in in any case.

I am going to ask you a question, but you must let me know if it is unfair to ask it, and I will go in another direction. It seems from correspondence that we have received and from evidence sessions that we have held that the barristers seem to have held back — I will not say climbed down — and seem to have accepted the offer that was put to them.

You talked about the amended criteria and the need to live within a budget. That deal seems to have been done on the basis of the money that we know to be available now, but, if changes are made, would that mean that the deal that the barristers have accepted could be downsized?

Mr Andrews:

If I can step back, I would also like to know the answer to your first question about whether the legal aid funding is ring-fenced, because, as you will remember, the Prime Minister's letter set out a legal aid settlement to 2013-14. The figure for 2013-14 was £79 million, and that is inclusive of administrative costs. Therefore, the planning assumption that colleagues in the Court Service, who have led in the negotiations on criminal fees, and the commission are working on is that we have a budget for 2013-14 of £79 million. That is, apparently, a known fact, but we recognise that, through other mechanisms, that may change, and we stand ready to respond.

Mr McNarry:

We need to be careful, because I am not too sure whether the public will respond favourably to — I am not getting directly at you — so-called fat cat lawyers having a chip taken from their payments while the rest of society has to take a hammering. Ring-fencing or no ring-fencing, society and, in general, this place will have to come to terms with how certain people are paid and the levels at which they are paid. That might apply to you, and it might apply to me, but we will have to take our medicine.

Mr Andrews:

I do not have any difficulty with your observation, but the only figure that is on the table on which to make a planning assumption for 2013-14 is £79 million. From the material that has already come before the Committee from my colleagues in the Court Service, the projection is that, with those savings delivered — "banked" might be an inappropriate word to use — we should reach the ballpark figure of £79 million forward moving forward. We are not complacent about it, because we appreciate that other considerations will have to be taken into account, and we will want to ensure that the funding that is given to any individual civil case is proportionate and appropriate for the complexity and the seriousness of the matter that is being dealt with.

Mr McNarry:

Like everyone else, if adjustments are required to be made to meet budgets, we consider the written acceptance that I and all Committee members have seen from the barristers in their negotiations over legal aid and on the fees that may or not be paid to be open to adjustment.

Mr Andrews:

I cannot say that it is not open to adjustment. I might venture to suggest that the criminal barristers might like their brethren on the civil Bar to share some of their experiences.

Mr McNarry:

I understand that. I am not particularly getting at the barristers, some of whom are poorly paid. I am really getting at those who are walking millionaires just for doing a bit of work.

The Chairperson:

Thank you, Mr McNarry.

Mr McNarry:

Thank you. That was helpful.

Mr O'Dowd:

Mr McNarry has covered one of the points that I wish to cover on the children's aspects. Your first two draft priorities are special Children Order proceedings, which raised concerns in the consultation, and civil proceedings where the client is at real and immediate risk of loss of life or liberty. That includes domestic violence, which, tragically, we have witnessed so often. That

comes under some scrutiny from a number of renowned groups in the consultation. In your introduction, you mentioned that you had taken heed of some of the concerns around domestic violence. What action are you taking?

Mr Andrews:

I run the risk of telling the Minister what to do.

Mr O'Dowd:

We do it all the time.

Mr Andrews:

That may be more your prerogative than mine, Mr O'Dowd. The commission had already decided that it was not content with the current legislative arrangements for two issues in civil legal aid. One of those was the financial eligibility threshold for victims of domestic violence, because, although it is hard to quantify the extent to which it is true, there is some evidence that individuals do not proceed with non-molestation order applications because they are not financially eligible and, perhaps, are not in a position to pay for representation. The commission has already decided that that will be one of the features, when it brings its changes to financial eligibility before the Committee.

The other feature, which is again perhaps not irrelevant to the previous evidence session, relates to mental health review tribunal cases, which are also currently means tested. The commission's view is that, because of the nature of the proceedings, they should not be means tested, and we want to change that.

Through our discussions with colleagues in the Courts and Tribunals Service and the Minister, we are seeking to bring forward proposals, notwithstanding the substantive reform of legal aid, to deal with those two issues. Those reforms would mean that it would be a really extreme situation in which an individual who had suffered domestic violence was unable to access the courts because of the financial eligibility criteria. Work is in hand. My colleagues behind me from the Courts and Tribunals Service are perhaps anxious in case I say too much to you, but I think that we are close to identifying a solution to that issue. We will put it to the Minister, and, hopefully, that can be brought in with all due haste.

Mr O'Dowd:

It is a matter for concern. We will await the outcome of the report to establish how much concern we should have, because, as regards your two main priorities, which are children's proceedings and civil proceedings where there is an immediate risk of loss of liberty, such as with domestic violence, there are chinks in your armour in the research that has been done, the presentation of the findings and the outworkings of that.

Mr Andrews:

I hasten not to be defensive at your observation, but I do not think that there is a chink in our armour on domestic violence. As I said in my introductory remarks, the observations made by Women's Aid and other groups are clear that the issue is financial eligibility and not the funding code. Indeed, they warmly welcomed the approach that was taken as regards the merits of a case in that arena. Therefore, it would be unkind to characterise the matter in that way. We are doing something about it through the legislation, and we are trying to do something even more quickly to redress that.

Children's cases are slightly different, because there is a range of services in the funding code that deal with family matters, and the majority of children's cases will be delivered in that format. Therefore, the policy and the legislative base are there. Mr McNarry's point was well made: when delivering that proposal, more could have been done to fine-tune how it would be taken forward. That is what we are addressing.

Mr O'Dowd:

OK. As I said, we will await the various documents. Your priorities are listed in annex 1 to the report. Are they equally weighted or listed in priority of order?

Mr Andrews:

The first two are almost absolute priorities, because they are proceedings in which a client is at a real or imminent risk of loss of life or liberty. We would also include things like habeas corpus, so that someone could be presented to court, and asylum matters where there is a particular difficulty or sensitivity around a client's deportation. Social or domestic violence would also feature, while the welfare of children deals with things such as adoption and residence, which are lower down. However, the other four groups would almost be a second tier that would be viewed together. They should not, in themselves, be read sequentially. To summarise, the first two

priories are absolutes and the next four are relative.

Mr O'Dowd:

Concern was raised in the consultation responses about the emphasis that will be placed on mediation as a remedy. One example was flagged up that, in dealing with hospitals or similar statutory bodies, internal avenues would need to be almost exhausted before legal aid would be granted. In your report, you state that:

"clear exemptions will be outlined in the Guidance".

One concern is that an internal domestic remedy process may take longer than three months, which would rule out a judicial review. How will you take that into consideration?

Mr Andrews:

There are two aspects. As you know, the Minister appointed Mr Jim Daniell to conduct a review of legal aid and access to justice in general. In the longer term, Mr Daniell will be interested in looking at mediation and internal dispute resolution mechanisms. The closer to the incident that the resolution is found, the better it is for everyone. In the longer term, Mr Daniell will have something to say on that issue. With regard to the day-to-day operation, the commission will want to be satisfied that it does not cater to someone who simply runs to litigate without having regard to alternative processes. The commission will be sensitive to cases where someone has perhaps made every practical effort but is thwarted or, in some sense, frustrated by not being able to move forward. If there are timescales within which litigation has to be commenced, the commission deals with those regularly by way of emergency certificates. We do that day and daily.

I suspect that the response to that consultation point was entirely understandable, but it read the proposal in a negative way, as opposed to the way that cases actually happen today, which is far more fluid and interactive.

Mr McCartney:

The report states that Disability Action's response was:

"In favour of the Commission providing reasons for refusal and the right to appeal."

That response was accepted. However, the Law Society's response objected to the fact that there was:

"no appeal against a refusal of funding on financial grounds."

The report seems to stand over that.

Mr Andrews:

There is a distinction between the two, and I will try to explain it. With regard to financial eligibility, under the current legal aid scheme, if someone is above the income threshold, there is an absolute refusal. The commission has no discretion whatsoever. When we introduce the proposals for financial eligibility, I suspect that you will find that that will also be a feature of that system.

If the issue is not someone's financial eligibility but the merits of the case, there is an appeal process. That is why there are the two different responses from the commission to two different points made by those organisations.

Mr McCartney:

On average, how many cases would be ruled out on financial grounds each year?

Mr Andrews:

I do not have that figure to hand, but I will provide it.

Mr A Maginness:

I would hate to see a situation arise where only the very poor or very rich could access legal services. Do you agree with that?

Mr Andrews:

Philosophically or financially?

Mr A Maginness:

Whatever way you want to deal with it?

Mr Andrews:

That is why the funding code is designed in that way. It is designed with an awareness of social inclusion to help those who are in particular straits to enforce their rights. It also recognises that there are people who may have greater means but who are not sufficiently well off to litigate on their own behalf. If those people have a strong case that deserves the funding, the funding code wishes to ensure that they are funded. That is where the private-paying client test comes in. I do

not think that the Legal Services Commission should spend money because it is not its money in a way that someone who was funding a case from his or her own pocket would react. That is the balance.

I also think about what was once famously referred to as the prawn-sandwich brigade, if my memory serves me right, in another context. There are people who would be financially ineligible for civil legal aid but could not afford to mount a significant legal challenge because of the cost involved. That is one reason why the idea of a contingency legal aid fund (CLAF) or a Northern Ireland additional legal aid scheme (NIALAS), as the commission referred to it, is attractive. It provides a mechanism that allows a greater number of people in society to have access to justice. As you know, there are technical issues involved that I will not go into, unless you wish me to.

Mr A Maginness:

What is the financial cut-off point?

Mr Andrews:

We all scurry for our figures.

Mr A Maginness:

Just give me the ballpark figure.

Mr Andrews:

Civil legal aid, which, at this point is more relevant to the discussion —

Mr A Maginness:

That is what I am talking about.

Mr Andrews:

In disposable income, the civil legal aid upper limit is £9,937, although in a case involving money damages that increases to £10,955.

Mr A Maginness:

Is that disposable income?

Mr Andrews:

Yes, as you will appreciate, a range of tests can disallow things.

Mr A Maginness:

So, could we say that somebody who earns more than £20,000 would be ineligible for legal aid?

Mr Andrews:

I not think so, because —

Mr A Maginness:

Why not?

Dr Donaldson:

The limit relates to their disposable income, so it would depend on what —

Mr A Maginness:

Yes. I am taking that into consideration.

Mr Andrews:

Even if you are looking at —

Dr Donaldson:

They would be ineligible if their disposable income was £20,000.

Mr A Maginness:

I understand the notion of disposable income. I am trying to get you to give us a pen picture of the cut-off point in terms of gross income, taking into account the disposable income limits.

Mr Andrews:

My difficulty in answering is that each set of circumstances is unique. For example, a mortgage payment of any size will be netted off against a gross income. Various other allowances will be netted off, including those for dependents, such as children. I suspect that we could easily find a range of people who have a gross income of £20,000 and who would still qualify for legal aid.

Mr A Maginness:

OK. We come then to the merit criteria. Is there not a robust system of independent scrutiny of the solicitor's or the counsel's view of a case?

Mr Andrews:

That is the dilemma. At present, as the Committee may be aware, appeals against the commission's refusal of legal aid go to a panel of external barristers and solicitors who are not employed by the commission. As an accounting officer, I value their work, but it makes me nervous because somebody else is spending the money for which I am accountable.

Mr A Maginness:

What is the appeal rate?

Mr Andrews:

There is no fee for an appeal, so the rate is very high.

Mr A Maginness:

No, I mean the rate of success or, alternatively, failure of appeals. Would it be 50% or 60%?

Dr Donaldson:

It is probably about 50%.

Mr Andrews:

Fifty per cent.

Dr Donaldson:

As you know, there is an automatic right of appeal against any refusal. About 50% of cases that go to the appeal panel are subsequently granted on appeal.

Mr A Maginness:

Therefore, there is a method of weeding out bad cases.

Mr Andrews:

Yes.

Mr A Maginness:

As a barrister, my experience of doing legally aided cases on money damages was that the vast bulk of them were settled. Very rarely does a case actually go to court. If it does, it may be settled during the course of that case, or, alternatively, the case is won, so there is no charge on legal aid. I do not understand why the commission cannot devise a system for money damage cases that virtually covers its own costs or provides a margin of profit.

Mr Andrews:

I do not say that we cannot devise a scheme. That is what we are trying to do.

Mr A Maginness:

And is that what you call the contingency?

Mr Andrews:

There are two sides to it. We are getting into technical territory, but, effectively, a discussion is taking place with the Law Society and the Bar. Basically, they are being told that the commission has significant overheads in administrating civil legal aid applications, which is a significant factor to bear in mind, particularly when I am in front of the Committee. We want to address that point.

We want to do that in a way that enables the legal aid fund to allow cases to run smoothly and without delay by going through a legal aid process in a way that does not expose the fund to additional cost. In our discussions with the profession, we have effectively been saying that, until such times as we have identified something that works and has a proven track record that it will not expose the legal aid fund to additional costs, the financial argument for a CLAF will not quite have been made. It will have been made intellectually and will probably have been accepted intellectually, but it will not be made financially, because there is an issue of seed funding.

Mr A Maginness:

In what percentage of all money damage cases for which you provide legal aid do you have to pay out? Maybe you do not have that figure with you.

Mr Andrews:

It is probably under 20%.

Dr Donaldson:

Those cases are a cost to the fund. I think that the latest figure for spend on losing cases was about £1·5 million.

Mr A Maginness:

That is from a budget of £37 million. That is the total spent on money damage cases?

Dr Donaldson:

On losing cases, yes.

Mr Andrews:

As the Committee knows, the number of money damage cases is going down.

Mr A Maginness:

It is going down because the criteria are so strict.

Mr Andrews:

The criteria, namely the merits test, have not changed at all since 1965. Although I accept the point that we lose very few cases, it is arguable whether we truly win all those cases. A significant proportion might be nuisance settlements. People and public authorities effectively decide not to pursue the action because it will be less expensive for them to settle, because, in so doing, it will impose a fund on other parts of the public sector. That has to be taken into account when we put this arrangement together.

Mr A Maginness:

You do not lose out on what you term nuisance settlements.

Mr Andrews:

The public purse may lose out, but the commission does not.

Mr A Maginness:

You do not.

The Chairperson:

They never lose any money.

Mr A Maginness:

Money damage cases can be taken against bodies other than public authorities. People sue their employer. If I were to sue my employer and my case was a risk, I would want legal aid because I would have no other means of protecting myself against the lawyers if I were to lose my case and my employer were to ask for the costs. It is quite reasonable. I do not see why a citizen should not enjoy that level of protection when they fight an employer.

Mr Andrews:

As we mentioned at the previous meeting with the Committee, the commission has to ensure that it provides a level playing field so that individuals have the backing of the legal aid certificate, which protects them from the costs of the other side and has an appropriate level of representation to withstand the other side. However, I do not think that legal aid should tilt that balance in favour of funded individuals so that they can afford, with impunity, to continue to pursue actions. The legal aid fund needs to ensure that balance in how it spends public money.

Mr A Maginness:

A big company can spend thousands of pounds to protect and defend itself. Are you saying that there is equality there and that you should protect big business from an employee or a visitor to premises?

Mr Andrews:

No, not at all.

Mr A Maginness:

There is no equality in the economics.

Mr Andrews:

I will take the reverse point, if I may. There may be a situation in which a firm, in its economic

interests, will have to decide the point at which it will settle a case. That consideration is not necessarily applied to the legal-aided party, because there is no financial incentive or imperative for them to do so. I appreciate that we are getting into esoteric territory here. However, the commission must have regard for achieving that balance when it establishes the funding code.

Dr Donaldson:

The funding code is not proposing to remove legal aid from money damages claims. It is important to bear that point in mind. Although, it will, on the face of it, reduce legal aid availability for lower level claims, it will not remove that facility.

Mr A Maginness:

What is the logic for doing that? If I were to injure myself after tripping over a pavement as a result of the negligence of the Roads Service or another public authority, but my claim was for less than £5,000, are you saying that I would not deserve to be protected or assisted if I fulfil the financial criteria? Is there some difference between £5,000 and £50,000? I do not see the justice in that.

Mr Andrews:

The justice aspect comes from a different consideration: how much should be spent to secure that benefit? For example, if you had an accident and were awarded £1,000 in the County Court, but the fees were £500, you would be getting half the value of the award. The question, therefore, is: if you were a privately paying client in a case, would you be prepared to take on those odds? I suspect that that is the balance that must be struck with the public money that is available. Is money being spent on the most meritorious cases that clearly secure a benefit that is in excess of the cost of arriving at that benefit? That is the sole point that the funding code makes on the issue.

Mr A Maginness:

It, therefore, is nothing to do with justice; it is just to do with economics.

Mr Andrews:

It is to do with the affordability of justice.

Mr McNarry:

Are you resting your case now, Mr Maginness?

Mr A Maginness:

Only for a while.

Mr Buchanan:

I wish to go back to the issue of domestic violence, which was highlighted in some of the responses. Why is it that the perpetrator seems to get priority over the victim? It appears that, once perpetrators are arrested, they are automatically entitled to free legal aid regardless of their financial position. Yet, the victims are exposed to continual danger because they cannot get legal aid. Is there not an element of discrimination against victims in such situations?

Mr Andrews:

I am shuffling away from the word "discrimination", Mr Buchanan. Your point is well made. If he, the perpetrator, is arrested — accepting the proposition that it is a "he" because it normally is — that individual is entitled to criminal legal aid subject to the judiciary's assessment of his means as presented to it. The statue effectively establishes two different tests. The financial eligibility test for criminal legal aid is different from the one for civil legal aid. As the Committee is aware, one of the clauses that is likely to be in the justice Bill will make provision for a criminal legal-aid test for Magistrate's Court proceedings in the first instance. That should go some way to addressing that issue.

At this point in time the commission does not grant the perpetrator legal aid at all. That is a function of the court under a direct line of statutory power. The commission must adhere to the financial eligibility criteria for victims that is set in legislation. That is why we are trying to ensure that a mechanism is brought forward that will ensure that there is no prejudice against victims because of financial considerations.

The Chairperson:

We have had a fairly long discussion about the issue. Mr Andrews has undertaken to come back to us on some of the issues, and no doubt he will do so in due course. Thank you for coming.