Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Justice Bill: Informal Clause-by-Clause Consideration

1 February 2011

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 Paul Givan
Mr Conall McDevitt
Ms Carál Ní Chuilín
Mr John O'Dowd

Witnesses:

Mr Paul Black	)
Mr Tom Haire	) Department of Justice
Mr Gareth Johnston	)
Ms Janice Smiley	)
Mr Robert Crawford	) Northern Ireland Courts and Tribunals Service
Mr John Halliday	)

The Chairperson (Lord Morrow):

We will now move on to the continuation of the informal clause-by-clause consideration of the Justice Bill and will cover Part 6, which deals with alternatives to prosecution, and schedule 4, which deals with penalty offences and penalties. We will also cover Part 7, which deals with legal aid. I welcome Janice Smiley and Paul Black. Others have left and you have come in.

I draw members' attention to the information provided in your folders, which will hopefully

assist you in your considerations. There is a summary paper covering the evidence received on clauses 64 to 91. There is also a response from the Minister of Justice regarding proposed amendments relating to the delegated powers contained in the Bill. We will address each amendment as the relevant clauses arise. There is also a copy of the departmental briefing paper on the results of the research into a fixed means test for criminal legal aid. The Hansard report of the oral evidence session that is relevant to clause 85 has also been provided.

Clause 64 deals with penalty offences and penalties. We will start with the departmental officials, if they wish to say anything or provide further information.

Mr Gareth Johnston (Department of Justice):
We have nothing in particular to say.

The Chairperson:
Do members wish to comment?

Mr McCartney:
I want to make a general observation and remind members that we want to see a community service element included when we were dealing with the prisoner levy. We also think the option of community service should be attached to any penalty. We will approach it with that general principle in mind. We are not opposed to many of the clauses. However, we just feel that, if the payment of a fine is introduced, the alternative of community service should also be provided for.

Mr Johnston:
Janice may want to add something. No one is under an obligation to accept a penalty notice. If someone does not want to accept it, they can say so, and the case will go forward to the prosecution for consideration in the usual way. One of the options then open to the court is some sort of community service order. Frankly, the cases that we are talking about are those that usually end up with a fine instead.

The major concern about offering a community service option is the cost of doing so. I recently asked for some information on the cost of supervised activity orders, where a probation officer does not monitor someone constantly while they are doing a piece of work but is involved in setting up the opportunity, making sure that the arrangements were made and checking that the

person has turned up and has done their allotted number of hours. The information that I got back was that it is something like £1,000 a case, so introducing community service option here may be a very expensive option. If the concern is about people's ability to pay, there is always the option for people to go to court and for the court to take account of the person's financial means in setting the level of the fine.

Ms Janice Smiley (Department of Justice):

If someone goes to court, they may find that their fine can be dealt with by extending the time available to them to pay or by their providing payment through instalments. There are, therefore, ways in which the court already deals with any financial order. However, if a person were not able to pay the fixed penalty, the traditional fine default arrangements would apply and additional payments would kick in. A supervised activity order as an alternative to custodial default could be available but it would have to be legislated for.

Mr McCartney:

OK. Thank you.

Mr A Maginness:

I want to ask a question for clarification and for my satisfaction. If someone receives and accepts a penalty notice, does it count as a conviction?

Mr Johnston:

It does not go on someone's criminal record. However, a note of it will be kept on the system, so that, if the person offends again, the first notice will be taken into account in deciding whether they get another penalty notice. However, it is not part of their criminal record.

Mr McCartney:

Would that be traceable through AccessNI or that type of trawl?

Mr Johnston:

No.

The Chairperson:

Include Youth said:

"we are now of the opinion that the proposals about the use of fixed penalty notices and conditional cautions should be

removed from the legislation."

It went on to say:

"it is essential that this legislation is right and we would purport that there is no need to rush these proposals through before their effectiveness has been fully tested and safeguards considered."

Therefore, it is Include Youth's opinion that Part 6 of the Bill should be held back until the findings of the youth justice review, the development of the reducing offending strategy and the prison review can be assessed.

Mr Johnston:

The provisions in Part 6 apply only to those who are 18 and over. We are not changing the arrangements there. If I recall correctly, Include Youth's concerns were in the context of wanting to see a bigger strategy on reducing offending. Work on that has now started, and the Committee will be briefed about it presently. We still feel that what is being done here is perfectly compatible with that strategy and gives older younger people, if you like, from the age of 18 to 25 the opportunity for minor offences in order to avoid starting a criminal record, given the implications that that might have for employment. That is a positive development and is fair to that age group of people.

Mr McCartney:

It says in our papers that the penalty for being drunk at any road or public place is a £40 fine. However, when we were going through the sports clauses, a fine of £1,000 was proposed.

Mr Johnston:

That is the maximum fine. There may be circumstances when a penalty notice was not appropriate and where police prosecution would want to pursue something through the courts because it was a more serious case. In fact, for all the offences that we are dealing with under the penalty notices, there is a higher maximum penalty if they are prosecuted.

Ms Smiley:

Yes, there are one or two within maximum penalties that incur a level 1 fine, which is about £250. The others are level 5, which could be £1,000 or more. The court is allowed the flexibility to deal with the variety of cases that might fall within the offence categorisation and the circumstances in which the offence occurred. It is about giving the court the full flexibility.

Mr McCartney:

If we had agreed to the clause about being drunk in a football ground, would that offence have been subject to a fixed penalty notice?

Mr Johnston:

It is not on the list, although it is certainly something that we could look at in the future.

The Chairperson:

Our summary of responses says that the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO):

"recommends the introduction of a proper diversionary based system, rather than reliance on fine based solutions and conditional cautions as alternatives to prosecution."

It also says that MindWise:

"notes that the penalty notice is for people over 18 years and suggests this should read 'people who have attained the age of 18 years'."

Is there some ambiguity there?

Mr Johnston:

It will just be people who are 18 and over.

Mr A Maginness:

Is there a time limit for paying the penalty? I cannot see that it is specified.

Ms Smiley:

It is 28 days from the date of issue.

Mr Maginness:

Do you know where it says that?

Ms Smiley:

Clause 68(1) states:

"Proceedings for the offence to which a penalty notice relates may not be brought until the end of the period of 28 days beginning with the date on which the notice was given ("the suspended enforcement period")."

Mr A Maginness:

I did notice that. However, is that the actual time limit? It does not explicitly say that, and that is the point that I am making. I thought that there could be a prosecution after that period and, I suppose, common sense would make you believe that it is 28 days. So, 28 days is envisaged as the period of time that a person has to pay the notice?

Mr Johnston:

It is. Certainly, what is printed on the penalty notice and what is said at the time would make people aware of that.

The Chairperson:

If no one else has any comments, we will move on to clause 66, which is entitled "Form of penalty notice". There were no responses received on this clause. Does the Department wish to add anything?

Mr Johnston:

No.

The Chairperson:

We will move on to clause 67. Our summary of responses states that the Law Society think:

"Police officers should be properly trained and the exercise of their powers should be audited. It is of fundamental importance that persons are informed of their right to be tried for the alleged offence. The penalty notice should inform the recipient of their right to seek independent legal advice."

Mr Johnston, do you have any comments?

Mr Johnston:

Yes, arrangements will be in place for training police officers. We have been in conversation

with the police about this since the early stages of the planning.

The Chairperson:

If no member has any comments, we move on to clause 68. Were there any additional views, Mr Johnston?

Mr Johnston:

No.

The Chairperson:

No member or official wishes to comment on clause 69, so we move on. Clause 70 deals with payment of penalty, clause 71 deals with registration certificates, clause 72 deals with registration of penalty and clause 73 deals with challenge to notice. There is no additional information from the Department on those clauses.

Clause 74 is on the setting aside of the sum enforceable under section 72. Our summary of responses says that the Women's Support Network (WSN) and Women's Aid:

> "remain concerned that women, particularly those with complex needs will continue to find themselves in the system, facing custodial sentences. WSN and Women's Aid believes that a fixed penalty will not address the causes of offending behaviour."

Do you want to say anything on that, Mr Johnston?

Mr Johnston:

There is a much broader women's strategy, and, as part of the consultation on that strategy, the workshop that was run dealt with alternatives to prosecution. However, we are not pretending that those are the only answer to addressing offending amongst women. A much broader strategy is in place.

The Chairperson:

Clause 75 is entitled "Interpretation of this Chapter".

Mr A Maginness:

I wish to go back to clause 73, which is on challenges to notice. Is that challenge through a Magistrate's Court?

Ms Smiley:

A statutory declaration would be made at the Magistrate's Court.

Mr A Maginness:

So, if I were to have some difficulty with a notice that was served to me, I would go to the court to challenge that. Is that the same as challenging the substance of it?

Ms Smiley:

When the 28 days have elapsed and no payment has been received, it will be registered and the individual will be written to. In some cases, that may be the individual's first indication that there is a case against them, and that is their opportunity to say that the notice did not relate to them and they did not receive it or that they have already requested to be tried within the 28 days and that, somehow, the payment notice has continued to proceed through the system.

Mr A Maginness:

That is not the same as being tried.

Ms Smiley:

No, there is no hearing. It is purely a written statutory declaration that the individual makes to say either that it was not them to whom the notice was issued or that they have already requested to be tried and that the notice should not have proceeded to that stage.

Mr A Maginness:

Who determines that issue?

Ms Smiley:

It will be an administrative arrangement in the court.

Mr A Maginness:

It is not a magistrate who hears that?

Ms Smiley:

No, I think that it will be a Magistrate's Court's clerk.

The Chairperson:

Clause 76 is on conditional cautions. On the issue of consideration of the victim, our summary of responses says that Victim Support said:

"it is essential that an identified victim is provided with an opportunity to comment on action being proposed in relation to an offender, particularly where the victim's participation is integral to the proposal."

Our summary also says that British Irish Rights Watch (BIRW) said:

"It is important that if these proposals are implemented both their effectiveness and integrity of application are regularly assessed and monitored."

We are also told that WSN and Women's Aid:

"WSN and Women's Aid urges the Committee to recommend that the Bill is amended to ensure conditions are applied before cautions in dealing with low level female offenders and this diversion should also be adopted rather than the imposition of a fixed penalty."

The summary points out that MindWise said:

"As part of the cautioning process an 'Advocate' trained in supporting vulnerable people should be present and ensure the same level of understanding takes place regarding the administering and accepting of a caution as occurs in the initial investigation stage. MindWise recommends that its suggestion be incorporated into the statutory codes".

Mr Johnston:

Those are all good points and we can pick them up in the guidance. When considering the issue of conditional cautions, the views of the victim will form an integral part of any decisions on the appropriateness of attaching a reparative condition. The views of victims will be taken into account.

Mr McCartney:

Do conditional cautions show up in traces carried out by AccessNI?

Mr Johnston:

Yes.

Ms Smiley:

They show up because they are police cautions.

The Chairperson:

We move on to clause 77, which relates to the five requirements. Our summary states:

"WSN and Women's Aid urges the Committee when considering clause 77, to recommend that the Bill ensures that cognisance is taken with respect to persons with mental health and other complex needs to ensure they understand the implications of the conditional caution."

We are also told that the Law Society:

"considers that sufficient safeguards must be put in place to ensure that any admission by an offender is made in the full knowledge of the case before him and the consequences. Government must avoid a situation in which an offender admits a crime he is not guilty of, simply to avoid prosecution. The Code of Practice referred to at Clause 82 must provide appropriate safeguards. Alleged offenders should be advised to discuss their options with their solicitor."

Mr Johnston, do you have any comments?

Mr Johnston:

The usual arrangements would apply, and, as with any other sort of caution, people will have access to the advice of a solicitor.

The Chairperson:

We will move on to clause 78, which relates to variation of conditions. If no member wishes to comment, we will move on to consider clause 79, which relates to failure to comply with conditions. Clause 80 relates to arrest for failure to comply. Again, our summary of responses says:

"WSN and Women's Aid note that there is no definition of what constitutes reasonable grounds contained within clause 80, nor does it define what constitutes a reasonable excuse. WSN and Women's Aid seeks assurances that those accused of non compliance of conditions are afforded every opportunity to provide a reasonable explanation and to have that explanation verified."

Mr Johnston, do you wish to comment?

Mr Johnston:

Again, that language is used elsewhere in the law. For example, when someone breaches the conditions of a community service order or a licence, there is always an opportunity for a person to explain and to justify what happened. The same standards would apply with clause 80.

The Chairperson:

If no member wishes to comment, we will move on to consider clause 81, which is entitled "Application of PACE provisions". Our summary of responses states:

"MindWise recommends that as the Department of Justice approved appropriate adult service delivery scheme in Northern Ireland any amendment to PACE should contain within either the code of Practice or a PACE schedule stating that in the event of an appropriate adult being required other than;-"

It then provides a list. Do the officials wish to comment?

Mr Johnston:

That is not quite my area, but that comment was made in a broader context about the role of appropriate adult services. The comments were heard and the Department will consider them further.

The Chairperson:

If no member wishes to comment, we will move on to consider clause 82, which relates to the code of practice.

Mr Johnston:

The Department has proposed an amendment to that clause. The Examiner of Statutory Rules recommended that the Assembly use the affirmative procedure to approve the code of practice. The Minister is content that that would be the case and proposes to bring forward an amendment accordingly.

The Chairperson:

If no member wishes to comment, we will move on to consider clause 83, which relates to the powers of the Probation Board. Our summary of responses states:

"Whilst PBNI welcomes the clauses covering Conditional Cautions, more detail on budgetary and personnel commitments will be required in order to properly cost this development in the Justice procedure."

Are there any comments?

Mr Johnston:

Discussions are ongoing with the various agencies about the implementation of those powers. I am confident that we can pick that up.

The Chairperson:

Clause 84 relates to interpretation of this chapter. We will move now to schedule 4. Do you want to take us through that or is it self-explanatory? It is not any more devious than it looks?

Mr Johnston:

It just sets out the offences that would be covered by the provisions and the penalties that would apply. It reflects lists that we gave the Committee when we gave evidence at the policy stage.

The Chairperson:

Schedule 5 is entitled "Transitional and Savings Provision". Does anyone wish to comment on paragraph 7, which relates to alternatives to prosecution?

Mr Johnston:

All it does is the usual human rights thing about making sure that it does not apply to any offence committed before the legislation came into place.

The Chairperson:

We will pause there. I thank Janice Smiley and Paul Black for their attendance. We will now be joined by the whole team. Mr Crawford, you are very welcome.

We will move on to Part 7. Clause 85 deals with eligibility for criminal legal aid.

Mr Robert Crawford (Northern Ireland Courts and Tribunals Service):

We have discussed that on previous occasions.

The Chairperson:

We should look at the comments from the Bar Council. Our paper states:

"The Bar is concerned that the administration of the new test would result in delay. The Bar Council pointed out that people are entitled to say that they are not ready for trial because their legal aid application has not yet been considered and that this will result in further administration and could well result in delay."

In addition, the Law Society:

"emphasised the importance of putting into place effective administrative arrangements to ensure that it does not create delay in the criminal justice system".

Therefore, two bodies have mentioned delay. Do you want to comment on that?

Mr Crawford:

We spoke about that at the previous Committee meeting. We acknowledged the potential for delay, but there are ways of avoiding that, particularly in respect of funding for a first offence in court before legal aid has actually been determined under a means test system. There are examples in the research paper of how that is done in England, Wales and Scotland. Therefore, we are mindful of those concerns. Before we bring proposals back to the Committee — indeed, we have not put proposals to the Minister yet — we want to ensure that we have that properly provided for.

The Chairperson:

The Law Society's view is that:

"means testing should be first commenced in the Magistrates court and be the subject of a pilot scheme before it is fully introduced across all courts. Early review arrangements should also be put in place."

Mr Crawford:

We have no difficulty with the first part of that. It makes a great deal of sense to begin in the Magistrate's court and transfer, effectively, most cases. We would want to consider exactly how piloting could best be done. It was not possible in England and Wales to pilot the current means testing scheme, and the lack of a pilot meant that they ran into difficulties. I think that that is what the Law Society is referring to, and we are aware of the difficulties over there. Without saying, "yes, definitely" to that point, we are certainly aware of its benefits.

The Chairperson:

The paper goes on to say that the Law Society is still not convinced that the potential for savings

will outweigh the likely delays and increased administration that will result.

Mr Crawford:

The point that we made on the previous occasion was that a research paper has information on cost and savings. Members of the Committee made the point about the high costs compared to the level of savings. As that has been drawn to our attention, we will take it on board when making our proposal.

Mr McCartney:

Will the new rules for financial eligibility come to the Committee for scrutiny?

Mr Crawford:

They will. In fact, they have to go out to public consultation.

Mr McDevitt:

Where are we on the commencement? Does the Department still propose to commence it by negative resolution, or has the Department agreed with the Committee that it should be done by affirmative resolution?

The Chairperson:

Page 9 of the paper says:

"The Committee considered the Examiner's views at its meeting on 13 January and agreed with the view expressed by the Examiner that this is a particularly important power that merits thorough Assembly scrutiny particularly as it relates to applications for legal aid in criminal proceedings."

Mr McDevitt:

Is the Department still resisting?

The Chairperson:

We think that the Minister has turned down draft affirmative resolution for clause 85(2). Is that still the position?

Mr Crawford:

That is the position based on the advice of the legislative draftsman. The Department was

minded to go with the Committee's recommendation. However, the legislative draftsman pointed out to us that that would be extremely difficult in the context of the power, and it would have to be amended because that regulation-making power governs all the regulations that are made for legal aid and making that subject to affirmative resolution will have the impact of affecting all minor changes to legal aid. The Minister decided that he cannot go against the draftsman's advice at this point. He indicated that he will be prepared to look at that in a more general and wider context.

Mr McDevitt:

The draftsperson is saying that — if I hear you right — if you take powers of affirmative resolution on clause 85, a consequence will be that all subsequent changes to legal aid would need affirmative resolution?

Mr Crawford:

The legal aid rates are set under a power that is set out in article 36 of the 1981 Order. I think that he is drawing attention to the fact that there might be consequences of the connection between the eligibility for legal aid and the rates. For example, rates might include anything to do with contributions and eligibility matters as well. His advice has not gone into the level of detail to enable me to give a full answer to the question, but he has expressed concern to the Minister that that would be very difficult at this point.

Mr McDevitt:

This takes on novel powers. It is new policy as well as new law. According to the Examiner of Statutory Rules, it is best practice that novel powers should always be subject to affirmative resolution.

Mr Crawford:

The draftsman's view is that there is a practical difficulty. He is not quarrelling with the principle; it is about the practical drafting.

Mr McDevitt:

There is an interesting tension between the practicalities of the draftsman's need to write proper law and the substance of the law. It strikes me that the substance is more important than the practicality of the drafting. In other words, we would not want to do it by negative resolution

because that is a practical way when, in fact, it is a substantial change that, in any other scenario, would require affirmative resolution.

Mr Crawford:

Again, the draftsman's view is that it has a connection to other legal aid provisions. Without him spelling all that out, the Minister's conclusion was that, on the basis of his advice, it would be best dealt with by looking more widely at the use of affirmative and negative resolution procedures for legal aid more generally. The Minister recognises that there are some areas where affirmative resolution might be appropriate, and he was prepared to go with the original suggestion from the Committee, whereas that might not be an appropriate use in other areas such as an inflationary uplift in rates.

Mr McDevitt:

I take Mr Crawford's point, but, in reality, we are being asked not to adopt best practice because of a practicality or technicality about the drafting of the legislation, not because it is not the right thing to do.

Mr Crawford:

To expand a little on the point about occasions where negative resolution may be more appropriate, the eligibility threshold would be set in those regulations, so if it were intended to increase that threshold by, say, 2% to reflect an increase in inflation or in living costs or whatever underlying principle that applied, that would then require affirmative resolution. That is an unusual use of affirmative resolution. There may be a solution in principle, but I think that the draftsman is saying that it is not by making everything made under this power subject to affirmative resolution. I think that his concern is that there would be technical changes that would also be caught by affirmative resolution.

The Chairperson:

However, importantly, it would permit and provide for debate on the Floor of the Assembly.

Mr Crawford:

It certainly would; there is no question about that.

The Chairperson:

Members, the Committee can bring its own amendment on this matter if it is minded to do so. That is something that we can consider.

Mr McDevitt:

It feels very uncomfortable to me that we are being asked not to do the right thing because of a technicality, given that everyone agrees that the right thing to do would be to make this through affirmative resolution. However, because of a technicality, perhaps in the way it has been structured or the way that the draftsman approached the structure of the clause by not separating it into distinct clauses, we cannot do it. It does not feel right.

The Chairperson:

I do not know whether other members wish to comment on that, but, if members are of the opinion that we should ask for the draft wording of an amendment, we can start to work on that and bring it to the Committee to look at the shape, size and direction of it.

Mr A Maginness:

We should do that.

Mr Johnston:

We note that, but we are not asking the Committee to abandon its concerns; we are simply suggesting that it would be better to explore them in the wider context of what is affirmative and what is negative in legal aid provisions. We are happy to bring back wider recommendations on that as soon as possible.

Mr Crawford:

To add to that, if the Committee has a particular concern about the first introduction of a means test, the affirmative resolution could be done for that occasion but not for subsequent changes. That might not meet all the Committee's concerns, but I simply offer that as a procedure that we have looked at in other areas.

Mr A Maginness:

That is interesting; that might be one way around it. To make a general point, we are going through this very carefully, and it seems to me to be quite a big change with all sorts of

foreseeable problems in relation to people. However, at the end of the day, I am not convinced by the Department's argument that there will be any real savings. Savings seem to me to be fairly minimal in any event, even in the best case scenario. We may go through all this and, ultimately, find that we have made little savings, and we may perhaps jeopardise people's rights to defence.

The Chairperson:

Thank you. I draw members' attention to this statement in our paper:

"When asked by a Committee Member for a view on the secondary legislation being introduced by negative resolution the Bar Council stated that, of all the clauses this is potentially the most significant around access to justice and it would be concerned if there was no further scrutiny of it."

The Law Society adopted a similar stance:

"The Law Society also supported that, where these proposals are being brought forward that are going to have such a major impact, they should be by way of affirmative rather than negative resolution."

Two significant bodies are saying what some of us are saying at this table. Anyway, members, you have heard what the officials have said. If members are content, we will draft an amendment, look at the wording and make a decision.

We will move on to clause 86, which is "Order to recover costs of legal aid". Do members wish to make any comments?

Clause 87 is "Eligibility of persons in receipt of guarantee credit". Do members wish to make any comments?

Clause 88 is "Legal aid for certain bail applications". No specific issues were raised in connection with that clause.

Clause 89 is "Financial eligibility for grant of right to representation". Do members wish to make any comments? I refer members to the letter from the Minister of Justice. The same argument about affirmative resolution is being put forward. Is the Committee minded to explore whether it should draft an amendment to that clause?

Members indicated assent.

The Chairperson:

We will let you have sight of that as soon as we get it.

Clause 90 is "Litigation funding agreements". There are some comments on this clause in our paper:

"The Bar's view is that money damages cases which represent a very small figure in relation to the expenditure of the Legal Services Commission – between £1 million and £2 million or 1% of the overall budget – should be maintained as a priority area (most cases are successful and there is no claim on the Legal Aid fund). It is recognised however that there are significant administrative costs … The Bar Council asks the Committee to look again at the question of whether money damages should be excluded from legal aid and whether it is appropriate to use another untried way of providing assistance that may be unsuccessful."

Mr Crawford:

In a sense, that is what the Legal Services Commission is exploring with the legal profession; they want to see whether an arrangement can be set up to have some further funding from legal aid so that it can be self-maintaining.

The Chairperson:

Do members wish to make any comments? I refer members to the comments on page 26 of that paper:

"The Law Society states that the removal of the prohibition on the NI Legal Services Commission funding legal services under litigation finding agreements is to be welcomed."

We will move on to clause 91, "Civil legal services: scope". Do members wish to comment on that clause? No specific issues were raised in connection with it.

Schedule 5(8) deals with witness summonses. That brings us to the end. Do members wish to put any other questions on those issues? Thank you very much.