

The Legal Aid and Coroners Court Bill Committee Stage - Written Submissions

Introduction

The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

Representing the views of members who provide advocacy and representation in cases across the broad spectrum of legal practice, the Bar Council serves to ensure and maintain an independent and quality source of specialist legal advocacy.

General Points

The Bar Council welcomes the opportunity to respond to the call for evidence from the Committee of Justice on the proposed Legal Aid and Coroners Court Bill.

The Bar Council previously responded to the public consultation conducted by the Department of Justice on safeguards to protect the individual decisions on the granting of civil legal aid and a copy has been included at Appendix A.

PART 1: Legal Aid

Clause 1

Clause 1 provides for the formal dissolution of the Northern Ireland Legal Services Commission. The Bar Council notes the stated impetus behind the Bill and the redesignation of the Legal Services Commission from a Non Departmental Public Body to an Executive Agency is largely due to failings on the part of the Commission to manage its processes, budget and forecasting on legal aid expenditure. Any improvements which can be made in this area to ensure transparency, predictability and accountability are to be welcomed.

Clause 2

Clause 2 provides for the designation of the Director of Legal Aid Casework. We note that the provision to designate a director of legal aid casework is identical to provisions contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced in England and Wales.

The primary concern in relation to the Bill relates to the independence of decision making. In becoming an Executive Agency, the Commission is more susceptible to Ministerial, Departmental and political influence. The granting of legal aid must be awarded on a case by case basis, and only awarded based on the merits of a case, without credence to any budgetary or political agenda. The assurances contained within the explanatory and financial memorandum of no ministerial involvement in individual decisions on civil legal aid funding are welcome. However, the practical detail of how the Department will ensure this is the case remains unknown.

The Committee for Justice should review the scrutiny undertaken by the Westminster Select Committee who previously considered similar provisions in the provisions contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Committee remained unconvinced that the legislation in England and Wales provided sufficient institutional safeguards to protect the independence of the proposed Director of legal aid casework. Of particular concern to the Committee was the prevention of any conflict of interest arising when making decisions relating to the availability of legal aid in challenging government decisions, such as in judicial review cases.

Within the Bill, Clause 2 states that the Department of Justice "*must designate a civil servant in the Department as the Director of Legal Aid Casework*". The Bar Council is concerned that there remains no provision to require that the Director of Legal Aid Casework is legally trained or qualified. It should be accepted that a legally trained Director of Legal Aid Casework would have the requisite experience, understanding and knowledge to make decisions on individual cases. Decisions being made by a director without legal training may lead to more challenges through the appeals process, thereby increasing administrative workload and costs.

Clause 3

Clause 3 relates to the exercise of functions by the Director of Legal Casework.

The Bar Council does not believe that the provisions contained within Clause 3 will provide the operational independence required in making individual decisions on the granting of legal aid and are not sufficiently robust as to enable the Director to challenge directions from the Department.

We welcome the inclusion that "*the Department must not give a direction or guidance about the carrying out of those functions in relation to an individual case*". However, it remains possible to compromise an individual decision, for example, through a budgetary or financial guidance in relation to a certain class or type of legal case. We would recommend the inclusion of a caveat at clause 3(1(a)) which allows the Director to, whilst acting in a reasonable manner, initially challenge and ultimately if necessary to choose not to comply where the direction compromises the independence of decision making.

In relation to 3(2), the Bar Council would request more detail on what would happen or what sanctions are available should the Department fail to comply. It would be useful to know what reporting mechanism will be available to the Director of Legal Casework in circumstances where he or she is concerned as to the direction or involvement of the Department.

We welcome the commitment by the Department to publish any directions and guidance given. We would request that this is clarified to ensure that the publication will be publicly available to all interested parties.

Clause 4

Clause 4 provides the power to the Director of Legal Aid Casework to delegate functions to other individuals in the Department of Justice, while regulations under schedule two provide for the creation of appeal panels.

The Bar Council believes that the current system of panels of practicing lawyers works well in the context of considering an application for legal aid funding. It is important that in moving forward, we

continue to constitute the appeal panels with suitably qualified, presently practicing legal representatives who have experience in the area of law under consideration.

Clause 5

The publication of the Annual report of the Northern Ireland Legal Services Commission has been fraught with many challenges and difficulties in recent years. The Bar Council welcomes the provisions in expectation that the report and the information contained within will improve in content and accuracy. The Committee may wish to consider the inclusion of a time limit for the laying of a copy before the Assembly to ensure timely receipt of a completed report.

Clause 6

The Bar Council has requested a legal opinion to ascertain the impact of the amendments relating to the legal aid, civil legal services and criminal defence services. We will be happy to share the opinion with the Committee on receipt.

PART 2: Coroners Court

Clause 7

The Bar Council welcomes the formal designation of the Lord Chief Justice as President of the Coroners' Court.

SCHEDULE 2: Amendments

Schedule 2 proposes a number of amendments, one of which relates to the register of solicitors and counsel eligible to be assigned to a criminal legal aid certificate.

The Bar Council appreciates that the intention behind the inclusion within Schedule 2 is to replicate the provisions in the 2003 Order which have not yet commenced. The Bar Council notes that the draft Bill replicates 36(1)-(4) of 2003 Order but unfortunately 36(5) has not been transferred. This requires the Department to *"consult the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland and undertakes such other consultation as appears to him to be appropriate"*. It is important that the profession and key stakeholders have a role in the development of any registration scheme and we would ask the Committee to propose the replication of 36(5) within the draft Bill.

The Department has yet to discuss the matter of registration in detail with the Bar and we would welcome the opportunity. However, we understand that the Department is preparing a public consultation on this matter.

Conclusion

Legal aid has a defining role in upholding access to justice. It affords many individuals access to justice, enabling them to defend themselves and to enforce their legal rights. The administration of the system and its independent decision making processes are vitally important and require robust protection from any form of interference.

As the representative body, the Bar Council would welcome the opportunity to meet with the Committee to further elaborate on this response and the issues contained therein.

Contact for more information:

Victoria Taylor

Research & Policy

The Bar Library

Tel: 028 90562596

Mob: **07824 806725**

Ext: 2596

Email: victoria@barcouncil-ni.org.uk