Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Recovery of Defence Costs Orders

24 May 2012

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Tom Elliott
Mr Seán Lynch
Mr Alban Maginness
Ms Jennifer McCann
Mr Patsy McGlone
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr Robert Crawford	Department of Justice
Mr John Halliday	Department of Justice
Mr Jim Millar	Department of Justice

The Chairperson: I welcome Mr Robert Crawford, the deputy director of the public legal services division, and his colleagues Mr John Halliday and Mr Jim Millar.

Mr Robert Crawford (Department of Justice): Thank you, Chairman. John Halliday and Jim Millar are from the legal aid team in my division and will deal with any detailed questions if necessary. We have provided the Committee with a post-consultation report on our proposals for rules in this area. The consultation period ran for 12 weeks, from 3 February 2012 to 27 April 2012, and we received 11 responses. None of the responses were against the principle of introducing these rules, but a number of them made comments about how the rules would operate.

It would probably be helpful to the Committee if I deal with how the rules will work, after which I will deal with a couple of specific points that came out of the consultation responses. First, the objective of the regulations is to give the Legal Services Commission power to recover all or part of the cost of legal aid funding in a small number of cases. We estimate that that would be a maximum of eight to 10 cases a year, from which we would, perhaps, recover some £200,000 per annum, having taken off the administration costs involved.

The general principle underlying this is that criminal legal aid is available for persons who come before the courts and who cannot afford to pay for their own defence. A small number of high-profile cases have come to the attention of the Committee, Assembly Members and the media in recent years where it has appeared that people who have been accused and, in some cases, convicted of very

serious crimes have been well able to afford their defence costs. There has been criticism of why those persons received legal aid. This proposal would address that concern.

The proposed regulations would do that by allowing the Legal Services Commission to seek a recovery of defence costs order (RDCO) against a person who has been convicted in the Crown Court. I stress that that does not apply to the Magistrates' Court or any court other than the Crown Court. It is only the most serious criminal offences that are involved in the proposal. The commission would identify cases and seek an order in the Crown Court from a Crown Court judge. The judge would have the full discretion that a judge has in relation to an order. A judge must decide, according to the legislation, whether it is reasonable in all the circumstances to grant the order. The judge can decide how much a person against whom an order is made should contribute, whether that be all or part of the defence costs. There is a specific requirement in the legislation that the judge should consider financial hardship. In other words, the judge shall not make an order if they believe that, in the exceptional circumstances of the case, making an order would involve financial hardship. The judge has complete discretion there.

In addition, the Legal Services Commission can operate its own sift in deciding which cases it should pursue. The Legal Services Commission has told us in consultation that it will not be carrying out a review of all Crown Court cases to attempt to establish whether somebody might be able to produce a small contribution towards the cost of their defence funding from legal aid. They are looking at the most expensive cases and most serious cases, and circumstances in which the convicted defendant — I emphasise that it will be only a convicted defendant — might have significant means. That means that the commission will, in the first instance, be looking only at cases where there appears to have been acquisitive crime through which somebody has perhaps gained a significant sum of money from criminal activity. The commission will look at all those cases to determine whether there is any point in pursuing recovery of defence costs. In addition, the commission will look only at the specific cases that come to its attention, whether though the media, complaint or because the commission itself becomes aware that the defendant appears to have considerable means. I assure the Committee that this is not an attempt to go through all cases and go after a large number of people. As I said, the maximum number of cases would be eight to 10 a year. We got that figure by looking at the number of Crown Court cases annually in which confiscation orders have been sought or awarded.

What type of cases are we talking about? A number of cases, of which the Committee will be aware, have come into the public domain in the past. However, I will give a couple of examples that perhaps you might not be aware of. Last year, there was a tax evasion case in which confiscation orders were sought and made against two defendants to recover approximately £2 million from each. That was £4 million in unpaid tax recovered under a confiscation order. The legal costs in that case approached close to £500,000. In that circumstance, that is a case that the commission would certainly want to pursue, because it appears that the convicted defendants may have had significant assets. The question, of course, is whether the confiscation order recovered all the assets and there is none left. That is really a question for the commission and, in the end, the judge to determine. I will give a contrary example to illustrate the discretionary nature of the judge's decision. There was a recent case in which two defendants were convicted of corruption and false accounting. The confiscation orders in that case were for £747.50 against one defendant and £1 against the other. Our understanding is that, in that case, clearly the judge felt that the defendant against whom a confiscation order of £1 was awarded would not have been able to make any meaningful payment.

That is effectively the way in which our recovery of defence costs orders would work. Where somebody has very significant funds, particularly if those have been gained through any criminal activity, the commission will pursue that vigorously, and we would expect that a recovery of defence costs order would be likely to be awarded. For a case in which somebody is convicted of an offence in the Crown Court, but perhaps in circumstances where the defendants are family members whose financial hardship would ensue because the only wage earner is about to go to prison, we anticipate that the judge would not award a recovery of defence costs order. The big protection in this is the judicial discretion. The commission is not going to force payments; it will be the judge who decides. The commission will make its own judgement about whether to seek an order.

Finally, I should say that there is an appeal mechanism in the process, so that anyone who feels that they were unjustly punished by a judge awarding an order against them will have that facility.

The chief executive of the Legal Services Commission has given us his view that, as a rule of thumb, it will not pursue cases where an individual who is convicted is not earning more than £50,000 a year. I say rule of thumb because, clearly, the commission would have to consider whether an individual who is earning less than that may have substantial assets in banks, savings or property. The commission

intends to apply to go after only the most wealthy convicted defendants. Apart from anything else, that also means that they are not pursuing cases where the amount recovered would be outweighed by the cost of going to court and getting the order and, perhaps, an appeal.

I will mention a few of the responses, just to illustrate the points that came up. The Legal Services Commission and the Social Security Agency (SSA) gave us some thoughts on the mechanisms. Protocols will be developed between those agencies about who recovers from which particular cases, because the Social Security Agency and other agencies have powers of recovery. We do not want the commission, the SSA and others tripping over one another in pursuing the same individual for, effectively, the same pot of money.

The PSNI suggested that the impact on justice would be minimal. Along with Coleraine District Policing Partnership, it made a point about proportional payments. We believe that the rules as they are drafted are sufficiently flexible to allow that, because the judge decides how much would be paid by way of contribution. We do not believe that there is any need for change in that.

Coleraine District Policing Partnership also suggested that the threshold for pursuing people might be a little bit wrong. It pointed to the fact that the benefits cap suggested for England and Wales might be £26,000. That concern is accounted for by the fact that, as you can see in the rules, people who are in receipt of income-related benefits will not be subject to RDCOs unless — on very rare occasions — they might have significant assets beyond that, in which case there is a question as to why they were on income-related benefits anyway. That is the only exception that is there. People who are in the benefits system will not be pursued for these costs. In addition, the chief executive's rule of thumb about people earning less than £50,000 means that those who are at the bottom end of income, wage earning and assets will not be pursued.

Coleraine District Policing Partnership also expressed concern that people may be deterred from bringing cases to the Crown Court because if they go to the Crown Court they might be subject to a recovery of defence costs order after they are convicted or if they are convicted, whereas if they were to plead guilty in a Magistrates' Court or have the case heard in a Magistrates' Court, they would not be subject to those costs. Our response to that has to be that that is a decision for the individual defendant in consultation with his or her defence representative. As far as we are concerned, the issue is more about whether people can pay for their defence costs, and if they choose to go to the Crown Court and incur a significant defence cost, it seems right that the taxpayer, in this case represented by the Legal Services Commission, should be able to recover those significant costs. We do not believe that that has any impact on the individual's access to justice or their legal right to a fair trial and being considered innocent until proven guilty or anything like that.

We carried out a screening exercise that suggested that an equality impact assessment (EQIA) was not necessary, and we did so because of the potential issue of financial hardship and because we did not simply have the data ourselves about impacts on different groups in society. We carried out the consultation exercise of a full EQIA, but we got no comments back from any of the section 75 groups or other consultees. I want to reassure the Committee that we sought to check whether anyone could see any problems with these proposals that we had not seen.

The Chairperson: Thank you. The paper indicates a £50,000 cost to recover the £250,000. Is that the maximum cost that you anticipate, and the maximum amount that you think the scheme will recover?

Mr Crawford: There are a number of factors in relation to the savings. The savings will vary from year to year, depending on whether they are particularly expensive cases in which an order is recovered. It takes account of the fact that, in some of those cases, there will have been a confiscation order as part of the sentence. It may well be that the convicted defendant has already lost much of their assets as a result of that confiscation order, so it may be that the recovery of defence costs order is not appropriate because there is nothing left that is worth pursuing. The figure of eight to 10 cases is based on confiscation orders going through.

If, however, we take a murder case, which perhaps costs £250,000 by way of defence costs, and it appears that the individual has very significant assets, the recovery could be as much as the full £250,000 if the judge was to decide that the individual concerned should pay that full amount. I should perhaps point out that, if we had a fixed means test, legal aid would not be paid to that person in the first place. They would have to meet the full £250,000 cost if they went to the Crown Court for that particular charge. That would be the case in other jurisdictions. So, it could be £250,000 in one case in a particular year, or, if three or four orders came together, it could be considerably above that.

What we are saying is that, in some of those cases, we will find that there is actually no money to recover, because somebody else will have got it already. RDCOs will generally come after the confiscation order proceeding, because that may be part of the sentence, so let us see what that gets back before we incur more cost going after the same money.

Mr Wells: Surely a simple way around it if they will not pay or cannot pay is to put a charge on the family home.

Mr Crawford: That will be an option for the judge. What we have said in relation to what the judge will take into account in deciding contribution is that the judge will not consider the first £3,000 of capital assets and will not consider anything below £100,000 of equity in the house. If it was a small house, that would not be the case. If it was a large house, a charge can indeed be imposed, and the judge will not consider the first £22,250 of income. Those figures were drawn from the RDCO scheme that operated in England and Wales. We have not adjusted them. What we are saying is that the judge will not have to take everything over and above that. The judge will make that decision, and may decide to take nothing, particularly if there is no other income coming into the family, but the judge will definitely not consider that first £100,000 in the principal residence.

Mr Wells: It is very generous. You said that anything below £50,000 is in the lowest pay bracket. That includes all the MLAs, so I am pleased to hear that. We will use that on 'The Nolan Show' next week. Surely, that sort of figure is double average earnings. That is an extraordinarily generous level. Why not set it at, for example, £30,000, which I think would be more realistic as to the man on the street's view of what constitutes high pay?

Mr Crawford: The likely level for universal credit, if it comes in in October 2013, might be, we understand, something above £32,000. Clearly, if somebody is in receipt of benefits, we do not feel that it is appropriate to regard them as being among the most wealthy in society or among the most wealthy of convicted defendants. The starting point that the commission intends to apply is £50,000. It can always be reviewed, and we will, as always, review the operation of that.

Mr Wells: Is £50,000 not far too generous?

Mr Crawford: I am not sure that it is at the moment. That £50,000 is gross salary.

Mr Wells: Right, yes. That is still what most people would regard as a very good salary.

Mr Crawford: When we brought the consultation paper to the Committee, we emphasised that the proposals were intended to go after the most wealthy defendants. I am sure the Minister would be happy to consider any views that the Committee may have on a lower figure, but what we said to the Committee was that we wanted to go after a small number of high-profile cases, particularly those dealing with acquisitive crime, where perhaps there might be significant assets acquired from criminality. That was what we said to the Committee when going out to consultation. Interestingly, in the consultation responses, nobody suggested that we should go lower than the figure, and £50,000 was not included in the consultation paper. We had a lower figure for the amount that the judge would exclude from consideration — the figures I just gave — and nobody said that it should go below that.

Mr Weir: I tend to concur with my colleague. I understand the principle of going after the lowest-lying fruit; you will go for the cases that will give you the most yield. Pitching it at £50,000 seems to be a bit on the high side, and I think that needs to be looked at. Were people asked specifically in the consultation whether the £50,000 was an appropriate level? I suspect you might get a different response on that.

Mr Crawford: In the consultation paper, we did not put in any figure for the rule of thumb that the commission might apply. The paper explained that it would be for the commission to decide which cases it should take, so we are not putting that in the rules. It is still open to the commission —

Mr Weir: So, from that point of view, you are looking at that as a rule of thumb rather than a rule?

Mr Crawford: It is very much the chief executive's view of what that should be at the start, and that can be kept under review. We put into the paper all the figures in relation to what would not be considered when the judge chooses how much should be paid. Those figures were £3,000 of capital,

£100,000 in equity in the principal residence and £22,250 in income — much lower than the £50,000 for the income. Nobody said anything about that.

Mr Weir: I understand that. I would also express the point that, if there was a charge being looked at, £100,000 for the house seems to be quite a large initial threshold that is not being considered.

I want to check the recovery cost situation. You highlighted examples where it has emerged that somebody has a lot more money than was initially declared. Is there any sort of cover for a situation where there has been a beneficial change in circumstances for the person initially receiving legal aid? For example, if someone inherits a large amount of money during the trial, or alternatively, someone wins the lottery and becomes a millionaire. We have seen a number of cases across the water where that has happened, and there has been public outrage at somebody receiving a large amount of legal aid whenever they have won the lottery and got £10 million, for instance.

Mr Wells: It did happen. There was a very famous case in Norfolk where that happened.

Mr Crawford: I think I remember seeing that in the media.

Mr Weir: Those cases have happened. Does this cover that situation where, for whatever reason, there is a dramatic change in circumstances, or is it purely where there has been a quasi-fraudulent situation where somebody quite clearly has not been necessarily truthful?

Mr Crawford: It can indeed accommodate what you described. When a case is committed to the Crown Court, if, at committal stage, the commission believes that it would wish to seek an RDCO, it has the power to require that defendant to fill in a financial means form setting out what their means are. That is so the commission can consider whether to take that forward when conviction happens. The commission can seek the order at any time once the person is convicted.

Mr Weir: When you say at any time, are there any time limits or any statute of limitations?

Mr Crawford: We have not specified any in the regulations that are unique to these. I am not sure what the normal statutory time limit would be.

Mr Jim Millar (Department of Justice): We have not set anything out. You made a point about changing circumstances. Under other legislation, a defendant can be pursued. When he signs his statement of means form and he originally gets his legal aid certificate, he signs an undertaking that, if his circumstances change throughout the currency of that, he would inform the commission.

Mr Weir: So, they are committing an offence if they do not inform. Quite often, someone will have had a change of circumstances, but may not publicise it.

Mr Crawford: If that then comes to the attention of the commission, whether through withdrawal of legal aid or if that is considered to be unfair at the point of the trial and if the person is subsequently convicted, an RDCO would be an appropriate way to recover that money.

Ms J McCann: I have one point for clarification, and I have brought it up before: the case of a family home of someone who has been convicted but the wife and children still reside at the home. There does not seem to be a lot of clarity on whether the home can or cannot be taken off the family.

Mr Crawford: The big protection is the Crown Court judge and the specific requirement in the rules that the judge shall not make an order if it would involve financial hardship for the family members or any other dependants. Considering whether to put anything more in about a specific family home is a difficulty because the rules say that the commission needs to have power to pursue assets that a defendant tries to get rid of or to put in different names, and the more we try to protect a family home or principal residence — the protection of £100,000 in equity that will never be looked at — the more difficult that becomes and the easier it is to evade this. We believe that it is better to put in the specific requirement for the judge not to make an order if there is financial hardship. For example, if the crime is against the family and the person who is convicted of the crime goes to prison and there is, therefore, no income coming in but there is a family home, clearly it would be bizarre to expect the family to pay. I gave the example of the £1 order, and the judge should — I am sure will — take that kind of thing into account.

Ms J McCann: I have that concern because money may not have been hidden and it could be a clear case of someone being married or the name on the house is that of the person who is convicted but the partner and the children live there. There should be a safeguard in there.

Mr Crawford: The biggest safeguard is the judge. The first safeguard is that the commission will not pursue a case where the only asset appears to be the family home because it will not expect a judge to grant an order in that circumstance. The second protection is that, if it turns out that the assets that the commission thought the person might have and were not needed for the family were not there, I would expect a judge to not grant that order because the judge must consider financial hardship. If the judge fails to do that, the appeal can be made on those grounds.

Ms J McCann: I am concerned that it is left up to the judge's discretion and that there is nothing in there. It could be firmed up a bit, because I have a concern that a genuine family that had no knowledge and no part in the conviction could be penalised for the actions of another family member. Leaving it to the judge's discretion is a bit woolly.

Mr Crawford: We can look at how to better describe that in the regulations before they come back to the Committee to be considered at the next stage. We can see if we can tighten that up. To be clear: we have described groups in principal residence, but, perhaps, an expansion of the financial hardship reference should specifically include consideration of the family home. Would that be —

Ms J McCann: Yeah, it needs to be firmed up.

Mr Crawford: It could even include reference to the financial circumstances of family and dependants, including family residents. That would make it absolutely clear that, if the judge does not do that, the appeal should be automatic. We will look at that.

Mr Lynch: You mentioned eight to 10 cases, which seems low. How did you arrive at that figure? Could it be much higher or could it be even lower?

Mr Crawford: It could be higher in a particular year. The eight to 10 cases are gathered from an assessment by my staff of how many cases involved confiscation order proceedings, and we believe the commission might want to activate the rules to chase the money. In a particular year, three or four high-profile cases might come before the courts, and the commission might pursue those. So, there could be some more, but I do not think that we will ever reach a situation of more than 20 cases in one year because, apart from anything else, the commission will not be resourced to chase that number of cases because we do not believe that they are there.

Mr Elliott: Thanks very much for that. I will be very quick. As Mr Lynch highlighted, the number of cases — eight to 10 — appears small. The figures also appear small when you look at the overall legal aid bill: it will cost £50,000 to manage, and it will probably recover £250,000. Even for eight to 10 cases, what sort of team do you have to do that at £50,000 a year?

Mr Crawford: We envisage that two staff in the Legal Services Commission will work in that area. That is adequate for that number of cases. The figure may be regarded as a low estimate, because if we recovered the full cost of one case, we could get £250,000 or more. The reason why we have given a cautious estimate is to ensure that we are not accused of over-representing the savings that we might produce. We also have a concern that other agencies are chasing the same money, particularly where proceeds of crime are concerned. So, if we let them go first — it is simpler and cheaper to let them do so if it is already part of the sentence — there may not be a lot left for us. So we have aimed off, if you like, from an optimistic view of the savings. The important thing is that, if a person can afford to pay, they are pursued for that, because the taxpayer should not be paying for their defence.

Mr Elliott: No chance of investigating solicitors and barristers involved in that.

Mr Crawford: I am not sure whether that is really a question for me.

Mr Weir: Are you out-Wells-ing Wells?

Mr S Anderson: Thank you for the presentation. Can I ask you about criminal activity and the proceeds of crime accumulated from such activity? If someone builds up large defence costs, and it is known that they have a lot of assets outside the jurisdiction, is there any way that those assets can be retrieved?

Mr Crawford: We are actually pursuing that with the police and other agencies. We do not believe that we necessarily need the powers in these regulations to do that. However, we are exploring how we can get access to that kind of information, so that we can, if necessary, seek an order under other legislation to get assets repatriated. Again, we are looking for the recovery of defence costs. Other agencies may be more and better equipped to undertake that pursuit. However, it is a good point. If you are content, I will happily look at that to see whether there is anything that we can beneficially build into the rules that would give us better powers to address that. There is nothing specifically in there about pursuing assets outside the jurisdiction. We will look at that before we bring the rules back to the Committee.

The Chairperson: OK. Members, you have heard all the different points. Some clarification is to be brought on Ms McCann's point. If members are content with the rest of the proposal, we will get clarification on that point when the Department sends back the rules.

Mr Crawford: Chairman, if you are happy, we will provide a covering note explaining how we have responded to both points.

The Chairperson: That would be appreciated. Thank you very much.