



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Reform of Eligibility for Civil and Criminal
Legal Aid: DOJ Briefing

21 March 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Tom Elliott
Mr Seán Lynch
Ms Rosaleen McCorley

Witnesses:

Mr Robert Crawford	Department of Justice
Mr Mark McGuicken	Department of Justice
Ms Claire Robinson	Department of Justice

The Chairperson: I formally welcome Robert Crawford, deputy director of public legal services, Mark McGuicken and Claire Robinson of the legal services division. This session will be reported by Hansard. Robert, I will hand over to you at this stage.

Mr Robert Crawford (Department of Justice): Thank you, Chairman and members. As ever, I will give a very quick overview of what is in the consultation paper that we hope to publish, and then I will answer questions from members. The paper covers three main areas. We want to harmonise civil legal aid financial eligibility thresholds and, as part of that, we also want to adjust a number of the provisions relating to civil legal aid eligibility, mainly to clarify or tighten up loopholes in the rules. In the paper, we want to consult on criminal legal aid financial eligibility, and we have set out two possible options for that. The paper also invites comments on our emerging thinking on how best to provide and fund legal advice in the future.

The proposals will deliver savings, if implemented in full, of £2.4 million annually for civil legal aid changes and £1.2 million in respect of the criminal legal aid financial eligibility introduction, making total savings of £3.6 million. The main driver of the proposals is not to make savings, but, given the very difficult financial position that legal aid expenditure is in, it had to be a factor in our considerations. Most of the savings in civil legal aid will come from tightening up or clarifying existing rules, rather than reducing the number of people who are eligible. I think that we have ended up with a good outcome on that, as I will explain.

On the harmonisation of civil legal aid financial eligibility, at the moment there are four financial eligibility thresholds for civil legal aid. One will become obsolete if we remove money damages cases from the scope. By way of example, 34.5% of the population are eligible under the rules that apply for people who apply for legal aid for legal advice and assistance, and 38.5% of the population are eligible for legal aid for advice by way of representation (ABWOR). For full civil legal aid, 42.7% of the population are eligible. It is clearly a bit of an anomaly that someone should be eligible to take legal

proceedings but is not actually eligible to get basic legal advice in the first instance. We want to harmonise that to bring all of that into one test so that, effectively, there is one income threshold so that people know or have a good understanding of whether or not they are eligible for legal aid before they go to a solicitor or as soon as the solicitor sits down to talk with them. That is the main driver behind our proposal to harmonise civil legal aid financial eligibility.

We have looked at where we should set the new threshold. In the paper, we have set a proposed figure of £10,682 per annum. That is an increase on the main civil legal aid figure of 7.5%. It would give us an overall eligibility figure for Northern Ireland, without the adjustments that I will come to in a minute, of 41%. That is higher than the existing figure for advice and advice by way of representation, but slightly lower than full civil legal aid. When we apply the harmonisation adjustments that I mentioned, that will come down to 35%, but we are still in a significantly better position than England and Wales, where the limit is lower at £8,796 per annum. Our figure is about 25% higher than that. We also have a better percentage outcome than England and Wales, where 28% of the population are eligible for civil legal aid, compared with our figure of 35%.

Although we are gradually tightening up the rules, we are still ending up with a more generous outcome than in England and Wales. We are trying to find a balance, and the consultation will tell us whether we have got that right. Clearly, we do not want to be seen as massively more generous than England and Wales. That said, there is a concern that England and Wales has been a little too harsh in the way that some of the rules have been recently applied on legal aid.

Most of the reduction in eligibility in Northern Ireland will come from harmonisation. I should say that, in all these cases, when we set new limits and implement any proposals that are approved, we will keep them under periodic review. By way of example, we are currently looking at raising what is known as the lower level for legal aid, which is the level below which a person gets 100% funding for legal aid. That is because jobseeker's allowance has risen and legal aid thresholds have not kept pace with that. That will be a technical amendment that is not covered in the paper. That is an example of where we will need to keep revising things. When benefits change, we will need to keep making sure that legal aid stays in line with those adjustments.

On tightening up and adjustments in civil legal aid, some are relatively straightforward and minor in relation to improving the administration of the system. Others are more significant. We propose, for example, to introduce a gross income cap. We are setting a figure of £35,000. Anyone with a gross income of £35,000 or more, before any adjustments are allowed, will simply not be considered for civil legal aid. That simplifies the system. We believe that that will make very little difference to the number of people who are eligible. It is about a 0.5% reduction in the number of people who are currently eligible, but it greatly simplifies the system because it means that the Legal Services Commission does not consider applications from people who have an income that is above that figure, only to turn them down. Solicitors who are advising clients will know very clearly that such clients will not be eligible for legal aid. In England and Wales, a cap is applied at £32,100. Therefore, again, we are allowing more leeway in Northern Ireland. It is an administrative convenience, and we believe that most people who are currently eligible for legal aid will still get it when the cap is applied — the vast majority: 99.5%.

Lifetime contributions do not make any difference to the number of people who are eligible, but they do deliver potential savings of up to £1 million. At present, people who receive civil legal aid and who are required to make a contribution between the lower and upper limits that currently apply are required to do so only for the first year of a case. Many cases covered by civil legal aid run much longer — sometimes two, three or four years. There may be long delays between particular sections of the proceedings. That means that the person's contribution that they should rightly pay based on their income is not levied after the first year. That means the legal aid fund has to pick up the remaining part of that tab, which is generally about two thirds of the actual cost. Therefore, we are saying that that is a flaw in the present rules. The amount that people are assessed as having to contribute — the better off are required to make a contribution — is not being collected in full. This proposal will remedy that by requiring that contributions are made throughout the entire period of the case. That is a correction that will save £1 million of the £2.4 million figure that I mentioned. As to the removal of passporting capital, we have identified a slight anomaly here in the sense that someone who would be eligible for legal aid on earnings but is not receiving benefit is knocked out because of their capital contribution, whereas someone who is on benefits, having just being gone into unemployment or whatever, but has significant capital, perhaps in savings, would be eligible. There is a slight unfairness in that particular instance.

Part of the reason that has come about is that the income support capital limit, which is the limit at which someone can get income support, has been raised to £16,000. In other words, there can be £16,000 of savings or capital and someone can still get income support. That was raised in 2006 and means that many more people received income support. The desire behind that was to encourage people into work so that they could still receive income support while building up some savings. Unfortunately, that has taken the group of people on benefits out of line with those who are actually on legal aid as they are passported through because they are on that benefit. What we are saying is that instead of their being automatically passported through, we will apply the capital test. Presently, the capital test limit is £8,000, so, basically, some of those people may not be eligible for legal aid in the future.

We have checked with DSD to find out what effect that would have: 72% of all income support applicants have less than £500 in savings, so they are not affected. Those who have capital or savings above £8,000 are 2% according to DSD, so, potentially, we are affecting 2% of benefit recipients. Again, it is a tightening up. It will not affect many people, but there is a fairness aspect to it in that people who are in work may not receive free legal aid, whereas those who are on benefits, who are in exactly the same circumstances but would be passported through, would receive free legal aid, so we are bringing the two into line.

Another tiny tidying is that there has not been a lower capital limit for asylum and immigration in the past. I think the assumption previously was that immigrants and asylum seekers would not have savings or capital. We are remedying that deficiency and applying the same level as is applied to every other applicant for legal aid.

The most significant thing that we will be most interested in getting responses to from the consultation is how we propose to take some housing equity into account. That has not been a feature of the Northern Ireland scheme in the past, but it is in other jurisdictions. We believe that it is appropriate to include somebody's property in that, but we have tried to set limits that are meaningful for Northern Ireland and that are not going to create massive differences between people.

We suggest that there should be up to a £200,000 disregard. If we are considering somebody's property — in fact, in many cases, their home and any other savings and property — up to £100,000 in equity in relation to the home element of that is considered automatically. That applies just because it is property. Up to another £100,000 will be considered in relation to a mortgage, so if a mortgage exists of £100,000 or more, another £100,000 is disregarded. That could mean that up to £200,000 of that disregard is applied. The average house price in Northern Ireland as of December was £138,966. Of course, it does not apply to anyone in rental accommodation, but in relation to somebody who is a property owner, anybody who owns the average house in Northern Ireland, and much beyond that, will not be affected by this, because it is only beyond the £200,000 element that that property value will start to be taken into account in assessing their capital assets. In England and Wales, it is much higher at £320,000, so what we are actually saying here is that, again, we are better off in Northern Ireland. The significance is that it will reduce eligibility by 6% to 7%, and we think that in relation to civil legal aid that is an area that we need to look at. There may be people who are not receiving large amounts of income and would otherwise be eligible, but have considerable amounts of value tied up in property. The saving there is £1.3 million.

If people are interested to look at the detail, annex H of the paper sets out some worked examples to show how that will apply. I should say that we did some testing to see how that would apply to the group that I think everybody will think of as most likely to be affected, which is pensioners. I am sorry for sounding a bit like a Budget statement here. In terms of the pensioner element, we felt that they would be hit disproportionately. The analysis that the research threw up was that this would reduce eligibility for pensioners — those over 65 years of age specifically — by 13%, not the 6% to 7% for other property owners. We felt that that was unfair. Indeed, other jurisdictions also feel that it is unfair. We have therefore added an extra £100,000 of disregard of the property capital depending on disposable income. Basically, therefore, if a pensioner who is over 60 has disposable income after allowances of less than £3,000 per annum — anybody who is on a basic pension and has very limited income above that — will have that £100,000 disregard in full. As their income per annum — disposable income, of course, because there are allowances that are taken off before disposable income is calculated, just as for benefit — increases, they will lose part of that £100,000 disregard. So, for a pensioner who is on a low or limited income other than their pension, what we are looking at there is a disregard that could be up to £300,000. Think of a pensioner who lives in a big house and whose family have all gone. It is quite a decent house to be worth £300,000. However, basically, unless that pensioner has a source of income that is above £3,000 a year, they will not be hit by that change. A similar disregard applies in England and Wales, so we are applying the same kind of

approach as colleagues elsewhere. Again, because our disregards in the other part are better, we think that they have resulted in a better outcome.

That is the very technical, civil stuff that we are proposing to do. We could have presented a lot of that in a written paper. We did, however, have a commitment to come back to the Committee before we made any proposals on criminal financial eligibility. That is why we suggested an oral briefing today.

On the criminal side, we have set out two possible proposals in the paper. I will just summarise their impact, because that is the critical point for us. Option 1 would provide eligibility for 48% of the Northern Ireland population. With option 2, there would be 45% eligibility. Already the eligibility for the total population in Northern Ireland for criminal legal aid on the approaches that we have suggested would be higher than for civil legal aid. We think that that is right: it should be easier to get criminal legal aid than civil legal aid because of the potential consequences.

We also did some more detailed assessment on the profile of defendants. Perhaps I should have said that, at this point, we are only suggesting proposing an introduction in the Magistrate's Court. The Crown Court is much more complicated in terms of developing a financial eligibility test. We would want, as we said during the passage of the Justice Bill two years ago, to see how anything applied and worked in the Magistrate's Court first.

Looking at the profile of those who come as defendants to the Magistrate's Court, we see that option 1 and option 2 would actually deliver 99% eligibility for the lowest earning 20% of defendants. So, almost all of the defendants who are in the lowest 20% of earners would still get free legal aid. There are no contributions in criminal legal aid. We looked at the Scottish approach. However, we have rejected that kind of approach.

Option 1 and 2 differ slightly for the next 20%. In the 21% to 40% lowest earning group, 94% receive full legal aid for option 1 and 93% for option 2. There is then a greater difference as they move up the scale. Proportionately, the vast majority of people who currently receive criminal legal aid would still receive it on those two options. Clearly, we want to get into the detail of that in the consultation and to make sure that the way in which we have assessed the impacts work out right, which they seem to do to us. At present, 97% of people who apply for criminal legal aid get it. What we are saying is that, for the lowest earners, that would continue to be the case. The savings in this are £1.2 million. There are very slight differences in the model. Those savings will really come from the wealthy defendants who, I think, members have expressed concern about in the past — those who received criminal legal aid when they were well above any financial threshold that we could have imposed. We believe and are fairly confident that that gets to where we want to be in terms of making sure that those who really cannot afford to pay defence lawyers will be properly supported.

I am conscious of the time. I will mention briefly part 3 of the consultation paper. In it, we set out some emerging thinking about new approaches to provision of early advice on civil legal aid. It refers to the "green form", as it is known. We do not think that it is a good scheme. It is administratively burdensome and expensive to administer. Last year, 43,000 certificates were issued out of a total volume of 54,000 or 55,000 civil certificates. So, it is the bulk of civil legal aid numerically. However, it is only a small part of the cost at £4.6 million. There has been an increase of 3,000 from the previous year. It is a growing area. I think that it is safe to say that solicitors do not like it. We do not like it because of the administrative burden and cost. We believe that there has to be a better way. Government, in the shape of DSD, spends £3 million a year to fund advice services. Compare that with our legal aid cost of £4.6 million. We believe that through working co-operatively, particularly with DSD, there must be a better way of doing that. We have started that working with DSD, particularly in the last lot of months. Our Department now sits on the advice steering group or working group. Again, we are plugged into that area. We believe that there is a better way. We have set out some thoughts in the paper because it is such a big part of civil legal aid. We wanted to use this opportunity to get some views.

We will certainly simplify the forms. Currently, the form for full civil legal aid is 21 pages long. The form for means-testing for advice is much smaller at around a page. However, the detail that still needs to be gone through in order to administer that is enormous. We want to introduce online applications, as has been done very successfully in Scotland. We have suggested, perhaps, the removal of means testing altogether and some form of payment directly to solicitors based on the volume of work that they do. There are difficulties with that, but we would like to test some views on it. Another interesting suggestion is whether we could move some of this work to the voluntary sector, which has already been done in certain areas, because some of the work that is funded by DSD is

actually in the legal field. It may be an idea to move it out of legal aid and, perhaps, put more money into other areas of advice where you may get better value for money if you get it right.

I do not want to take up more time going into the detail of that, Chairman, because we are just seeking views and taking the opportunity of the consultation paper. Finally, because of the complexity and detail of this, we propose to publish the research reports that we commissioned and received at the same time as the consultation paper goes out. The report is by Tony Dignan, who is a well-known social researcher and economist. Effectively, he has built us a model that will show how all of the impacts of any change in these proposals would apply. We feel that, given the detail, people should see what we have actually got from him at the same time. So, we aim to do that if the Committee is content with the consultation paper.

The Chairperson: Thank you very much, Robert. It certainly seems to be a well-researched document. You have a pretty big task to try to turn the oil tanker of legal aid around. There is no doubt about it. We have made a start, and this is another step in the right direction. Obviously, it is going out for consultation, so I will not prolong the meeting unnecessarily. Certainly, I am content.

I have a couple of quick queries. The £35,000 limit for an individual — for married couples, is it based on the combined, or is it still the individual?

Mr Crawford: Essentially, it is an individual test because, you understand, in the vast majority — or a large chunk — of cases in family law, it may be that the couple is fighting. There may be an argument. Therefore, it must actually be assessed on the individual's case there. I would say that there is a slight variation for a child. Clearly, the parents' means are taken into account unless there is an argument or reason why the child needs representation in their own right, in which case no means test is applied. Essentially, that is how it works. Universal credit will create a problem for us because it gives a family benefit income. With regard to passporting, that will be a problem. However, essentially, because of the nature of civil legal aid, it will, in most cases, be the individual.

The Chairperson: In terms of the capping of property value, I take it that it relates to properties that are mortgage-free, so to speak? If someone has just bought a property at £250,000 —

Mr Crawford: If they had the cash to buy it at £250,000, the £100,000 equity disregard will still apply. However, the second £100,000 will not apply unless there is a mortgage. If there is an £80,000 mortgage, they will get the £80,000 disregard. That is taken off before their property value is assessed. So, on £250,000 with an £80,000 mortgage, a £100,000 equity disregard would apply, and £80,000 would be disregarded for the mortgage. That is £180,000, so £70,000 of the value would then count, which would mean that they would be ineligible. There are worked examples in our submission if anyone wants to go through them.

The Chairperson: OK, thank you.

Mr Lynch: Robert, you are nearly more convincing than George Osborne. This is a complex document. One concern that we have is that it denies access to justice. I know all of the figures that you put out there, and they seem to set it out in fairly high brackets. I was just listening to the Chair's question. You could find somebody who is a separated lone parent in a fairly expensive house because of the separation? What would happen there?

Mr Crawford: If they are in the house and divorce proceedings are ongoing, if they do not have access to the value of the house because the property is in dispute, then property in dispute is not counted at all. Clearly, it would be unfair to take into account the fact that somebody is living in a house. If they cannot sell the house or raise money on it then it cannot be counted at all. If that is the situation, that is not an issue.

If they are a lone parent and no family proceedings are involved, and perhaps they have been left a house in a will, what would apply would depend on that disregard that I have already mentioned: £100,000 for equity because it is property, automatically, and up to another £100,000 if there is an outstanding mortgage that they are paying. If they are paying a mortgage on it, that will apply up to the value of the mortgage.

The average house price in Northern Ireland is £138,000, so we have captured the average, below average and well above the average house price. If they are paying a mortgage, they are probably

OK on part of the value of the house. If it is fully paid off, they are in a more difficult situation because the £100,000 equity disregard will not cover all the value of that property.

Mr Lynch: And what of access to justice? We do not believe that those in most need should be denied access to justice.

Mr Crawford: We have tried to construct a situation whereby those most in need get the available funding, while tightening the rules so that those least in need end up having to pay a bit more. For example, the lifetime contributions change is for people who are well off enough to pay a contribution towards their legal aid. We are saying, why should they not pay for the full life of the case and the full amount that they are expected to pay?

In relation to property, by setting the disregards where we have, we believe that we have protected those least well off. If I am working and my house is fully paid off, I will never be eligible for civil legal aid — nor should I be. Because we have not included property in the mix, there are people getting legal aid because their incomes make them eligible, and who arguably should not be getting legal aid.

Again to use this sad example, if I was out of work and not receiving any benefits — well, indeed, benefits I could passport through, but if I was out of work with no earnings, the level of my property at present would not be a bar to my getting civil legal aid. I do not think that is fair compared with the example that you gave of somebody who has limited means and who would otherwise be eligible for legal aid. Compared with me, however, I would get the same as that person. That seems to be unfair.

Mr Lynch: Finally, if universal credit comes in, Robert, how is that — I know you mentioned it. It may come in or it may not, and one householder gets the sum total.

Mr Crawford: We hoped that we had cracked that by getting direct access to the Department for Works and Pensions (DWP) computer systems, but that is not now going to be available until 2017. Another problem is that universal credit, as I think certainly most of you probably know, is a household benefit and cannot be disaggregated at present, although recent discussions with DWP have suggested that at least it was prepared to look at that. In the short term — over the next few years — we will still have the services of the legal aid assessment office, which will carry on doing the work that it currently does, and it will be able to work out the necessary figures for us. We are also able to passport through anybody who has zero income, and that will save some administration. Unfortunately, if we cannot find a better solution, each means-testing form will have to be gone through in detail rather than passporting on benefits. The zero income passporting will help, but it will not be as good as what we have at present, where we are able to passport on a range of benefits. That is something we have still to resolve with our colleagues across the water.

Mr McCartney: On a general point, there are a lot of changes around legal aid, and I think that I mentioned that before. Would it be possible to give us some sort of table? These seem to come every lot of months, and when you are trying to form a picture in terms of access, you forget the last proposal. Could there be a table of all the —

Mr Crawford: We could. We provide a quarterly update on the reform programme. However, in addition, we could set it out better, because I do not think that it is maybe giving you the information that you need. Setting out what the savings are — and we are just about getting to the point where we have a proper savings plan — and setting out the timescales, and perhaps putting in some notes about interdependencies. Yes, I think we could prepare that.

Mr McCartney: On this particular aspect, it is nearly an indication of the type of cases that this will affect. I take it, in terms of civil legal aid, that judicial review will be one of the —

Mr Crawford: At the moment, we are not planning to drop anything out of scope, other than the money damages cases, which has not quite gone out to consultation, and the Committee has seen the paper on that. Clearly, we will need to look at dropping things out of scope if we cannot get the savings elsewhere but, at present, there are no proposals to drop judicial review out of scope. The Minister has made it quite clear that he wants to look at that at the very end. Without having cleared it with the Minister, I could say that judicial review is obviously an area where you want to be careful about how you limit people's access.

Mr McCartney: That is my broad point. For any threshold, the person who is £1 over the threshold is where you nearly have to — you know. Has any consideration been given, say, to the cost of a case? It is understandable that some of them are just over the threshold, but the case is only going to cost — Mr Wells is not here, so I need to be careful. If it is not going to cost very much, then it is easy for a person to make a decision. However, if you are just over the threshold and it is a big, complicated case, people will obviously just make a pragmatic decision and say that it is too costly and if they lose, everything will be up for grabs. How do you come up with a scheme to protect access and even public interest?

Mr Crawford: The first point that I would make on access is that we are trying to protect those who are least well off and ensure that they have access on all the legal areas. England and Wales is probably not the best example, in the sense that we do not necessarily think that what they have done is right. However, if somebody in the future goes for an uncontested divorce, they will get no legal advice funded by legal aid. We are trying to keep areas like that in scope so that the least well off will still get advice in that area. The alternative, of course, is to take areas out of scope so that they do not get help in that area but we actually bring more people in who are better off to use the money that way. That is the thinking behind the approach.

In relation to the cost of a case, the section on legal advice has an element of that in it. One of the ideas is whether we drop means-testing for that altogether. For example, if any of us go to a solicitor and ask for a piece of legal advice, the solicitor will, perhaps, put in a bill for up to an hour, which would be £43 and a bit, in relation to the funding that they are claiming. However, the actual administration cost, to actually assess that through the means-test of the person and then making the payment, is a very significant proportion. And with 43,000 out of a total of 103,000 legal aid certificates, 55,000 civil, that is a massive amount of admin costs. That is one of the questions that we have put in that part of the paper: should we just drop means-testing for it? That would mean, of course, that anybody would be able to get a solicitor's advice on anything. We would need to put some controls on that, but it is the kind of area that we want to get into.

Mr Elliott: You mentioned possibly outsourcing some of the services, perhaps to the voluntary sector. How would that operate? Would that mean the Department actually taking some money that is currently in the legal aid budget and putting it into CAB, the Law Centre or something like that? Is that the type of process that you are thinking of, or would it be an entirely new one?

Mr Crawford: In a sense, we already have a couple of pilot projects on that. The Housing Rights Service is one where we have taken money and ploughed it into a grant to provide a particular focused area of legal advice for people facing potential repossession proceedings. We are also examining transferring some money into DSD to change the way that immigration and asylum advice is provided. Those are relatively small areas. We are suggesting that that is done more globally between the two Departments. It is really only since devolution, to be honest, that our Department has started having this engagement with DSD in a proper, detailed way. There may be other areas where funding should be channelled through DSD rather than legal aid, and it may well be that we get better value for money.

Another way of doing it is, as you said, to outsource as we have in providing a grant to an organisation to carry out x thousand acts of assistance or provide x thousand pieces of advice. In England and Wales, again — I am not sure that we necessarily endorse this approach — they fund private sector organisations to provide legal advice by telephone. So there are a number of options, and we are only at the beginning of that work. Again, we would like to explore all of those more creative approaches, not least because they may actually be better at getting the information to the client. A lot of people may find it easier to go to an advice agency than to a solicitor, where they are going to be worrying about whether they will have to pay anything and the complexity of it.

The Chairperson: OK, members? Thank you very much, Robert and your team. I assume that nobody has any fundamental objection to the consultation going out, then? We will hear the views and come back to the subject in the future.

Mr Crawford: We will provide the Committee with copies of the detailed research directly.

The Chairperson: That would be good; thank you.