Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Legal Aid and Coroners' Courts Bill: Oral Evidence Event

14 May 2014

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 Sydney Anderson
Mr Stewart Dickson
Mr Tom Elliott
Mr William Humphrey
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Jim Wells

Witnesses:

Mr Sam Ellis	Association of Personal Injury Lawyers
Mr Martin Hanna	Association of Personal Injury Lawyers
Mr David Mulholland	Bar Council of Northern Ireland
Ms Victoria Taylor	Bar Council of Northern Ireland
Mr Gerry Hyland	KRW Law LLP
Mr Niall Murphy	KRW Law LLP
Mr Paul Pierce	KRW Law LLP
Mr Chris Stanley	KRW Law LLP
Mr Les Allamby	Law Centre NI
Ms Arleen Elliott	Law Society Northern Ireland
Mr Peter O'Brien	Law Society Northern Ireland
Mr Colin Caughey	Northern Ireland Human Rights Commission
Mr John Corey	Northern Ireland Human Rights Commission
Dr David Russell	Northern Ireland Human Rights Commission
Mr Paul Andrews	Northern Ireland Legal Services Commission
Ms Fiona Donnelly	Northern Ireland Legal Services Commission
Mr Ronnie Spence	Northern Ireland Legal Services Commission

The Chairperson: I welcome everybody who has joined us here today to speak to us. The Bill, as you will hopefully all know, was introduced on 31 March. The Second Stage was passed on 8 April, and we began our scrutiny role on 9 April. That will complete on 20 June, and then we will provide a report to the Assembly. In response to the Committee's call for evidence there were 20 written submissions from stakeholders. Obviously, a number of you have come to today's event to provide oral evidence to us. For the evidence session, everyone should switch off their mobile phone. Do not put it on silent. If you keep it on, it will interfere with the recording, and that will make it more difficult to get an accurate transcript of what everybody says.

Hopefully, everyone has received a paper outlining the way in which the evidence session will take place. If you do not have that paper, please indicate, and the Committee staff will provide you with the way in which the evidence session will be structured. There will be a microphone provided, so do not speak until the microphone gets to you, and then introduce yourself and the organisation you are from.

I will work through each clause of the Legal Aid and Coroners' Courts Bill in the order that has been outlined in the folder. I will take each one in turn. When we get to clause 1, it will only be clause 1, and I will call those who have indicated that they want to speak on clause 1 to do so. Once the initial organisations have made their contribution, if anyone else wants to make a comment on it they will be invited to do so. If you do not have any comment to make, do not make it — allow the event to move on. If the point has already been made, do not repeat it, but, if it is different, please feel free to share your view on it. A number of the organisations want to speak on particular clauses, and you will have the opportunity to do that, but you are at liberty to make comments on some of the other clauses as they arise.

OK, we will move on to clause 1. I will try to keep us right as we get through the structure. It has worked on previous occasions, so hopefully it will work today. On clause 1, which is the dissolution of the Northern Ireland Legal Services Commission (LSC), I am first going to call the Legal Services Commission to speak.

Mr Ronnie Spence (Northern Ireland Legal Services Commission): Thank you, Mr Chairman. My name is Ronnie Spence; I am the chairman of the commission. The commission supports the core proposal in the Bill to transfer its responsibilities to the Department of Justice, subject to effective arrangements to ensure that individual decisions on the granting of legal aid are taken independently. I will come back to that point later in the afternoon. It may seem very strange for a public body to support its own abolition or dissolution. However, the commissioners have believed for some time that the arrangements for legal aid in this jurisdiction require major changes. Some years ago, I described those arrangements as the faulty architecture — the John Cleese version of it.

Around the time of devolution of responsibility for justice, the commissioners pressed the need for a radical review again, and that was accepted by the new Justice Minister. Jim Daniell, who was then our chair, was released from that role to conduct the access to justice review. We supported his work and have subsequently supported the Department in carrying forward the action to implement the review. We also agree with the Justice Minister's decision last autumn to initiate a second phase of the access to justice review. We believe that it makes sense in the Northern Ireland context to bring together, in one body answerable to the Assembly, the responsibilities for policy, finance and delivery in this area. That structural change will not in itself solve all of the very difficult issues around legal aid and access to justice, but we believe that it should provide a more appropriate framework and help to deliver improved transparency, effectiveness and accountability.

The Chairperson: Thank you. Next is KRW Law.

Mr Niall Murphy (KRW Law LLP): My name is Niall Murphy, and I am a partner in KRW Law, a solicitors' firm in Belfast. I am obliged to the Chair for the invitation to address the Committee. We oppose the dissolution of the Legal Services Commission. The present arrangement regarding legal aid funding is satisfactory in that the Legal Services Commission is an independent public authority. To dissolve the LSC to create the office of a director of legal aid casework within the DOJ would be to give rise to a potential conflict of interest, in our opinion, in the event that the DOJ was to be joined in litigation requiring publicly funded legal aid. The proposed arrangement would therefore not be sufficiently independent to satisfy human rights compliance in litigation engaging the European Convention on Human Rights.

We request that the Committee reflect on the particular circumstances of the recent past in this jurisdiction and, in particular, consider conflict-related legacy cases, including pending litigation. The Committee will be intensely aware that the mechanisms for dealing with the past continue to be subject to judicial challenge to ensure human rights compliance. We specifically draw your attention to the package of measures accepted by the Council of Ministers of the EU following the McKerr group of cases in 2001 from the European Court of Human Rights, namely the Police Ombudsman, the Historical Enquiries Team (HET), the coronial process and inquiries.

It is our analysis that the unique legal imperative and responsibility that arises from the McKerr cases and package of measures, in our respectful submission, is such that this Committee must ensure intense scrutiny of the Bill so that bereaved families of victims and survivors who are forced to resort to

litigation because of state failings to expedite dealing with the past are able to do so with appropriate mechanisms, systems and resources in a human rights-compliant manner.

Can you hear me OK?

The Chairperson: Yes.

Mr Murphy: One of the main issues is independence. The cornerstone of access to justice is the right to ensure that the ability of a next of kin to take a case against an agency of the state will not be prejudiced by the interference of another agency of the state. The dissolution of the independence of the LSC provides for that. As a civil servant within the DOJ, the director of legal aid casework will be responsible to the Minister. In the event that the DOJ is joined as a respondent or a defendant in litigation which is publicly funded, there would be a conflict of interest, in the absence of a rigorous mechanism to ensure independence in decision-making. We do not consider that that exists appropriately in the mechanism proposed.

I will afford the Committee potential examples of where the DOJ could become a respondent or joint respondent in proceedings. If, for example, the Police Ombudsman were to advice a citizen that they could not undertake an investigation on the basis of insufficient funds being available, the Minister would be a respondent to judicial review challenge. Similarly, if the coroner was unable to adequately resource an inquest to permit a timeous convention, the DOJ could be a respondent to proceedings. There could be a judicial review, as is the case at present, of the failure by the Minister to consider a recommendation — which, at present, is a referral from LSC — to exceptionally grant fund a case, as happened in Omagh. Existing case examples with months of no decision are the likes of Bridie Brown, who is engaged in an inquest on behalf of her husband, Sean Brown; James O'Donnell, who is engaged in an inquest on behalf of his son Kevin Barry O'Donnell; and Martina Dillon on behalf of her husband Seamus Dillon. Similarly, there could be a judicial review of the failure to adequately resource the PSNI legacy unit. Recently, we received a letter in the case of Teresa Slane, a case considered by Sir Desmond De Silva. It will take up to nine months to complete consideration of the papers on that case.

Although the Bill states — articles 2(a) and (b) — that there can be no ministerial interference, there could be a direction in relation to categories of cases, such as judicial review, which the Executive and the Assembly would have direct interest in. That could also give rise to a conflict of interest.

The second issue that I would like to address is the effective resourcing of the mechanisms, which Europe has prescribed as the appropriate article 2 discharge of the state's responsibilities. All persons affected by our recent past should receive the support of the state, and the relevant institutions of the state should be effectively resourced to discharge the investigatory procedural obligations arising under article 2. Without effective resourcing of the means to investigate legacy cases, litigation, when systems fail, will be an inevitable consequence, further delaying truth and access to justice. That is a quote from Mr Justice Stephens in the case of Jordan, which was decided at the end of January.

The inability of the Minister of Justice to provide for effective resourcing does not, therefore, augur well for the best intentions of the Bill, specifically with regard to the Coroners' Court. The Committee should be aware of recent correspondence from the senior coroner to the Minister in relation to the ongoing Stalker and Sampson inquests, wherein considerable frustration of the senior coroner was clear to see, specifically with regard to the inability of the PSNI and Court Service to provide necessary resourcing in terms of funding, personnel and practical arrangements. Indeed, the senior coroner stated that it:

> *"should be viewed as an enormous source of embarrassment to the State that these Inquests have not been held."*

He further stated that the question of resourcing lay with the Minister and that this was not being asserted, so much so that the senior coroner intended to pursue the matter directly with central government.

The letter went on to say:

> *"The Senior Coroner is of the view that the Inquests are being funded on a drip feed basis and that there is no demonstrable commitment to ensure that these Inquests are properly resourced and otherwise facilitated so that they can take place timeously."*

He went on to say:

> *"The delay for the families of the deceased and for many of the witnesses involved must be nothing short of intolerable."*

I regret to inform the Committee that the delay was more than intolerable for two of our clients, the parents of Seamus Grew, who both passed away last year. After the inquest having been open for seven years, they were in effect denied access to justice and the convention of a timeous inquest, in accordance with the state's obligations under article 2.

The letter goes on to say:

> *"the obligation of the Senior Coroner's Office is to satisfy an unconditional obligation imposed on the United Kingdom to carry out an Article 2 Investigation into the circumstances of these deaths. It is not a task that can be avoided because there is no or insufficient money ... money has to be prioritised to the completion of these Inquests. Otherwise, the further sanction of the European Court of Human Rights awaits."*

I take it that the Committee has that letter, but I have copies with me.

The Chairperson: Was it the Legal Services Commission that did not fund the Coroner's Court to allow those inquests?

Mr Murphy: It was the Minister.

The Chairperson: Yes, but this is about the dissolution of the Legal Services Commission, so I am trying to link it in with what you are saying about those inquests.

Mr Murphy: I use the inquests as an example. Our concern is that the independence of the Legal Services Commission would be lost if it became an in-house body within the DOJ. There already exists a concern that the Minister has not been able to discharge his obligations when it comes to effectively resourcing other limbs of justice, such as the Office of the Police Ombudsman, the legacy unit of the PSNI and, as that letter describes, the coroner system. It does not augur well if one considers that as an example that is in existence already.

In conclusion, we are concerned that the provisions of the Bill are unsatisfactory when considered in relation to conflict-related cases and prospective litigations thereon, in the absence of an alternative human rights-compliant mechanism of truth recovery, justice and accountability. I appreciate that there is a wider political and societal debate surrounding that.

The inherent concern in relation to a conflict of interest will manifest itself in circumstances whereby the DOJ is joined as a respondent and the state is tasked with discharging its procedural obligations to investigate, in compliance with both domestic and Strasbourg jurisprudence. It is foreseeable, therefore, that if the Bill proceeds as proposed, the legal aid funding decision could form part of a challenge as part of a matrix of public resource policy, combined with other components such as a thematic concern about collusion, generalities of disclosure and public interest immunity. The decision to grant, or not grant, legal aid from a ministerial perspective would therefore be a key point of contest. To ensure fairness, the office that is making those key legal aid funding decisions must be independent from the executive arm of the state.

The Chairperson: Do any members want to ask any questions of the two people who have spoken? Does anyone in the Gallery want to make any comments about the clause beyond what has already been stated?

Mr Paul Andrews (Northern Ireland Legal Services Commission): This is an attempt to be helpful to the commission. The current legal aid legislation and the proposed legislation do not require the availability of funding to be taken into account. *[Interruption.]* I hear Mr Murphy's points, but I want to make it clear that currently, and under the proposed Bill, the availability of funding will not be a factor that the commission or the agency can have regard to in making a funding decision. It will have to be made on the basis of the statutory tests that are set out in the legislation. *[Interruption.]*

The Chairperson: Is that your phone or someone else's?

Mr Andrews: Mine is off, I hope.

If I may indulge one second point, there is a technical issue that needs to be addressed. Under the existing exceptional grants scheme, in certain circumstances, the commission has to require authority from the Minister to make funding decisions. That requirement is not part of the Bill that is before you; it follows a recommendation of the access to justice review, which was undertaken by Mr Daniell, for that link to be severed. Those observations may be of assistance to the Committee. *[Interruption.]*

The Chairperson: Thank you very much. We will be asking the Department to respond to all of the concerns that are being raised about independence and the comments that have been made.

Mr McCartney: That is the point that I am making. The Department will get a transcript of today's meeting. That is OK.

Mr A Maginness: Will the Department respond today? No?

The Chairperson: Not today. Members will be able to pursue those points when the Department comes to the Committee.

Mr A Maginness: Can I ask one question then, Chair? It relates to what Mr Murphy said. I can understand the problem of independence. However, under the scheme that is being put forward, there will be operational independence as far as legal aid grant is concerned. The point that you have raised, which is an interesting one, is that you accept that that may well be but categories of cases might be excluded under the new arrangements. Is there any way to protect categories of cases or ensure that legal aid is not restricted by category?

Mr Murphy: I trust that that would be a matter for a parliamentary draftsman. However, from a practitioner's perspective, we are concerned that categories of practice, such as judicial review or representation at the coronial court, could be subject to ministerial discretion and that that, in and of itself, could represent an Executive fettering of what should be unfettered independence.

Mr A Maginness: Thank you very much, Chair.

The Chairperson: Clause 2 relates to the designation of a director of legal aid casework.

Mr Martin Hanna (Association of Personal Injury Lawyers): Good afternoon, members. My name is Martin Hanna. I am speaking on behalf of the Association of Personal Injury Lawyers (APIL), an association that effectively represents genuinely injured victims of accidents, disease, etc.

At the outset, I want to say that it is vital that all applications for legal aid funding are considered diligently and carefully. In Northern Ireland, the provision of legal aid has been vital to the most vulnerable in society, the people whom we represent, such as children and the elderly, who have little or no finance resource to fall back on to investigate matters. Members have already welcomed the safeguards to protect individual decision-making in the granting of legal aid. That is something that we support as it obviously goes without saying, as far as we are concerned, that there should be no political involvement in the granting of a legal aid certificate to a genuinely injured victim.

APIL is concerned, however, that no detail is contained in the Bill to ensure that the director of legal aid casework is legally trained or has legal experience. We say that it has to be a minimum requirement that a director of legal aid casework has the requisite experience, understanding, knowledge and qualifications to make decisions on individual cases. Decisions being made by a director without legal training will, in our view, lead to inevitable challenges through the appeals process, thereby increasing the administrative workload and costs.

We represent people with personal injury cases, many of which are very complex and need detailed scrutiny to decide what chance of success they have. Without the necessary knowledge and experience, the director would be unable to give any application the detailed scrutiny that it requires. I can give a number of examples to demonstrate the point. In clinical negligence cases, particularly those that involve children who were brain-damaged at the time of their birth, those brain-injured children require intensive care and have other very complex day-to-day needs which require specialist input for the rest of their life. There are many such cases in the court system. Indeed, I have been involved personally in three such cases that have come before the courts within the past 12 months.

Each of those cases was ultimately resolved for a very substantial amount of money and at no cost whatsoever to the legal aid fund, as the unsuccessful defendant — the relevant hospital trust — also had to meet the costs. Although there was no cost to the legal aid fund per se, without the benefit of legal aid, those vulnerable children and their families would not have been able to investigate what are extremely complex cases with regard to establishing legal liability and causation. Therefore, it is vital in our view that the director be legally qualified and trained to determine these applications properly. They are difficult cases for experienced and qualified lawyers in any event. It is, therefore, essential that applications in this type of case be assessed and determined by legally qualified individuals. We must always remember that these cases are brought by the most vulnerable individuals in society. They rely very much on legal aid to enable them to instruct the appropriate specialist lawyers — solicitors and barristers — to properly investigate claims.

The granting of legal aid has been and must continue to be awarded on a case-by-case basis, based solely on the merits of each case and without reference to any budgetary or political agenda. The assurance of no ministerial involvement in individual decisions is contained in the explanatory and financial memorandum. If the director is not legally trained, his decisions could be more liable to a challenge. Those appeals would mean an additional cost to the taxpayer.

The Chairperson: Thank you.

Ms Arleen Elliott (Law Society Northern Ireland): Good afternoon. I am junior vice-president of the Law Society. I will pick up some themes that have been raised by previous contributors. Can you hear me?

The Chairperson: Yes.

Ms A Elliott: I share similar concerns to those of previous contributors about the independence of the role of the director. Essentially, we will have a director who is a civil servant and whose loyalty will be to the Minister. That will automatically place him in a conflicting position should he make decisions that are potentially adverse to the Minister's interests — *[Inaudible.]*

The Chairperson: We will let you swap microphones because we are not picking you up. That one is not working. The staff will get another.

Ms A Elliott: Is that better?

The Chairperson: No. We will use another one.

Ms A Elliott: Hello.

The Chairperson: That is much better. Apologies for that.

Ms A Elliott: I do not intend to repeat myself unless anybody would like me to. Turning to clause 3, you will see that the drafting of the clause deals primarily with loyalty to the Department and states that the director must comply with its directions and guidance. Secondly, the clause deals with independence in individual decisions. Therefore, I am saying to the Committee that the drafting of the clause suggests that loyalty, in essence, comes before independence.

Thinking more closely about the issue of loyalty, we see that clause 2 states that the director will come from the Civil Service. As we all know, it can be very difficult to make decisions in an objective and independent manner when those decisions may be subject to criticism or disapproval from colleagues or superiors. The Committee will be well aware of the experience of some whistle-blowers both in the Republic of Ireland and across the water, which has been quite topical recently. Those cases are examples of how difficult it can be to go against the grain or the culture of an organisation.

Bearing that in mind, I ask the Committee to consider why the Department wishes the director to come from a Civil Service background. If independence is a real consideration, is it not better to appoint someone from outside the Civil Service who does not have pre-existing loyalties within the Department?

If we adopt the position that the director is fit to carry out his role in a fair, objective and rigorous manner — picking up on the point that Mr Maginness made earlier — the Committee should consider

that the Department cannot issue guidance or directions in relation to a class or classes of cases. If the Department were able to do that, it would clearly drive a coach and horses — *[Interruption.]* That is not my phone. It would drive a coach and horses through the whole decision-making process and the independence of the director.

On the point that was raised by the Chairman, I take the view that the establishment of the power of the director to make decisions in respect of exceptional funding is probably a progressive step in so far as that decision will not be made by the Department, which is the case presently. However, that will have integrity only if the director is fit to exercise his role in a very independent manner.

Mr Spence: I will make just a couple of supplementary points. It is, of course, for the Department to decide what qualifications are required when advertising the post, but I will point out that, when we in the commission advertised for the chief executive post that Mr Andrews occupies, we stated that the person should have appropriate experience and expertise. We did not specifically require a legal qualification.

You have to bear in mind that, as well as being able to properly consider the legal issues that are under consideration, the person will be managing quite a big organisation of probably over 100 people and a budget of over £100 million. If that person does not have legal expertise, they have, of course, access to lots of legal expertise in the organisation itself. To repeat an earlier point, it is a matter for the Department rather than the current commission to decide what the qualifications should be.

The Chairperson: Ronnie, was the commission ever challenged because the chief executive did not have a legal qualification? Was that ever a reason to challenge decisions not to fund cases?

Mr Spence: No. That has not been an issue.

Mr Humphrey: Arleen, I listened carefully to what you said. You are talking about someone being appointed from outside the Civil Service because you are concerned that there may be sympathies with the Minister, for example.

Ms A Elliott: The concern that I am raising is really one of independence. There is, first, the legal position and, secondly, the practical position. I think that, in practical terms, it will be very difficult for any person to come from the Department or from a Civil Service background and carry out that role, which may be quite difficult or controversial, in an environment where he or she may have pre-existing loyalties. I suppose that it is an expansion of the issue of whether the director can, in effect, carry out his role in an independent manner.

Mr Humphrey: How does the Law Society of Northern Ireland propose that the person be appointed?

Ms A Elliott: I am quite sure that the Civil Service is very adept at setting up an appointments procedure. Obviously, the appointment could be open not only to those in the Civil Service but to those outside it. I do not see a reason why that cannot be done in this instance.

Mr Humphrey: Are you perhaps suggesting that you would like to see the post put out to public appointment, like the chair of the Parades Commission or something like that?

Ms A Elliott: Yes.

Mr McCartney: The Department will be provided with the transcript of this meeting, but there does not seem to be anything, either in the Bill as tabled or the explanatory notes, on why the Department is insisting that it has to be a civil servant. I would like to hear why the Department is insisting on that because, when it comes to clause 3 on the exercise of functions, the issue of independence becomes starker, particularly in respect of how the person who is appointed is expected to carry out their role and challenge whatever guidance comes from the Department. That is why we need an explanation for the insistence on a civil servant.

The Chairperson: Does anyone who has not yet spoken want to comment on clause 2?

Mr David Mulholland (Bar Council of Northern Ireland): I endorse the previous comments about concerns on independence, but I will not repeat them all. I would like to draw attention to the need to demonstrate independence. The Bill touches on a few areas in which independence could be

demonstrated. Accepting that this is primary legislation, how could each of those areas be expanded on? The first area would be the appeals mechanism. That could offer a means to test and ensure independence or appeal if there is a decision that people find unsatisfactory. However, there is not sufficient detail to assess how adequate that would be. The second area relates to clause 3 and is akin to the Law Society's point. That could be built upon to describe, if there is a perceived or real conflict of independence, what avenues or channels are available to the director to raise those points and seek a resolution. Can the director reasonably refuse a direction? What other mechanisms are available?

The Chairperson: OK. Thank you.

Mr T Elliott: Apologies for being a little late. On the issue of the designation of the director, something we struggle with all the time in any Department is getting the expertise because, quite often, with no disrespect to civil servants, they are not always a reasonable expert in the field. You only have to ask people from any business background. It is an interesting proposal that it should be a different appointment process, and I fully support that. Maybe that would set standards for other areas of government. Maybe we are setting a good and positive standard for the rest of government by making this point.

The Chairperson: We could debate whether it is a good idea or not. I might take a different view, but I will save my own views for later.

We will move to clause 3, which some people have already touched on. It deals with the exercise of functions by the director. If you have covered it, you do not need to speak on it again. I invite the Law Centre to comment.

Mr Les Allamby (Law Centre NI): I am the director of the Law Centre. Our starting point is that independence is like justice; it must not just be done but be seen to be done. Our concerns about clause 3 were shared by the Westminster Joint Committee on Human Rights but were, ultimately, rejected by the Westminster Government. We recognise and acknowledge that the clause in this Bill is identical to one that was in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the so-called LAPSO legislation.

There is a formidable challenge to the director of legal aid casework. He or she must enable access to justice, as the chief executive of the Legal Services Commission said. Although the financial situation is not directly an issue when making individual decisions, there is no doubt that the director of legal aid casework has to be aware of the financial backdrop. That will be one of the issues, perfectly legitimately, that will, no doubt, be addressed to some extent in the backdrop of directions and guidance.

One of the two issues that we have has been ventilated by KRW, which is around challenges to government. That goes beyond the Minister to other Departments. The second is around cases that may have significant financial consequences for the legal aid fund, a lead public-interest case etc. As the Bill is drafted, the legal aid casework director has autonomy around individual cases but must follow the directions given by the Department. You do not need to be a conspiracy theorist or Machiavelli to realise that you can still give directions about a class of cases that may well impinge on decision-making on individual cases. You could talk about particular types of judicial reviews or particular aspects of cases that you know are in the pipeline.

Our suggestion is that we bolster the independence of the director of legal aid casework. We suggest two amendments. I will read them very quickly. The first is to clause 3 and would simply read:

"(1) The director must—

(a) comply with directions given by the Department about the carrying out of the Director's functions"

— in other words, as it is drafted now, with the addition of these words:

"save where this compromises the Director's independence".

That would bolster safeguards on the independence of the director.

Secondly, in clause 3(2), the amendment would be, starting with what is there:

"But the Department—

(a) must not give a direction or guidance about the carrying out of those functions in relation to an individual case"

— with the addition of these words:

"or to a class of cases where it unreasonably impinges on the Director's ability to act independently in an individual case."

We are not saying that you should not have something in the Bill on classes of cases, but not where it directly impinges on the independence of the director of legal aid casework. We think that those amendments would bolster the independence of the director and would be significant and important.

Our other comment on clause 3 is on subsection (3), which states:

"The Department must publish any directions and guidance given under this section."

I must be a conspiracy theorist, because the Law Centre's view is that, frankly, although we do not need it in the clause, we would want the Committee to get reassurance from the Department about where and how that will be published. You could publish in something that has a normal readership of half a dozen or you could publish in something that everybody regularly gets to see and read. Therefore, the guidance and the directions must be published in places where people will be able to find and access them easily and be able to respond accordingly. As I said, I do not think that needs to be in the Bill, but I would like to get that type of reassurance and detail so that we avoid a situation where, after the event, we become aware that there have been particular directions or guidance, and the ramifications come when it is too late to comment on them.

Ms A Elliott: The society fully supports the comments made by Mr Allamby. I have raised the issue of classes of cases that could put the director's independence in an impossible position. The amendments to clause 3 suggested by Mr Allamby are worth careful consideration by the Committee.

Mr Colin Caughey (Northern Ireland Human Rights Commission): I am the policy lead at the Human Rights Commission. In light of concerns regarding the independence of the director, the provision for an appeal to an independent and impartial body is vital in ensuring that the overall decision-making framework is compatible with article 6 of the European Convention on Human Rights. In that regard, the commission advises the Committee to seek further information on the proposed appeals body, including the manner of appointment of members, the terms on which they will be appointed, terms for any disqualifications, and what guarantees of independence will be provided. The Committee should ensure that sufficient guarantees are in place to exclude any legitimate doubt as to the independence or impartiality of the appeals body.

Mr Spence: It is worth reflecting on the fact that, in the 10 years of the commission's existence, both under the Lord Chancellor's Department, which was responsible initially, and under the Department of Justice since devolution, there has been no case in which a Minister tried to influence a decision taken by the commission. Therefore, the evidence is that this is not a problem, or has not been a problem in the past. That is not to deny that it might become a problem at some stage, but I think that there are a number of safeguards.

First, you have to rely on the professional integrity of the person who is the director of the organisation. He will be appointed as an independent person, probably after some form of public competition. The professional integrity of that person is one of the guarantees. Secondly, there is the fact that the board of the new organisation will have three independent members. One of their roles will be to focus on any situation in which the director is being asked to do something that he or she does not believe to be right.

The final point that the Committee should consider is whether it is worth its while to seek an accommodation with the Minister under which the Minister will always consult the Committee before making any significant direction. Therefore, the Committee and the Assembly would not be faced with a fait accompli when a significant direction is being made. The Minister would undertake to consult the Committee in advance. That might provide an additional safeguard.

The Chairperson: Do members have any questions or comments?

Mr McCartney: It is worth noting that the Department has rejected the two amendments, as proposed. We need to see the rationale for that. I do not think that anyone would question the professionalism or the process for making public appointments, but you want to put the person who heads this up into the best position possible to do what is best in the interests of justice. A person may be appointed, but the law might restrict them in challenging the Minister. We have to ensure that, whatever law we frame, the public interest is best served.

The Chairperson: Clause 4 concerns the delegation of functions of the director. I invite the Human Rights Commission to comment.

Mr Colin Caughey (Northern Ireland Human Rights Commission): We support Ronnie Spence's suggestion that directions be sent to the Committee for scrutiny before they are placed on the director.

Mr Hanna: In many respects, our comments on clause 4 mirror those that the association made on clause 2. Clause 4 allows the director to delegate functions to other people as necessary. Anyone considering an application for legal aid, whether it is the director or someone who has functions delegated to them, should be legally qualified and have legal knowledge, experience or training. The current system of panels of practising lawyers works well in considering applications for legal aid funding. It is essential that we continue to constitute legal aid appeals with suitably qualified practising solicitors and barristers who have experience in the area of law under consideration.

The Chairperson: Do any members have any questions or comments?

Mr McCartney: I have a broad point. In one sense, it is a good idea and good practice for the Minister to bring something to the Committee. However, unless the Committee has a power of blockage, that could be meaningless. We should not put great store in the fact that a Minister who is going to make a big policy change has to bring it to the Committee if we have no power to say whether we think that it is right, wrong or indifferent. The Minister might bring something to the Committee every week and just walk out the door. I am not saying that the current Minister would do that; I am talking about the government structure. A Minister might tell the Committee about a change of direction but not necessarily listen to its views. Why would he? He or she would say that they have the Executive power to do what they want.

The Chairperson: Clause 5 concerns the annual report of the director. I invite the Legal Services Commission to comment.

Mr Andrews: The broad context of this is fairly uneventful. There is a requirement on public authorities to make annual reports, so the majority of the clause is entirely fine. The issue that is of more direct importance is how the director reports on the discharge of his functions. That is particular to this environment. We need to reflect on the fact that there are already a number of legally qualified people making decisions on the granting of legal aid. An independent appeals mechanism was established, and a discernibly independent appeals mechanism is proposed in the Bill. If any directions are issued that impinge on the independence of the decision-making process or if any inference of influence is brought to bear on it, it is critical that the report is clear. A key issue with the integrity of the post is to be very clear about how the functions are discharged not only by the director but by anyone who, in the day-to-day operation of decisions, has to face the applications and process them appropriately.

Mr Allamby: I have a brief point about the timeliness of the annual report. In the past, the Legal Services Commission has not always produced its report within a reasonable period. I say that with a certain chagrin because I was a member of the Legal Services Commission, so I know that the commission was not in any way cavalier in its approach to annual reports. A set of circumstances often took over events, and, occasionally, the annual report took time to get together. There was also a variety of other circumstances.

We are suggesting a short amendment to clause 5(1). It currently reads "as soon as reasonably practicable". The addition of "and in any event within nine months" is being proposed. Clause 5(1) would then read, "As soon as reasonably practicable and in any event within nine months after the end of each financial year, the Director must prepare an annual report for the financial year." The end of the financial year is April, so that would guarantee a report by the end of the calendar year. "As soon

as reasonably practicable" is a great deal more flexible, and, no doubt, any kind of arguments could be made as to what would lead to a delay. This bolsters the chance of ensuring timely reports. Otherwise, we have no difficulty with clause 5.

The Chairperson: What is your view on the statutory provisions that already exist for Departments and agencies? The deadline is normally 15 November. That is applicable to all Departments. This is what would happen: your amendment would allow them to go beyond what is normally expected statutorily.

Mr Allamby: I do not have a strong view that the date should be 15 November as opposed to, effectively, 31 December. I want a cut-off point. You do not want to send a message that says, "Get it in on 14 November" or "Get it done on 31 December". You want something that ensures that you know there is an eventual time limit operating.

Mr T Elliott: The Bill is pretty scarce on what the report must contain. Clause 5(2) states:

> *"The annual report must state how the Director has carried out the functions of the office in the financial year."*

Do any of the organisations feel that something additional should be in the clause? It seems fairly bland, and there is not much detail. How can we improve on that, if at all?

Mr Allamby: I will answer very quickly, and I will then pass across to the Legal Services Commission's chief executive. I do not see the need to have that in legislation per se, but I think that it would be useful to get the parameters of what is expected in the report in your exchange of correspondence with the Department. We know what is in the current Legal Services Commission's annual reports. Frankly, I would expect to see at least that level of detail in future reports. I am relaxed about not having it in legislation, but I am keen to see something by way of a clear exchange of correspondence that sets out what will be in the report, if that is helpful.

Mr Andrews: I go back to your point, Chair, that, if the commission becomes part of the Department and then is an agency of the Department, there are established protocols about the content of annual reports, and those will apply. I think that that goes to Mr Elliott's point. There are governance arrangements that clarify what should be in those reports. The point of the clause is that there is an additional requirement, which is expressly to deal with the independence of decision-making. That is why that is the only one that is mentioned, because normal business and protocols will cover the rest of the material. I have no personal difficulty with Mr Allamby's suggestion for a framework to be developed that could provide useful and timely information to those who are interested.

The Chairperson: We move on to clause 6:

> *"Amendment of law relating to legal aid, civil legal services and criminal defence services".*

Mr Gerry Hyland (KRW Law LLP): There is no issue with exceptional grant funding applications being brought into the mainstream of legal aid. With the two types of exceptional grant, which have traditionally been inquests and non-inquests, we have a concern that there is a risk to independence in decision-making, which my colleague and many other contributors mentioned. You are dealing with very controversial cases on which particular views may be taken by a particular Minister. We would all want to make sure that we have a system that is fit for purpose. There are concerns about the current system. These provisions mirror some provisions in England and Wales, where, one of the submissions notes, only some 5% of applications were approved under the English regime. We have concerns that there is an inherent delay in the current system, and there is no indication that the new system would be any fitter for purpose.

Clause 6 is technical in nature and brings forward a number of provisions from the Access to Justice (Northern Ireland) Order 2003. The Bar Council, for example, mentioned that it is seeking a counsel's opinion on some of the provisions. We would welcome the opportunity to comment on that at a later date, if it is made available to the Committee. A number of issues highlight the theme that members have heard at great length: concerns about the independence of the decision-making process under this new regime.

Mr Andrews: I think that we could take this under schedule 2, because the meat of the proposal is in schedule 2 rather than in clause 6, if that is helpful.

The Chairperson: Go ahead.

Mr Andrews: Schedule 2 and clause 6 do two different things. Certain provisions for criminal legal aid are being transferred to the 1981 order. These are not speaking to criminal legal aid per se but are to do with the infrastructure — that is to say, the registration of providers and disclosure of information. There is no existing provision for disclosure of information in the 1981 order, so that is essentially trying to bring to bear the same tools for civil legal aid as for criminal legal aid.

If I may suggest, for civil legal aid, there are two substantive changes. One is to abolish what was known as the "funding code" in the 2003 order. That will mean that the existing legal aid scheme, with its various tiers, which practitioners know, will continue in the first instance. So that is an "as you were" provision, if I can put it in those terms. The second change is to do with exceptional grant funding. As I said in an earlier observation, the provision effectively leaves the entire responsibility for deciding those cases with the new body. It does not require any referral to Ministers, as is currently the case. As I said, in the access to justice review, it was specifically recommended that that referral would be removed from the system, and the current legislation does that.

The Chairperson: Let me continue with schedule 2, given that you have invited me to do so. I ask the Law Society for its comments.

Ms A Elliott: My issue with schedule 2 is an expansion of the independence of the director. I mentioned that clause 3 will put in a minimal safeguard, and the second safeguard is, obviously, the appeals mechanism. For the appeals mechanism to have confidence, it must be seen to be fair, accessible and rigorous. If it is anything less than that, the public will not have confidence in the system, and the only outcome that can be anticipated would, ultimately, be judicial review. I see that the Department has taken on board some representations that were made about the appeals mechanism that was initially proposed. The Bill refers to three panel members at least, but the details are quite light. I ask members to pay close attention to the regulations that will be brought forward in due course. I know that MLAs are not strangers to the current appeals system. I am sure that many Committee members, through their constituency work, have personal knowledge about some of the complex issues in terms of fact and law.

Members will also be aware that the appeals mechanism does not attract legal aid. At present, appellants either appear in person or they request that the matters be considered on the papers. Alternatively, they will have a solicitor or barrister attend, usually on a pro bono basis. It should not be assumed, however, that matters to be considered on the papers will always be sufficient. As members will be aware, appellants often have literacy issues, mental health issues and limitations in presenting the facts that might be relevant and addressing areas of the law that would be relevant to the appeals panel.

Against the background that I have described, it is imperative that members of the panel who are appointed are externally recruited lawyers who may provide redress or balance to inadequacies or deficiencies for appellants in presenting their case. That is not to say that there is not room for the layperson; there is. A layperson can provide a common-sense view and an expertise outside the law. Those details will be in the regulations. The Committee should be very concerned that the panel should have the ability and the power to make fair determinations, provide reasons and, ultimately, protect the Department from challenge and safeguard the rights of individuals to prosecute in what may be a very difficult case.

In a similar vein, it is important that the work of the appeals panel is open and transparent and that it is not carried out in a darkened room somewhere. To expand on the procedures and detail in the Bill, which is very light, natural justice would indicate that appellants should always be allowed to appear in person unless they determine that they do not wish to do so. Appeals panels are often better informed by such oral representations, but there is always a balance to be struck between the demands of natural justice and running a cost-efficient system. The Bill, in its current format, provides for appeal without any oral hearings, unless that may be prescribed. That will come through in regulations.

Finally, I ask the Committee to take a careful view of that provision and keep a close watch on the regulations that will eventually be presented.

Mr Hanna: We entirely endorse the Law Society's comments. I refer members to the Second Stage debate, particularly the comments from Mr Allister and Mr Maginness, in which they discussed the workings that have been going on for a long time as to how legal aid committees function. They function very well in practice. Practitioners usually turn up on a Friday afternoon with their clients. They appear before the committees, and appeals are gone through very vigorously. The system works extremely well because there are qualified solicitors and barristers who are trained to know all the issues with the applications and appeals that they are dealing with.

Mr Caughey: A point was made about exceptionality provisions. In England and Wales, with comparable provisions, the number of applications has been extremely low, and the number of successful applications has been even lower. I think that it would be useful for the Committee to have an indication from the Department of the number of applications that it thinks that it will receive each year and the number that will be granted.

Funding for inquests is not brought within the scope of the mainstream legal aid system by way of the Bill. Individuals will have to continue to apply by way of the exceptional funding arrangement. The Committee should seek an assurance from the Department that requiring individuals to apply by way of that exceptionality provision does not in any way disadvantage them any more than if they were applying through the mainstream system.

The Chairperson: Did anyone not get an opportunity to speak to clause 6 or schedule 2?

Mr Mulholland: I have a couple of additional points on schedule 2. We noted that schedule 2 was trying to replicate some of the provisions from the 2003 order that had not yet commenced. Paragraphs 1 to 4 of article 36 in the original 2003 order seem to have been carried across faithfully but article 36(5) does not. That paragraph stated that there was a requirement on the Department to consult:

> *"the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland, and ... may undertake such other consultation as appears to him to be appropriate."*

That may be an omission, or it may be the intention to deal with that in another way. We would appreciate clarification on that point.

We are already mindful of and are working on registration, which is dealt with in schedule 2. However, we would definitely appreciate the opportunity for the Department to conduct a public consultation on the matter.

The Chairperson: Why is the omission, as you see it, of that paragraph important to the Bar Council?

Mr Mulholland: We understood that this was intended to give effect to the 2003 order. As I say, it is a point of clarification on whether that is an omission or an intentional change from the 2003 order.

The Chairperson: Clause 8 deals with the appointment of the presiding coroner.

Mr Caughey: The Human Rights Commission broadly welcomes the proposal and hopes that it will further strengthen the efforts to address delay in the Coroners' Court, which Mr Murphy set out earlier. Delays in inquests relating to deaths during the conflict in Northern Ireland have once again recently been raised by the European Court of Human Rights in the McCaughey case. The Committee of Ministers continues to monitor measures taken to address delay. This autumn, the UN Human Rights Committee will also consider the matter. We will report to it and keep the Committee up to date.

The Chairperson: Clause 12 is on commencement.

Mr Andrews: There is very little for us to say. It is really a matter for the Department following the passage of the legislation. The timing of that will, I am sure, determine what the Department decides should be an appropriate commencement day.

The Chairperson: Schedule 1 deals with the transfer of assets, liabilities and staff of the commission.

Mr Andrews: This is a normal provision that you would expect to see when a public body changes its status. There is nothing controversial or exceptional.

Mr McCartney: With the transfer of staff, are there any issues with equal pay, change of status or change of pension rights?

Mr Andrews: Any outstanding pay matters have been resolved. So the answer to your question is no.

Mr T Elliott: Do you see the transfer of staff being perceived by the wider public as rearranging the deck chairs as opposed to providing real change by bringing new people in? It is widely accepted that there have been problems with the Legal Services Commission. If staff transfer, that may be perceived as jobs for the boys.

Mr Spence: There has already been considerable movement of staff in and out of the organisation with transfers and secondments to the Department. When appropriate, we have been advertising. In future, I think that, with specialist jobs that cannot be filled readily from elsewhere in the Civil Service, the tendency will be to advertise. It is good that the staff movements have been both in and out of the organisation, because some people have been working in the Legal Services Commission for a long time, and the change of status will enable them to try to broaden their careers in the public sector.

Mr T Elliott: How does the private sector — the Bar Council and the Law Society — view the transfer of staff?

The Chairperson: If they wish to comment —

Mr Andrews: I was going to be cheeky and say that most of the staff came from the Law Society to the Legal Services Commission. *[Laughter.]*

Ms A Elliott: I suspect that Mr Elliott may be quite right in identifying the issue. If I have read the papers correctly, it appears that the cost of the commission at the moment is £7·2 million, and, with the transfer, the cost of the new agency will be £8 million. I do not know whether the issue has been raised about additional capital being put into the new body to deliver all that is promised. Time will tell.

The Chairperson: We now have the Law Centre on the Attorney General's proposed amendment.

Mr Allamby: We support the Attorney General's amendment. When we put in our submission, we had not seen the detail of the proposed amendment. We now note that it is confined to health and social care issues. As things stand, the Attorney General has powers to order inquests. Our understanding of the amendment is that it will allow the Attorney General to ensure that, in this case, he gets access to the relevant material in a timely and straightforward manner.

One of the bases on which you might decide to order an inquest or otherwise might be having all the material before you in order to make a sensible and prudent legal decision. It seems, therefore, to be about straightforward administrative efficiency, openness and transparency. We have examples in recent public inquiries of how difficult it is to get access to the full picture until you get to public inquiry stage. It seems to me that this is one way of ensuring a much more seamless and transparent process. We would have supported an amendment going beyond health and social care because we think that the same principles apply in other cases, but we recognise that that is clearly not what the Attorney General is looking for. I say that in full cognisance of the political sensitivities that go with some of the areas that are dealt with in the inquests that were referred to earlier.

Mr Caughey: I will reiterate a point in our submission that the state's procedural obligation under article 2 of the European Convention on Human Rights extends to deaths in a medical context.

Mr Murphy: We welcome the Attorney General's proposed amendment, and, although we accept that it has a principal focus, we consider that it may have a broader effect, especially with article 2 legacy cases. A provision could be made that disclosure of material directly relating to the circumstances of the death of the deceased might be sensibly made automatically to the Attorney General and to the next of kin. The proposed amendment has a medical context, but the principle could be extended to public records.

The Chairperson: Are there any other comments? If not, that concludes the session. Some clauses were not discussed because nobody wanted to comment on them. I assume that we are content with that.

I thank everybody for coming today to share their views. Over the coming days, the transcript of today's event will be circulated to everybody who participated. When that is finalised, it will be published on the Committee web page and included in the Committee report to the Assembly on the Bill. Thank you, everyone, for helping us today.