



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Legal Aid and Coroners' Courts Bill:
Informal Clause-by-clause Consideration

4 June 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 Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley

The Chairperson: We will go through each clause and schedule in the order that they appear in the Bill. Members can indicate their views on each clause with the aim of, hopefully, reaching an agreed Committee position that will be reflected in the Committee report. Once all the clauses and schedules have been discussed, there will be an opportunity to consider the Attorney General's proposed amendment. There are two tabled letters from the Department on the Attorney General's amendment and the issues that Mr McCartney raised with the Law Centre's proposed amendments. They arrived just before the Committee meeting started, so members can look at those now.

I refer members to clause 1, which deals with the dissolution of the Northern Ireland Legal Services Commission and the transfer of its functions to the Department of Justice. Do members have any views or comments? There are no comments, so I take it that members are content with clause 1 as drafted.

The Chairperson: Clause 2 is the designation of the director of legal aid casework. Do members have any comments on clause 2? Are members content with clause 2 as drafted?

Mr McCartney: I think that clause 2(1) could be better worded, but we will come back to that.

The Chairperson: Do you mean the words "a civil servant"?

Mr McCartney: Yes.

Mr Elliott: Sorry, what is that?

The Chairperson: Issues were raised about whether there is any rationale for specifying that the director should be a civil servant or whether the post should be filled by public appointment.

Mr McCartney: We might settle on that, but this might read better, "The Department must designate the director of legal aid casework as a civil servant in the Department after his or her appointment." As it reads now, some people might think that someone in the Department must get the job.

Mr A Maginness: Chair, I am slightly confused. Is it implicit or explicit in the Bill? I am not certain.

Mr McCartney: I think that it is not clear. That is just me; it may be clear to others.

Mr A Maginness: Of course, the words "must designate a civil servant" do not preclude the recruitment of somebody from outside who becomes a civil servant.

Mr McCartney: That is fair, but it is unclear.

Mr A Maginness: There is clearly an issue with the standing of the caseworker.

The Chairperson: The officials said that there would not necessarily have to be a competitive process and that there are a number of ways in which the post could be filled. The Department outlined that the person recruited would be appointed to the Department first, and then the Minister would designate that individual as the director. I am content with the clause as drafted. Are you suggesting that you might —

Mr McCartney: At present, we are OK. I am just expressing a reservation and saying that we might amend it, but we will not hold the Committee back at this stage.

The Chairperson: I am assuming that other parties are content with the clause as drafted.

The Chairperson: Clause 3 is the exercise of functions by the director. The Law Centre proposed a number of amendments to enhance the safeguards for independence. The Department's response is that it is satisfied that the current draft Bill provides sufficient safeguards. The Department was also concerned that the proposed amendments could have unintended circumstances — those are outlined in its letter to the Committee — that could not currently be identified, and it undertook to consider any potential negative impact of the proposed amendment. Are members content with clause 3 as drafted?

Mr McCartney: We will come back on the Law Centre amendments, but that will be at another stage.

Mr A Maginness: An important issue raised by the Law Society and others is that, although the director could exercise his functions independently on an operational basis, policy constraints could impact negatively on the exercise of that independence, because a category or species of cases could be excluded from consideration by the director. There must be safeguards against that.

The Chairperson: The Department outlined that directions or guidance cannot override the provisions of relevant legislation. That was its comeback on the classes of case issue.

Mr A Maginness: As a Committee, we need to be satisfied that that is a proper safeguard.

The Committee Clerk: The Department's response is in your tabled pack, and it outlines the hierarchy of legislative materials and how that would work. Its view is that the guidance comes below the primary and secondary legislation.

The Chairperson: I am satisfied with clause 3 given the information that the Department has provided that the guidance is secondary to legislation and cannot override what the legislation says.

Mr A Maginness: I will reserve my position on that, Chair.

The Chairperson: Are other parties agreed?

Members indicated assent.

The Chairperson: Clause 4 is on the designation of the functions of the director. Concern was expressed that anyone in the Department of Justice who is involved in considering an application for legal aid funding, as well as those in appeals panels, should be legally trained. The Bar Council believes that the current system of practising lawyers considering applications for legal aid and appeals works well and should continue. The Department outlined that any staff involved in considering an application will receive the necessary training to discharge the function effectively and will have recourse to independent legal advice if and when required. Appeals panels will be made up of three people from a range of backgrounds and experience of the types of issues involved, with a lawyer as the presiding officer.

Are members content with clause 4 as drafted?

Mr A Maginness: I am content with the panel of three and certainly content with a lawyer being the chair, but I am not certain whether I am convinced that lay members and non-lawyers bring anything to the evaluation, given that they will deal primarily with legal issues that require a thorough understanding of the law and the facts relating to the law. I am not entirely convinced that laypeople are in the best position to do that. It may well be that a panel consisting exclusively of lawyers might be a better make-up for the panel.

The Chairperson: We will note your comments. I am content with the clause as drafted. You can reserve your position on that aspect of it.

Clause 5 is on the annual report of the director. Are members content with that?

Members indicated assent.

The Chairperson: Clause 6 is the amendment of the law relating to legal aid, civil legal services and criminal defence services. Are members content with clause 6?

Mr A Maginness: Is that a purely technical amendment?

The Chairperson: Yes.

Members indicated assent.

The Chairperson: Clause 7 provides for the Lord Chief Justice to be president of the coroners' courts. Are members content with that clause?

Members indicated assent.

The Chairperson: Clause 8 makes provision for the presiding coroner. Are members content with clause 8?

Members indicated assent.

The Chairperson: No comments were received about clause 9, which is on issues to do with application to the Crown Court and to the Crown. Are members content with clause 9?

Members indicated assent.

The Chairperson: Clause 10 is about supplementary, incidental or consequential provisions. Are members content with clause 10?

Members indicated assent.

The Chairperson: Clause 11 is on appeals. No comments were received. Are members content with clause 11?

Members indicated assent.

The Chairperson: Clause 12 is commencement. Clauses 12(1) and 12(3) of the Bill provide for the commencement orders. In accordance with normal practice, these are subject to no Assembly

procedure. The Examiner of Statutory Rules suggested that it may be more appropriate for clause 12(3), which is about "transitional" and "transitory provisions" to be worked into clause 10, which concerns the supplementary, incidental and consequential provisions. Orders under clause 10 are subject to negative resolution unless they amend or repeal a provision of primary legislation, in which case they are subject to the draft affirmative procedure.

So it is a difference in approach. There is no real fundamental issue. Are members content with clause 12?

Members indicated assent.

The Chairperson: Clause 13 is the short title. No comments have been received on clause 13. Are we content?

Members indicated assent.

The Chairperson: Schedule 1 to the Bill is about the transfer of assets, liabilities and staff of the commission. Are members content with schedule 1? There were not a lot of comments on it.

Members indicated assent.

The Chairperson: Schedule 2 is on the appeals panels. Concerns were raised about the manner of appointment and their composition. Only the presiding officer will be legally qualified. The Law Society suggested that the majority should be legal members, with a third member drawn for a relevant background. The Department outlined that its aim was to ensure a multidisciplinary approach, with a range of experience on the appeals panel that will include people who have experience in relevant areas, such as social care for family matters. They will be appointed through a public process. The Department points out that the detail of the proposals for appeals panels will be brought to the Committee as part of the regulations, by way of subordinate legislation.

Does the point that you made earlier also apply to appeals panels?

Mr A Maginness: That really is the same point. So it will be a matter of subordinate legislation in any event.

The Committee Clerk: Yes, the detail will be in that.

Mr A Maginness: OK.

The Chairperson: Appeals are to be considered without any oral hearing unless that is prescribed in regulations. An issue raised was whether appellants should always be allowed to appear in person unless they prefer not to do so. When an application for funding is refused, an outline of the reasons will be provided. The Department outlined that the provision of reasons for refusing an application means that, in most situations, it would be appropriate to deal with an appeal on paper. I am content on the subject of oral hearings. Are members content?

Members indicated assent.

The Chairperson: Do members have any issues with statutory exceptional grant funding? No.

Next is the funding of civil legal services. Do members have any issue with the schedule? No.

I will turn to the issues that were touched on earlier and which were raised by the Examiner of Statutory Rules. These were the new articles on legal aid advice and assistance, which make provision for rules for the assignment of solicitor and counsel where a criminal aid certificate has been granted. The first rules made are subject to draft affirmative procedure and subsequent rules to negative resolution.

The Examiner of Statutory Rules queried why the powers should be subject to the draft affirmative procedure in the first instance with subsequent rules being subject to negative resolution. In his view, given the significance of the powers, the rules should be subject to the draft affirmative procedure on the first and subsequent exercise of the power.

The Department asserted in its written response and in oral evidence that it is standard practice for the first set of rules and regulations to be considered by the Assembly and for minor changes or modifications that take place thereafter to be subject to negative resolution.

The Examiner of Statutory Rules has said that he believes that these changes are substantial and should be made by way of affirmative resolution in both instances. I tend to agree.

Mr A Maginness: That is a good point, Chairperson.

The Chairperson: If members are content, we will go for the affirmative procedure in both instances.

Next is new article 20A of the 2003 order. Is this the same issue?

The Committee Clerk: It is the same issue of affirmative resolution, but this one deals with the appeals panels. Again, given the significance of the provisions, the view of the Examiner of Statutory Rules is that the rules should always be subject to draft affirmative procedure rather than to draft affirmative procedure for the first rules and negative resolution subsequently. He provided a further note reiterating that, because of the significance of the powers. Having seen the Department's comments on his initial view, he remains of that view.

The Chairperson: Are members content to go with the draft affirmative procedure on this one?

Members indicated assent.

The Chairperson: Schedule 3 is repeats. No comments were received. Are members content with schedule 3?

Members indicated assent.

The Chairperson: I now turn to the Attorney General's proposed amendment. In the context of the powers of the Attorney General, the Minister of Health, Social Services and Public Safety said that he would not have any objection to the Attorney General having the power to access the information necessary to allow him to discharge his functions. However, the Health Minister questioned the appropriateness of the Bill as the vehicle to make the Attorney General's proposed amendment. The Health Minister, in his initial letter dated 18 April, outlined a concern that a legislative requirement to produce documentation may have an adverse impact on staff coming forward to provide relevant information. Members are familiar with some of the concerns. Do members have any views on the Attorney General's amendment?

Mr A Maginness: I have just noticed in the responses that some health trusts say that this could provide clarity on their legal position on patient documentation. It is an interesting point. The issues are not clear, and the matter requires further consideration by this Committee, individually and collectively.

The Chairperson: OK. On the face of it, there is a natural sympathy for it, but there seem to be substantive points that you want to scrutinise further.

Ms McCorley: It would be hasty.

The Chairperson: My only issue is that we do not have the time to do that.

Mr McCartney: When is the faster, fairer justice Bill being introduced?

The Committee Clerk: It is due to be introduced before the summer recess.

Mr McCartney: It might be better to ask the Attorney General to consider that.

The Chairperson: OK. I am happy enough for the Committee to indicate a general sympathy for wanting to pursue this, but we want some more time to scrutinise it. If we can find an alternative vehicle, we may be sympathetic to doing that.

Thank you. The formal clause-by-clause consideration will take place on 11 June so that the draft report can be prepared and agreed at our meeting on 18 June.