



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Exceptional Grant Scheme Consultation:
Department of Justice Briefing

11 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 Tom Elliott
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Patsy McGlone

Witnesses:

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|-------------------|-----------------------|
| Mr Padraig Cullen | Department of Justice |
| Mr Mark McGuckin | Department of Justice |

The Chairperson: I welcome Mark McGuckin, deputy director from the public legal services division, and Padraig Cullen, principal legal officer of the public legal services division, both from the Department of Justice. You are very welcome. As normal, Hansard will record this session, and it will be published in due course. I will hand over to Mark at this stage.

Mr Mark McGuckin (Department of Justice): Thank you very much, Chairman, for your introduction and for the opportunity to present to the Committee. I will keep my comments brief as the details are set out in the paper that the Committee has before it. The paper includes a summary of the responses received to the consultation document together with the Department's proposed way forward.

The purpose of exceptional grant funding is to provide legal aid funding for representation for persons seeking to participate in certain legal proceedings that fall outside the scope of ordinary legal aid. Legal advice and assistance is already available under the green form scheme, and the exceptional grant scheme would include, for example, inquests into the death of relatives. Under the provisions of the scheme, the Northern Ireland Legal Services Commission can request that the Department authorises funding for exceptional individual cases.

To date, the exceptional grant power has most often been used to provide funding for representation of next of kin at certain inquests to comply with article 2 of the European Convention on Human Rights. It has also been used to provide funding for the representation of the plaintiffs in the Omagh civil action. Potentially, this power can be used to provide funding in exceptional cases that fall outside the scope of ordinary legal aid, either to enable the commission to comply with its duty under the Human Rights Act not to act in a way that is incompatible with a convention right, or to enable the Government to comply with their obligations under the law of the European Union.

Under the current legislation, the Department can either direct that legal aid be provided by the commission in specified categories of cases that fall outside the scope of ordinary legal aid or the Department can authorise funding generically or in respect of an individual case if the commission requests it to do so. To date, there has been only one direction issued in relation to exceptional legal aid — direction 1 on representation at inquests. Funding for the representation of the next of kin at most legacy inquests involving deaths at the hands of agents of the state or where there have been allegations of collusion has been provided under this direction. The other main category of inquests that have been funded under this scheme involves hospital death cases. Representation for the next of kin in such cases has been authorised by the Minister following individual requests from the commission.

Exceptional grant funding was considered as part of the access to justice review, and its report contained a number of relevant recommendations. In particular, it recommended that the Minister should no longer have any decision-making role in the grant of exceptional funding in individual cases. The Minister accepted that recommendation and, recognising that the existing arrangements had been in operation for seven years, commissioned a review of the scheme. The review focused on four particular areas: the delegation of discretion to vary or waive the financial eligibility test; the definition of the term "immediate family" and the application of the financial eligibility test; the remuneration payable to legal representatives; and the scope of proceedings included under direction 1. With the agreement of the Committee, the Department undertook a targeted consultation to seek views and inform decisions on the way forward. Five substantive responses to the consultation were received. Overall, the responses to the proposals in the consultation document were positive, though there were some suggestions about implementation.

In light of those positive responses, the Department proposes to proceed as follows. Decisions on the grant of exceptional funding in individual cases should be the responsibility of the statutory appointee at the head of the legal aid delivery organisation. In practical terms, we propose implementing the change in line with the establishment of the proposed legal services agency. That will be provided by the new article 12A provision to be inserted into the Access to Justice (Northern Ireland) Order 2003.

Once that arrangement is in place, appeals against decisions not to grant funding or further funding in individual cases should be heard by an independent appeal panel. That will be provided by the new article 12A provision to be inserted in the 2003 Order.

The statutory appointee should be given discretion to vary or waive the financial eligibility test, so removing that responsibility from the Minister. That will be provided in the civil legal services financial regulations to be introduced under article 13 of the 2003 Order.

The meaning of the term "immediate family" should be redefined to address issues where an adult has died without a partner and where, potentially, parents, children and siblings are involved and to clarify the application of the financial means test in such cases. That will be provided under the civil legal services financial regulations to be introduced under article 13 of the 2003 Order.

There is a need to reform the fee structure for inquest cases funded under the scheme. However, rather than look at that in isolation, it will be taken forward as part of the wider reform of civil remuneration.

When responsibility for the grant of exceptional funding passes to the legal services agency, decisions on requests for exceptional funding for categories of cases that fall outside the scope of ordinary legal aid will rest with the director of legal aid casework. That will include inquests into deaths that occurred while the deceased was detained by the state under the Mental Health (Northern Ireland) Order 1986. The new article 12A provision to be inserted into the Access to Justice Order 2003 will also provide a mechanism to fund cases of that nature. Potentially, the Department could also issue a direction to the director of legal aid casework in broadly similar terms to the current direction 1, but with the scope of the direction also covering this class of case under the Mental Health Order.

As I mentioned, the provisions to transfer decision-making on application for exceptional funding in individual cases from the Minister to the director of legal aid casework in the proposed new legal services agency is contained in the Legal Aid and Coroners' Courts Bill. The other changes required can be provided for in secondary legislation, which will come before the Committee and the Assembly. The Bill provides the legislative mechanism for the introduction of independent appeals panels to consider appeals. The role of the panels will include hearing appeals against the refusal of an award of exceptional funding or further funding in individual cases.

Further detail on the outcome of the consultation is set out in the post-consultation report. I am happy to address any questions that the Committee might have on the outcome of the consultation and the Department's proposed way forward.

The Chairperson: OK, members. As Mark indicated, in taking this forward, we have already covered some of the proposals in the Legal Aid and Coroners' Courts Bill. The other mechanisms will be introduced by way of secondary legislation, which will obviously have to come to the Committee for detailed scrutiny. That said, if any members want to ask something now, they are at liberty to do so, bearing in mind that we will look at this in detail when the legislation comes before us and then decide whether or not to implement some of what the proposals contain.

Mr McCartney: This is just a broad question. In general, how many inquests are there in any given year?

Mr McGuckin: I do not know off the top of my head.

Mr Pdraig Cullen (Department of Justice): We do not have that information about the number of inquests. Of course, we can provide it. If your question is directed at how many applications for that form of funding are received, we will return to you in writing with those details.

Mr McCartney: It will be useful when we scrutinise that. It will be interesting to see how many inquests there actually are.

Mr McGuckin: I can give you the number of inquests and then, to put that into perspective, the number of applications for exceptional grant funding for inquests. That would let you see the volumes.

Mr McCartney: OK. That would be fine.

Mr A Maginness: Just when we are on that issue, is there any figure for the overall cost of exceptional grants to date?

Mr Cullen: Again, we have those details. We can provide them in written form. They are logged separately from the cases that are paid for by way of exceptional legal aid. I am afraid that we do not have those figures to hand.

Ms McCorley: Go raibh maith agat. Do all inquests fall into that category?

Mr McGuckin: Into the exceptional category? Pdraig, do you want to take that question?

Mr Cullen: Potentially, the scheme could cover any inquest. However, because of the ambit of the ordinary legal aid scheme, particularly for advice and assistance, which can be provided in any type of legal proceedings, that funding is intended to fund representation by a solicitor and barrister at an inquest hearing. The overall scheme is set up on the basis that it is intended to provide funding in exceptional inquests. Again, the nature of inquest proceedings, like some forms of tribunal proceedings, is that they are intended to be inquisitorial in nature rather than adversarial, which is the normal form of legal proceedings in a civil or criminal court. Therefore, potentially, yes, that funding could be provided in any type of inquest.

However, the scheme is established with limited funding on the basis that it is targeted to fund exceptional inquests; when the next of kin are unable to afford their own representation and, with the inquisitorial nature of inquest proceedings, the nature of the issues to be investigated by the coroner in that particular inquest are serious, coupled with other factors like whether other parties are legally represented and whether there have been other forms of inquiry into the death in question. Those various criteria can feed into the question of whether the individual inquest is considered to be exceptional and whether, in particular, article 2 of the European Convention would require the state to provide exceptional funding if the next of kin could not afford their own representation.

Mr McGuckin: So, ordinarily, in the run of inquests, you would not necessarily expect somebody to have legal representation added in the nature of the event. The provision here is for very exceptional cases in which that is appropriate in order to get to the right outcome.

Mr McCartney: I have just one further question. I am sure that it is something that we will tease out. In what you would describe as a "normal" inquest, who represents the deceased? Obviously, the family represents the deceased. Would their representation be provided by the coroners' office?

Mr Cullen: It would not provide representation at the hearing of the inquest. We do not speak for the Coroners Service. However, it has support staff who will assist the next of kin on any individual death and advise them on whether there will be an inquest and what the procedure will involve. As regards having representation at the hearing, in the great majority of inquests cases, as indeed the great majority of cases in the civil and criminal courts, the parties are not legally represented. When it is considered that the nature of the issues involved are particularly serious, such as when agents of the state were involved in the death or there are serious allegations of collusion, and in the other category of case that Mark referred to, such as particular hospital-death cases in disputed circumstances, and other cases of that nature, the scheme has been designed with the intention to provide funding for those exceptional cases where the coroner concerned may not be able to discharge the obligation on the state to carry out an effective investigation into the death without representation for the family.

As I said, we will provide the numbers retrospectively. The broad picture is that they are a small number of cases compared with the whole number of cases that are heard in the Coroners' Court each year.

Mr Elliott: Just for clarity, what was the answer to Mr Maginness' question about costs?

Mr Cullen: I am afraid we do not have those figures available today.

Mr Elliott: You will come back with them?

Mr Cullen: I am, of course, happy to provide them. They are separately maintained within the Legal Services Commission's financial records, broken down between criminal cases, different court tiers and civil cases. This is classed as a separate class of case, and we have those figures available.

Mr McCartney: I have just one technical question. In relation to clause 3 in the Legal Aid and Coroners' Courts Bill, if the Department were to take a policy decision not to fund certain types of inquests, is that possible? Would the director be in a position to say that he thought that was unfair given the way the legislation is now going to be framed?

Mr Cullen: No. Categorically no. In our presentation and oral briefing to the Committee in relation the Bill if it is clearly understood, whether it is direction or guidance they sit under legislation. They cannot override that, whether that is primary or secondary legislation. The article 12A provision in the Bill to be inserted into the 2003 Order sets the legislation. The guidance or potentially a direction will sit under that.

The Chairperson: All right, gentlemen. Thank you very much.