



Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

**OFFICIAL REPORT
(Hansard)**

Fixed Means Test for Criminal Legal Aid

20 January 2011

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Lord Morrow (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Lord Browne
Mr Thomas Buchanan
Mr Paul Givan
Mr Alban Maginness
Mr Conall McDevitt
Mr David McNarry
Ms Carál Ní Chuilín
Mr John O'Dowd

Witnesses:

Mr Robert Crawford) Northern Ireland Courts and Tribunals Service
Mr John Halliday)

The Chairperson (Lord Morrow):

I welcome Robert Crawford, head of public legal services division in the Northern Ireland Courts and Tribunals Service and John Halliday, criminal legal aid policy adviser. Gentlemen, you are very welcome, and we look forward to your briefing. You have 10 minutes to say what you want to say. After that, there will 20 minutes for questions.

Mr Robert Crawford (Northern Ireland Courts and Tribunals Service):

Thank you very much, Chairman. I remind members that the fixed means test or, as we tend to call it, the fixed eligibility test is provided for in clause 85 of the Justice Bill, which gives the Department the power to set a test. Subordinate legislation would be required thereafter to set the level of such a test.

The proposal is one of the legal aid reform proposals that were developed by the Court Service in considering how to reduce legal aid expenditure to live within the available budget. We had originally estimated that there could be savings of £1 million if Northern Ireland were to move to a fixed eligibility test along the same lines as those that apply in England, Wales and Scotland. However, in the finance paper that we have provided since we presented savings proposals to the Committee in May, we used a figure of £0.5 million because our original savings figure had not taken account of implementation costs.

Research that we commissioned some time ago was intended to fill part of the information gap. Previous research on the impact of a fixed eligibility test had been carried out in 2007. That research had not dealt with or attempted to estimate the costs of implementation, which are clearly an important element in any savings calculations. We also felt that it was important to update the research as time passed, as there have been changes in the income distribution in Northern Ireland, the financial situation and people's overall financial circumstances.

I apologise that it has taken so long to get the research to the Committee. We promised it to the Committee some months ago so that it would have the information for its consideration of the Justice Bill. We had commissioned it to inform what we are doing in this policy area, but when the Committee expressed an interest in the area, particularly in the issues of eligibility and impact on justice, as part of its consideration of the Justice Bill, the Minister agreed to provide research. The reason for the delay is that the researcher had difficulty in getting other public sector organisations to provide the relevant data. We received the draft report just last Tuesday and sent it to the Committee at the end of last week. Apologies for that are in order. We had hoped to get it to you much earlier.

The objective of the research was primarily to indicate how eligibility for legal aid would be

affected if we were to introduce a fixed means test. As I am sure members are aware, the means test that applies at present is that a judge must determine whether or not an applicant has insufficient means to pay for his or her own defence. If the judge considers that that is not the case, the means test is satisfied. In addition, there are the merits and interests of justice tests.

In considering the introduction of a fixed means test, we felt that savings could be made. We had concerns about the cost of implementation and about the fact that, in Northern Ireland, there is a different income structure; specifically, people are poorer, and there is often a higher incidence of people on benefits. We wanted to get some better information on that.

We also asked the researcher to look at how the impacts would fall in equality terms. That is not a substitute for a full equality impact assessment. If we were to bring forward proposals, they would be the subject of such a full assessment. Since the researcher was looking at good social economic data, we felt that it would be possible to get an early indication of how that would play out. That work appears near the back of the report, at section 5.

The research looked at seven options. We did not in any way limit the options that the researcher would look at. We simply asked Tony Dignan, an independent economist, to look at how the impacts could come about. Included in the seven options are the England and Wales model, the Scottish Legal Aid Board model and variations on those models, where the researcher has attempted to see what would happen if various limits were adjusted and different limits substituted. We have provided a summary of those along with the paper.

The paper is very lengthy. Page 31 has a useful summary of the eligibility impacts. I am not suggesting that the Committee needs to read all of the detail of the paper; the key elements are in the summary.

The Chairperson:

Members, you have the summary paper in front of you.

Mr Crawford:

The full paper was provided, but it is very detailed. I will explain where we are going with it, and

members can decide how much more information they want to take out of it. It is a draft report, so we still expect to see some refinement of the data. We will provide the full report when we get it. However, there will not be any significant changes in the conclusions.

All seven options produce over £1 million in savings, with the exception of option 4. After discounting the costs, the savings produced would range from £0.578 million to £0.846 million. That suggests to us that there is still merit in proceeding with consideration of the proposal as a savings-producing option. We had included £0.5 million for the item in the overall legal aid reform savings programme. Taking account of costs, it looks as if it would produce that.

The percentage eligibility in the table provided in the summary is based on the percentage of applicants who currently receive legal aid in Northern Ireland. You will see that, with the exception of option 4, there would be a reduction in eligibility of some 10% to 14% on the current level of about 97% or 98%. The research has confirmed what we suspected, which is that a significant proportion of the applicants who currently get legal aid would not get it if we imposed a fixed eligibility test along the lines that the researcher examined. We expected that, and, indeed, we could not have produced savings without that.

Option 4 is based on setting an eligibility threshold on the basis of a no-impact option. In other words, if we were to keep eligibility broadly the same as at present, what would the cost of introducing a fixed threshold be? As you can see, we would not make any savings at all. In fact, introducing the test would put the costs up. As you would expect, we would incur costs but not get any benefit.

We do not consider option 2 to be a runner, because option 2 was calculated on the original basis of the England and Wales test, which was that 50% of the population should be eligible for legal aid. Applying that to Northern Ireland would mean using a lower threshold than in England and Wales, because the average incomes are lower here. With option 4, we have decreased the savings, but we still have the same costs. With option 2, we end up with high savings, but, in order to make those savings, we have to reduce the income threshold below the minimum wage. That is not an outcome that makes sense to us.

We are just teasing out a couple of the options, and those are our initial feelings after one week of looking at the report. We need to do further work on this. The researcher has suggested options 1 and 5, which are the England and Wales option and a variant on the Scottish model. Those are his preferred options, based on the numbers for savings and costs. We would need to do further work before making any firm proposal based on the research.

We would also need to look at which options we would want to consider. As I have already suggested, options 2 and 4 are effectively non-runners. We would like to generate some sub-options. If we look at the eligibility rates in the table of 83%, 85% and 86%, we can see that there would be quite a drop from our current rate of 97%, even though we believe that that is in line with the kind of eligibility rates that apply in England and Wales. There would be changes in the number of current applicants. We would look to generate some further options to see what savings could be made by perhaps having a lower threshold that would allow more people to access legal aid. Effectively, we would be generating options for different threshold levels.

We need to do some further comparative work on the figures that have been produced. As you have probably gathered from what I said, there is a lot of detail that needs analysis. We also want to dig into the costs estimates, because they are just that; we have not put any flesh on them. There are assumptions in the cost estimates that might be wrong, and it would be wrong of us to suggest that that is not the case. For example, there are assumptions about transfer of IT capability in that it is assumed that the models used in England and Wales or Scotland could be lifted and moved across to the Northern Ireland system. Without further work, we cannot say whether that is accurate. My experience of IT is that things always takes longer and cost more than you think. So, I am wary about the costings at present.

We have provided the information, and we are happy to provide the results of further analysis. I hope that it is of some assistance. Our conclusions are that it is still worth pursuing a fixed eligibility test as a possible means of makings savings in legal aid. At this point, it is not possible for us to say what our final proposal might be. Indeed, we have not yet exposed any of this discussion to the Minister to find out what his view might be. However, that is an update on where we are at present based on the research that we have received.

The Chairperson:

Thank you. I liked your comment that things often take longer and cost more than expected.

Mr Crawford:

Regrettably.

The Chairperson:

I expect that you say that from experience, too.

The more I look at the figures, the less attractive they become. The summary paper mentions that 13 full-time staff would have to be recruited. It also says that there will also be costs of at least £70,000 that could rise to £95,000. I am bearing in mind your other remark that things often take longer and cost more than expected, so that is probably a guesstimate. If we take the figure of £1 million of savings and the figure of £97 million, we can see that that works out to give us a figure of about 0.01%. You have to ask yourself: is this worthwhile and should it be done? We must also bear in mind that there is a shifting figure of 10% in the eligibility rate. Am I right in saying that?

Mr Crawford:

You are certainly right in your overall proposition. Indeed, the figures in the costs and net savings columns show that the net savings range from just under £600,000 to £850,000. Those would be the savings if all the costings turn out to be right. As you quite properly say, the costings are subject to error and, indeed, checking, which is why we are expressing caution about them.

You asked whether this is worth doing. We provided the Committee with a separate paper on the financial consequences of Budget 2010, and it shows that, at the moment, the savings proposals for legal aid would take us to a position where we would have a surplus of about £0.5 million, if all the savings are delivered on the basis of the proposals presented to the Committee and if the £2 million of additional civil legal aid savings that are being imposed by the Department of Justice are delivered — savings for which there are currently no firm proposals from the Legal Services Commission. From our point of view, we cannot not recommend that we

keep in a proposal that could deliver savings that might be necessary. We acknowledge that, if there were better ways of making the savings, this would probably not be our first option.

We are also conscious that introducing any fixed threshold could impose delays in some cases. That point was made by Committee members in previous meetings, so, in a sense, it is your point and not ours. The full research paper explains how that issue is handled in England and Wales and in Scotland to minimise delay. However, we acknowledge that the introduction of any test would impose some delay in at least a small number of cases.

In England and Wales, there are very strict performance targets. I think that a decision has to be reached on 75% of applications within two days and on 95% within six days or thereabouts. That is very good, but in Northern Ireland, where there has been no fixed test and where we would have to introduce performance indicators, it would take a bit of time to get to that position.

We openly acknowledge all the negatives of the proposal. Nevertheless, it is a savings-producing option, and we would be hesitant to abandon it unless we had certainty that savings were coming from elsewhere.

Mr McDevitt:

In options 3, 5 and 6, how do you define disposable income?

Mr Crawford:

The tests are, in fact, slightly different; that is the variation in the options.

Mr McDevitt:

Take option 3, for example.

Mr Crawford:

Option 3 is based on the approach used for Northern Ireland civil legal aid. Option 5 is based on the approach used in Scotland. Option 6 adds the capital threshold used in the Northern Ireland civil legal aid test to the version in England and Wales. That is explained in the full report, but they are variations on the same theme.

Let me expand a little on that. In England and Wales, when disposal income is looked at as part of the test, they try to work out what a person needs to live on, and anyone who has enough to live on pays their own legal costs without the help of legal aid. The Scottish system looks at what the case might cost and the impact on a person's resources. So, it takes into account the cost of the case and how that will impact on income and then determines if an applicant has enough left after that. The two tests operate in different directions, which is why some complications arise and why seven different options have been presented.

Mr McDevitt:

In option 3, the threshold is £5,200, but, in option 5, which you tell us is based on the Scottish model, the threshold is £3,398, which you say is the threshold set in England and Wales. Is it also the Scottish threshold?

Mr Crawford:

In Scotland, it is different, because a completely different approach is used. The figure there is more variable because they have to take into account the cost of the case.

Mr McDevitt:

Just for clarification; why are you using the England and Wales threshold limit of £3,398 in your illustration of option 5? It is based on the Scottish model. Is that correct?

Mr Crawford:

Yes, that is right.

Mr McDevitt:

However, the figure that you use to illustrate that option is £3,398.

Mr Crawford:

Sorry, that is by way of comparison with a previous option. The paper then says what the threshold is in England and Wales. As the paper shows, the Scottish disposable income test works from the other end. That is my point. I apologise if I mixed you up.

Mr McDevitt:

Sorry, I misread that.

Mr Crawford:

I apologise; it is not a very clear paragraph.

Mr McCartney:

Thank you very much for your paper. I know that it is a work in progress. By looking at just the broad figures, though, I can see that there would be savings of about £840,000 to £634,000 a year, but that would mean that there would be an opt-out of something like 10% to 14%. Nearly one in ten or one in seven people would be outside the system for savings of less than £1 million.

Mr Crawford:

Yes, based on the current access. That is right.

Mr McCartney:

It does not seem to be —

Mr Crawford:

Proportionate?

Mr McCartney:

Yes. You made that point earlier, and I understand that. It should not be a case of trying to make savings in one part of the system because you cannot make savings in another part. To me, it should be a case of deciding whether or not something is required and then assessing the impact of making changes. It seems that, for what you are achieving in savings, the impact is too high.

Mr John Halliday (Northern Ireland Courts and Tribunals Service):

The economist did a lot of research, and he split his findings into five quartiles, the first being the lowest. He found that, in the first quartile, 100% of people got free legal aid, and that, in the next quartile up, a very high percentage also got legal aid. It was only when he reached the middle

and higher quartiles that people were refused legal aid, and those tended to be people in employment who have disposable income. It is not that it is applied across the board to everyone; it looks to protect the poorest in our society.

Mr Crawford:

The 10 to 14 percentage points will largely affect those currently in employment. That said, one reason that we want to do further research is to find out who those percentage points would catch, because they are the people who would be affected by the change. It is the same for all the proposals, essentially. We would certainly reject anything that is hovering around the minimum wage. In the generation of further options, we will, for example, look at whether to have a version that would reduce the eligibility rate to, say, 90% or 92% and at what savings that would bring. Again, the costs need to be factored in, because, as you say, if the costs go up or down, it may well not be viable.

On the point about the civil legal aid budget, we now have our 2010 budget allocation. We know what it is, and we cannot, in all conscience, bid for extra funds. From our perspective, our starting point has to be to find savings within the legal aid budget.

Mr McCartney:

I understand that. It is hard to get into the issue case by case. However, even in option 2, it is accepted that people in employment and on the minimum wage would fall into the ineligible category. You can imagine that there would be an impact on someone who earns more than the minimum wage but who perhaps bought a house at the wrong time. All I am saying is that, from the headline figures, it does not appear that we could say, “We are making this amount of savings and here is the impact”.

Mr Crawford:

In some ways, that option is possibly the least attractive of the savings options. It does not produce the least savings — there is at least one option that produces fewer savings — but it directly impacts on applicants in that someone who would have received legal aid before introducing the test would not get it thereafter. The only thing that would mitigate that is that, as in England, Wales and Scotland, there would be a hardship test through which an individual

could bring into the equation costs that would not otherwise be captured — for example, costs associated with caring for a dependant or relative — to show that the impact on them would be greater than thought. That is a saving and a mitigation that I did not mention. Other than that, I take your point.

Mr McCartney:

However, even that system can lead to a process. There could then be an appeal, so access would be delayed and the costs would increase. As each case is delayed, costs will go up elsewhere.

Mr Crawford:

Some of the options are very simple, and some produce greater or lesser savings. I acknowledge that none of them is perfect in that regard. The simpler you try to make it, with the least delay, the more violence, perhaps, you do to the individual who does not have the opportunity to make their own case.

Mr A Maginness:

You said that there is a fast-track system in England and Wales. That is basically what it is, is it not?

Mr Crawford:

They have an allowance for someone whose case has not yet been determined. In that circumstance, an allowance is payable to cover the initial appearance in court, for example. That is paid up front so that the person can get representation to appear in court or make a plea or whatever. So, if the system has failed to deliver a decision, they are not denying legal representation for that period.

Mr A Maginness:

Does the defendant or the accused pay a fee?

Mr Crawford:

No.

Mr A Maginness:

It is probably covered by legal aid.

Mr Crawford:

It is a limited fee.

Mr A Maginness:

I understand that. In order to fast-track the system, you need more staff and IT, and you need to be able to research a person's means and so forth. Does that not mean additional costs, over and above the ordinary administrative costs that we are talking about here?

Mr Crawford:

I agree; there are additional costs with any of this.

Mr A Maginness:

I mean costs over and above what we are talking about.

Mr Crawford:

No. All of that has been costed into the various options. If the options run as described, then, according to the researcher, those costs will be accurate. Again, we want to test the sensitivity of that.

Mr A Maginness:

With your indulgence, Chairperson, I will make a broader point. Under the new system, if someone has to pay for their defence and is acquitted, is there any comeback, compensation or reimbursement?

Mr Crawford:

None of the schemes provide for that.

Mr A Maginness:

That would seem rather harsh if somebody is acquitted.

Mr Crawford:

It is not provided anywhere in any system that we have found.

Mr A Maginness:

So a person could be found not guilty and yet have to pay quite substantial legal fees.

Mr Halliday:

I think that there are facilities for the court to order costs against the prosecution, but the amount is limited.

Mr Crawford:

That would be the normal costs approach, but there is no facility within the legal aid scheme as such to automatically pay back.

Mr McNarry:

Would any of the proposed schemes speed up the process for a person getting to court?

Mr Crawford:

The short and simple answer is no. For a large proportion of cases in which applicants have passporting benefits, there would be no slowing down of the process. Somebody who is passported through on a benefit that is a passporting benefit today would still be passported through under the new system. That would still happen. That can happen on the day of the hearing. A member of courts service staff enters a person's details, which are passed to the legal aid advisory unit in the Social Security Agency, which gives an instant answer as to whether the person is on benefits or not. So, for a lot of people, the process will not be slowed down, but, to answer your question completely honestly, for some people, it would be, because they would have to do a full —

Mr McNarry:

I am just thinking about efficiency. If you have to do this, you will need more people. Words such as "fast-tracking" and so on have been used, but will the process actually be speeded up?

Mr Crawford:

No. The number of people for whom the process would be slower would be small, particularly if, to go back to Alban's question, we build in the fact that a fee would be paid for appearances. Therefore, the process would not necessarily be slowed down greatly. However, in a small number of cases, there could be delay if there were a protracted issue around the income means test and whether or not a person was eligible. The fees in Scotland, England and Wales cover those initial appearances. They do not cover the full cost of the case. Therefore, if you have gone through the initial phase and there is still an issue, the case could be held up, so there would still be a delay.

The Chairperson:

Mr Crawford, the Committee did not get your paper. We got the summary but not the paper itself.

Mr Crawford:

I will investigate that, Chairman. It was attached to the papers that we sent out.

The Chairperson:

Well, it never arrived.

Mr Crawford:

That said, there are 100-plus pages.

Mr McNarry:

It was not fast-tracked, then?

The Chairperson:

It should be easy to identify.

Mr Crawford:

I think it will be. Given the points that have been raised, I would specifically draw members'

attention to page 31, which contains an eligibility table showing the different eligibility thresholds under the options. A lot of the information in the report is relevant to our consideration, but, as regards the issues raised by the Committee, the table at page 31 and the one that we have included in the summary are the key comparative data. I was not aware that you did not receive the report, so my apologies.

The Chairperson:

Thank you very much.