Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Overview Presentation from the Northern Ireland Legal Services Commission on Civil Legal Aid Reforms

23 September 2010

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Members present for all or part of the proceedings:
Lord Morrow (Chairperson)
Lord Browne
Mr Thomas Buchanan
Mr Paul Givan
Ms Carál Ní Chuilín
Mr John O'Dowd

Witnesses:
Mr Paul Andrews) Northern Ireland Legal Services Commission
Dr Theresa Donaldson)

The Chairperson (Lord Morrow):

With us today are Theresa Donaldson and Paul Andrews. You are both welcome.

Mr Paul Andrews (Northern Ireland Legal Services Commission):

Thank you, Chairperson. I appreciate that the Committee has had a busy day. I will take this opportunity to make introductions and a few observations. I have been chief executive of the commission since February 2010. I should declare that, before that, I worked in the Northern Ireland Court Service. I am accompanied by my colleague Dr Theresa Donaldson, who is head of the civil legal aid section. Dr Donaldson has oversight of civil policy development and is

responsible for the delivery of civil services. Prior to joining the commission in September 2004, Dr Donaldson worked in the Guardian Ad Litem Agency, which is, of course, relevant to some of the business that the commission is responsible for.

The commission is very pleased to have this opportunity to provide a briefing to the Committee on its work and, in particular, on the reform of civil legal aid. We provided a wide-ranging briefing paper, which I trust will be of some interest and assistance to the Committee. The paper is intended to provide an introduction to the commission and civil legal aid; therefore, I hope that it avoids too much detail. The Committee will, of course, have substantive briefings from the commission in due course. That process will allow more detailed discussions on individual aspects of our proposals, and, unless the Committee wishes otherwise, I propose to avoid introducing further details on which the Committee has not been briefed and to focus instead on the matters raised in the briefing pack.

Since the commission issued its briefing paper to the Committee, the Justice Minister has, of course, announced the terms of reference for the review of legal aid and access to justice that he commissioned. For some time, the commission had been convinced of the need for some form of wide-ranging review, and, as such, it fully supports the establishment of the review. However, for some of us, that means that we have lost an excellent chairperson.

The review offers an opportunity to develop a more holistic view of access to justice. It should also assist in ensuring that, within the devolved environment, legal aid and access to justice are fully integrated into the design of systems and procedures that may require mediation or litigation in the future. Perhaps that is a feature that has not always marked our system.

My other remarks seek simply to highlight some issues in the briefing paper that may be of assistance for this evidence session. First, I remind the Committee that the commission was established in November 2003 and took over responsibility for the administration of legal aid from the legal aid department of the Law Society. In its formative years, the commission faced many difficulties. Although it has not resolved all those difficulties, it has made significant progress in recent years and is committed to continued improvement in all aspects of its service.

In part, the difficulties are due to the current legislative basis upon which civil legal aid operates, which is very dated. One of the main sources dates back to 1965, with very little

modification. Accordingly, the legislation does not permit the flexible and imaginative provision of access to justice that is required in today's environment. The legal aid system also suffers from paper-laden systems. Irrespective of the outcome of the review that the Minister has commissioned, there is a need for new legislation to enable the commission to develop responsive and targeted solutions for the provision of civil legal aid. Our proposals will be brought to this Committee for scrutiny.

The briefing paper makes clear that, before devolution, the then Lord Chancellor introduced legislation that not only established the Legal Services Commission but provided a statutory framework for reform, which reflected his policy in England and Wales. Accordingly, the commission was mandated to develop policies that have their origins in England and Wales. However, the commission is content that the basic principles that underpin the legislation, such as designing systems that target cases with the highest priority and the development of more flexible and less adversarial means of resolving disputes, is entirely appropriate for Northern Ireland. Nevertheless, the commission has not slavishly followed the position that has been developed in England and Wales. For example, as a model for delivering services, the commission has placed more emphasis on standard fees rather than contracting, and it has not adopted the approach in England to conditional fee agreements for cases involving damages.

The commission has been developing those changes with the objective of providing more focused access to justice. I should stress that the civil reforms that we were mandated to develop and bring forward were not conceived originally as a means of reducing expenditure. They were, however, designed to provide levers of control to enable the commission to respond to changing financial settlements and emerging needs. The commission recognises that we are in a very challenging financial climate and is looking at the adjustments required to live within whatever the revised budget may be.

I have said enough to provide the Committee with a sense of our approach, and I appreciate that I might outstay my welcome if I go through the detailed paper that we provided. Nonetheless, Theresa and I are more than happy to assist you in any way that we can.

The Chairperson:

Thank you, Mr Andrews. I have looked at the briefing paper, and you will not be surprised to hear that I am interested in the cost and business trends. All civil legal aid expenditure increased

by 224%. All criminal legal aid expenditure increased by 156%, and the total legal aid fund increased by 180%. Total administration costs increased by 174%. Will you comment on those figures?

Mr Andrews:

I would prefer to be commenting on expenditure that had reduced by those amounts. However, we live in a particular context. I will approach the figures in reverse order, so, in the first instance, I will deal with administrative costs. Although the commission's administrative costs have increased significantly, a wide range of issues have contributed to that increase. The commission has entirely different rules and responsibilities from those of the legal aid department, which originally administered legal aid. The whole area of policy and research, for example, was not on the legal aid department's agenda, so we had costs associated with that. We also inherited significant backlogs in the processing of cases, which the commission has been seeking to address, with, I would venture to say, some success, and we are addressing others. Not only that, but we had to address some fundamental weaknesses in the financial management of legal aid, and the cadre of staff in position to do so was scarce. As you will appreciate from reading the briefing paper, we are making considerable efforts to try to catch up with the production of our annual accounts, so there are a number of cost heads in that area.

In general, the majority of the civil legal aid budget is paid on scaled costs or as a result of taxation, so, in that sense, little of the spend is directly controlled by the commission. We may assess fees against prescribed rates, which, no doubt, will come before the Committee for discussion as it has already considered some of the criminal rates that have been under consideration. Therefore, the rise in costs is in part a product of the increasing complexity of cases. It is also in part due to areas of work involving new types of cases being brought into the legal aid scheme without the corresponding funding coming to legal aid. So, there is an area in which costs have increased for a variety of reasons.

The Chairperson:

You are doing very well, Mr Andrews, but your submission goes on to state:

"During that period the total number of certificates increased by 22% including a 36% increase in Crown Court certificates."

That is, in some way, attributed to the figures that were just quoted: 224%, 156% and 180%, and a rise in total administration costs of 174%. I may not be making my point well. Against those figures, increases of 22% and 36% seem very small, do they not?

Mr Andrews:

Indeed, and I understand your point. I would like to have a magic wand to enable me to explain that away, but there is none. We find that cases increase in cost due to complexity and changes in procedure, and the commission has to find ways of curtailing those costs so that reasonable remuneration is provided to service deliverers at the same time as having regard to the budget. That is why a more fundamental look at how legal aid is provided and remuneration levels is important. To simply continue to try to give a fee for a case that has the potential to become increasingly complex leads only to average costs rising over time.

The Chairperson:

The Committee has discussed high cost cases and heard from others on the issue. Such cases have contributed significantly to the overall bill. The Committee was told that there was a plan for five or six, but ended up with 50-plus, or something like that. Surely, that spiralling out of control is no longer acceptable: it must stop, and not in the distant future, but immediately.

Mr Andrews:

I sincerely hope, Chairperson, that after the Committee's deliberations last week, once the consultation paper comes out, it will stop immediately. The Legal Services Commission considers that the most direct threat to the stability of its budget because that is the area causing the biggest drain. In all fairness, last year, the figures may have increased disproportionately because of the fact that a number of years' payments came through. However, the principle of control and predictability of legal aid spend is vital for the commission and public finances.

Dr Theresa Donaldson (Northern Ireland Legal Services Commission):

I will comment on the increase in the civil case costs. Those figures relate to 1999 and the comparator is with 2009. In 1999, the commission started to get bills in from cases related to children. The Children (Northern Ireland) Order 1995, with which I am familiar because of my previous role in the Northern Ireland Guardian Ad Litem Agency, introduced the role of the guardian into public law proceedings for children in 1996. The legislation also significantly increased legal representation for parties in such proceedings. So, parents who would have had

representation were guaranteed representation under the Order. The child was also guaranteed representation in public law children's proceedings.

Having come to work for the Legal Services Commission, it is my understanding that a legal aid impact assessment would not have been conducted on the effect of that legislation on the legal aid budget. Fortunately, awareness has now been raised of the importance of undertaking a legal aid impact assessment when new legislation is being introduced, so that provision for costs is made. However, at that stage, there would not have been such awareness. I offer that as part of the explanation for the increasing costs.

The Chairperson:

Do you accept that there was poor analysis of the overall picture for high cost cases in particular, given that the projected figure was five or six but there ended up being something like 53 or 54 cases?

Mr Andrews:

I fully understand the point. The commission shares the sense of frustration that underpins your observations, Chairperson. There has to be a process of establishing whether a case meets the criteria. That was the commission's responsibility, and it did that. However, it was very difficult for the commission to prove that individual cases did not achieve the criteria that were set. That is why we welcome the initiative to try to move the benchmark to a more objective test, which was an issue that formed part of the deliberations that the Committee had with my colleague Robert Crawford in another context. The commission fully supports that initiative and is keen to work through that to a successful conclusion. The system is very different from that which is perhaps used in other jurisdictions. However, it may find a resting place with us that will give us the budgetary control that we need.

The Chairperson:

You say that it was "very difficult". Will it be any easier in the future?

Mr Andrews:

I think it will be easier. At the risk of going into evidence that the Committee has already taken, if there is a more objective test, for example, things that are clearly demonstrable, rather than someone's opinion of how difficult something is going to be or on how many pieces of paper are

going to emerge, it will assist in making a decision. It would mean that the commission can simply say no. Were the facts to change, that can then be reassessed at that point in time. The more objective the test, the more chance we have of a successful and controlled delivery of that environment.

The Chairperson:

And more chance of meeting the targets.

Mr Andrews:

We all have to live within our budgets.

Ms Ní Chuilín:

Paul already mentioned this, but I am interested to find out whether the principle that applies to very high cost cases (VHCCs) will also apply to civil cases. As regards access to justice, if a benchmark or a cap is put on one section but not another, access to a choice of a representation will be skewed towards cost. I am keen for that to be addressed.

Also, the briefing paper states that the current proposals will produce revenue streams for the commission through the statutory charge reforms. Will you elaborate on that?

Mr Andrews:

I will take that in three parts. First, the commission is keen to establish some form of corresponding mechanism to the principle of controlling VHCCs. I am not quite clear in my mind that the mechanism will be exactly the same on the civil side, because we have found that family cases are very expensive. In fact, family cases tend to be the most expensive because of the way in which they proceed through the system to the High Court. They tend to be about children and public law and are very important. We, therefore, want to give priority to those cases, but we need to find a way of controlling them.

The commission is looking at trying to develop a high cost unit that manages cases, not necessarily in a contractual way but in a way in which is underpinned by the principles of contract through constant dialogue with the profession about how cases are progressing so that we can authorise further expenditure. We, therefore, want to encourage that principle.

Ms Ní Chuilín:

I want to come in on that point before you go into the second and third part of the question. I am not expecting you to comment on individual cases, but I wrote to you recently about a particular example. I am finding that more people are abusing the family courts, for all sorts of reasons and none, by using them to sort out personal disputes where there has been a breakdown in a relationship and children are involved. In some cases, rulings have been made, but I do not wish to stray into detail. The point is that there seems to be an endless pot for access to legal aid for one while the other has to fund their defence at a cost that spirals into thousands of pounds. There is a comparison, and the gap between very high cost cases and civil cases is closing rather than widening.

Mr Andrews:

That is an important point. The Committee has had to consider the area of levels of representation in its consideration of Crown Court work. The commission also has an interest in that area in respect of High Court work, and, perhaps, from a slightly different perspective.

To bring in your second point: legal aid, as it was originally conceived and designed, was, to put it in layman's terms, meant to create a level playing field so that an individual who was unable to litigate on their own behalf or to defend themselves against litigation was able to withstand that, whether against an insurance company, a public authority or whatever. Over time, we have got to the position where that can become skewed. Effectively, a legal aid certificate is a cost indemnity because it is almost impossible for a legally aided person to have costs awarded against them in that sense.

I will not comment on the individual context of your letter, but various MLAs have written to us to highlight constituents' concerns that there almost seems to be a continuing vendetta because one party is legally aided and the other is not. That should not be the case, and it is, effectively, an abuse of the system if that is proven to be case. I will leave that as a different matter, but you have our assurance that the commission thinks that that should not happen, and reform will need to address that directly.

Dr Donaldson:

We are conscious that those types of disputes can be very difficult for both parties and children. We will come back before the Committee to talk about the funding code, which is mentioned in

the papers that you have in front of you. One of the issues that we want to be developed through the funding code is mediation for those cases so that the dispute is not resolved in the courts. We know that the judiciary is also keen that mediation develops much more in Northern Ireland, and it is yet another cross-cutting issue with health. We are working closely with our health colleagues, but we need a greater pooling of resources so that we can develop the services that would help to prevent the sort of situation that you described.

Mr Andrews:

The final point that I owe you an answer on is the statutory charge, which also speaks to that very point. The Committee Clerk, in a manner that I can only say was careful of the Committee's well-being, was conscious of the proposal to bring a statutory charge paper before you next week with the funding code paper. Wisely, she thought better of that.

The statutory charge is a means whereby an almost private fee-paying mentality is applied to a case. In other words, legal aid is looked at as a loan. Funding is provided to enable a person to defend themselves and get money that they are due or to protect money that they say is theirs. If the person is successful and does not have their costs paid by the other side, the person pays the commission the difference from their winnings in recognition of the funding that had been provided. Historically, that has been applied in a way that generates very little money. Sometimes, that is because the legislation envisages that, and we were going to bring before the Committee ways of changing that so that. In effect, if someone is going to secure property or funds, there will be a regime that says that, if the full costs of their case are not met, they have an obligation to the legal aid fund to pay back the difference that may arise.

That is an important revenue stream for the commission, because, under the current arrangements, it forms additional moneys as part of our legal aid fund that can be spent in other areas. I am sorry about that long-winded answer, but I tried to cover those points.

Lord Browne:

Do the figures that we have been provided with on the cost of legal aid take account of any orders to pay costs to a client who is funded through legal aid? In those cases, the money granted in legal aid would be recovered.

Mr Andrews:

They do; they are hidden in those figures, but they are there. Perhaps I should offer another observation. We are not talking just about the cost to the legal aid fund. I suspect that Mr O'Dowd on the Public Accounts Committee when it considered the costs incurred to the public purse by the central claims unit. There was a concern that legal costs were exceeding the amount of damages being paid out. That is important because, for example, if someone is granted a legal aid certificate, and that individual wins, the cost does not fall to the legal aid fund but to the public authority. That is one important reason for ensuring that the level of representation that we give is appropriate to each case. Otherwise, we would merely be transferring the cost to another part of the public purse, so there needs to be a proper balance between ensuring the rights of an individual and having regard to the total cost of the litigation.

The Chairperson:

We thank the officials for their contribution, and I understand that they will be coming back in the not-too-distant future to brief the Committee on individual civil legal aid reform.