



Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT (Hansard)

Legal Aid, Sentencing and Punishment of Offenders Bill: Legislative Consent Motion

15 September 2011

NORTHERN IRELAND ASSEMBLY

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**Legal Aid, Sentencing and Punishment of Offenders Bill:
Legislative Consent Motion**

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Members present for all or part of the proceedings:

Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Seán Lynch
Mr Basil McCrea
Mr Alban Maginness
Mr Peter Weir

Witnesses:

Mr Robert Crawford) Northern Ireland Courts and Tribunals Service
Mr Paul Andrews) Northern Ireland Legal Services Commission

The Deputy Chairperson:

I welcome Robert Crawford, who is head of legal services and who has been here many times,
and Paul Andrews, who is the chief executive of the Legal Services Commission. We were to be
joined by a third colleague.

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

I am afraid that our colleague has another meeting to attend. However, we are happy to present ourselves. Paul Andrews is the chief executive of the Legal Services Commission; he will explain the benefits of what we are suggesting.

The Deputy Chairperson:

I remind everyone that the session is being recorded by Hansard. I hand over to you, Robert.

Mr Crawford:

Thank you very much, Chairman. We understand that legislative consent motions should be used rarely. The legal aid system in Northern Ireland, as members are well aware, is very different from that in England and Wales and Scotland. The use of a legislative consent motion would not be practical in most cases even if we felt that it was desirable. Knowing the sensitivity of some of the areas and members' interest in legal aid, we would not want to do that unless we felt that there

was substantial benefit for Northern Ireland in suggesting it. I am trying to explain why we think that this is a little bit different and why we are putting it before the Committee.

In all applications for legal aid, whether in Northern Ireland, England and Wales or Scotland, two tests must be met: the merit test, which is not relevant to what we are talking about today; and the means test. The means test ensures that legal aid resources are targeted at those who most need legal aid. England and Wales and Scotland have a fixed means test for civil and criminal legal aid; at present, we have a fixed threshold for civil legal aid only. However, there is still a means test for criminal legal aid, but it is on the basis of insufficient means, and that judgement is made by a court based on the information provided to it.

What happens in practice, and my colleague will explain it to the Committee in more detail if members wish, is that information is sought from organisations, principally the Department for Social Development's social security agencies, to allow passporting to take place. That means that applicants on most benefits are automatically eligible for legal aid; it is designed to speed up

the process, as it allows applications to be dealt with more quickly. Someone on remand who needs representation for a bail application can be dealt with quickly, and he or she is not held for longer than necessary. Passporting applies throughout Northern Ireland, England, Wales and Scotland; there is no difference in the principle.

However, England and Wales have just discovered that their approach does not have statutory underpinning for obtaining access to Northern Ireland details, either from the Department for Social Development (DSD) or the Department of Finance and Personnel (DFP). Those Departments have a data-sharing agreement with the Department for Work and Pensions (DWP), which handles all information for Scotland, England and Wales. Social security is not devolved in Scotland, which means that there are no difficulties there.

The fact that that data-sharing protocol is not underpinned by statute means that, for example, information on an individual from this jurisdiction who has to seek legal aid in England or Wales cannot be readily or quickly obtained by the Legal Services Commission in London. The

commission has just discovered that, because it mistakenly assumed that, like Scotland, social security policy was not devolved here. That is the origin of the request to us, but that is not the full story. The Legal Services Commission wants to repair that defect, which means that applications by folk from Northern Ireland who need legal aid in England or Wales can be dealt with more quickly. There is a benefit in fixing the situation.

We can fix that in our own compliance Bill, which we hope to introduce later this year. If that were the only issue, we would not be looking for a legislative consent motion for any urgent reason other than the benefit derived from making the changes as quickly as possible. However, there would be a benefit in having provision in the Bill going through the Westminster Parliament, because that would give us access to information from England, Wales and Scotland that we do not have. We would have to ask them to legislate for that, but we cannot do that. This is an opportunity to give the Legal Services Commission here access to that information.

We have told our colleagues in the Ministry of Justice (MOJ) that we believe that the Northern

Ireland Assembly would not approve a legislative consent motion unless there were to be a reciprocal arrangement. After some humming and hawing and a bit of an argument about how impractical that may be, we got the Department for Work and Pensions to agree, and we have a letter from the Minister of State for that Department confirming that fact. Our colleagues in the MOJ are prepared to amend the Bill as it passes through the UK Parliament to give us that access.

There is an additional benefit in that we currently have no statutory underpinning here for our own data sharing with DSD and DFP, as DWP in England and Wales holds all the information from the three jurisdictions. If we could enact that change in the Bill, the Legal Services Commission could set up an IT link to draw information directly from just one source, which would be extremely efficient. Paul Andrews will say a little bit about that, but it would mean that we would have much faster processing of applications, not just for people from England, Wales or Scotland who find themselves in trouble over here, but for own citizens. Otherwise we would have to take the legislative power ourselves and build a separate IT link to the Departments here.

We can ask our colleagues separately in England and Wales to make the legislative change, but this is the obvious opportunity to do it for all jurisdictions at the same time. They have agreed, as a quid pro quo for repairing the defect in their own arrangements for Northern Ireland people, to give us that amendment to the Bill. I hope that I have managed to explain it. I will allow Paul to explain the benefits to the Legal Services Commission and the number of cases that will be covered.

Mr Paul Andrews (Northern Ireland Legal Services Commission):

In civil or criminal cases where advice is given to an individual who appears before a solicitor or to someone who appears in a Magistrates' Court for the first time, most people in the Magistrates' Court in criminal cases will claim to be in receipt of benefit. Before a district judge will consider an application, there is a mechanism to allow the verification of that fact to be put before the district judges so that they can satisfy themselves that the means test has been satisfied. Approximately 18,000 transactions verifying criminal legal aid entitlement are made per annum at the Magistrates' Court.

Moreover, in civil legal aid we have a random sample of about 20% of the bills for the basic level of advice that is available to citizens at any point of Northern Ireland law to satisfy ourselves that the individual is, indeed, entitled. The responsibility is with the solicitor to apply the test; however, we have a backstop in doing such an assessment. We also have cases that are not part of that sample but which we think merit examination simply to satisfy ourselves that funds are being properly expended.

About 30,000 applications each year are assessed and verified for a means benefit. At present, all those transactions are assessed by a small unit of the Social Security Agency (SSA) based in Derry. The unit has responsibility for checking that on behalf of the Northern Ireland Courts and Tribunals Service and the Northern Ireland Legal Services Commission. Unfortunately, that office also has to assess the actual entitlement of full civil legal aid, which is a far more onerous task. My concern is that the limited number of staff available to them will be distracted from their core job by doing that important, if rather low level, work, which, to be honest, if the commission had access to the data link, it could take off their hands. That would not only enable us, as the spending authority, to satisfy ourselves, but would enable them to dedicate their

resources to more challenging functions. That would enable us to speed up the assessment of civil legal aid applications.

My colleague Mr Crawford mentioned the difficulty of someone who is in the wrong jurisdiction when getting their eligibility assessed; this would speed up considerably the circumstances in which those individuals find themselves. Having checked with colleagues who carry out those assessments, I understand that they have to go through an elaborate process to get some information, but they do not get all the information that they would get if it was someone from Northern Ireland and they were checking their own assessments. Therefore, with regard to value for money and safeguarding the public purse, it is an idea on which the commission is very keen. We welcome the Committee's support in moving forward in the way in which Mr Crawford has outlined.

Mr Crawford:

In the absence of a statutory underpinning for data sharing, a workaround is put into place by

protocols. However, it is slow. It means that information has to leave the commission, go to the Social Security Agency, be assessed there and come back again. If there were statutory underpinning for data sharing, Paul's staff could type in an individual's details and look that person up on the SSA database. The same would apply to information from England, Wales and Scotland if someone from one of those countries needed legal aid in this jurisdiction. Data sharing would expedite greatly the processing of legal aid. As we said, if someone were held on remand, legal aid could be granted immediately. A solicitor could represent that person in a bail application right away.

What makes that different from other requests for legislative consent motions is that we would gain much more out of it than England, Wales and Scotland. They are trying to fix a little fault that they have identified — although not so little for those whose applications are delayed in the system — whereas we would get much more out of it because we have none of that architecture in place in all. They, at least, have statutory underpinning for their own information.

Mr Andrews:

I want to assure the Committee that there would be necessary safeguards with regard to access to personal data. It would be no different from current arrangements whereby the commission can access the Courts and Tribunals Service's court system. We have the necessary controls in place to safeguard personal data there, and we would work closely with colleagues in DFP to ensure that that was in place, should that measure come to pass.

The Deputy Chairperson:

I will lead off with a couple of questions. You will be aware of discussions that the Committee has had on consent motions in the past, and I accept that opinions vary. How slow is the current procedure? How long does it take?

Mr Andrews:

There is a same-morning turnaround for criminal legal aid, because it is given priority. A district judge cannot adjudicate upon an application unless the information is confirmed; therefore, it is

given immediate priority by colleagues. The vast majority of such cases are verified, and a district judge can move forward with them. We are probably talking about turnaround times of 10 days to get a full assessment in the cases that we deal with in civil legal aid. Some will come back quickly, but it takes some 10 days for an entire batch to come back.

Our concern is more about how this erodes the capacity to deal with the more complicated civil legal aid applications, in which some of your constituents will seek legal assistance, as they get backed up because of the turnaround time. That is where the benefit would be: you would release the small number of staff who work in that area in the SSA to focus on their core statutory role of assessing civil legal aid eligibility, and there would be a mechanism that would automatically ensure the propriety of public expenditure in other areas.

Mr Crawford:

For clarification, the reference there is to criminal cases in the Northern Ireland jurisdiction. The fact that they are given immediate priority does not mean that the answer is immediate, whereas,

in the system that we are describing the IT link would allow that to be instantly available as the case is heard. It would, of course, be slower if we were dealing with an applicant from outside the jurisdiction, whether such a person were to be here or in a court in England and Wales. That would be much slower than our current arrangements, so for those people there could be a much more significant delay.

The Deputy Chairperson:

How many cases from outside the jurisdiction are we talking about?

Mr Andrews:

I do not have a figure available at present on the number of both civil and criminal cases from outside the jurisdiction. We can look at that if it would be of assistance.

The Deputy Chairperson:

Is the number large or small?

Mr Crawford:

Eighteen thousand is our own number. However, if you think about the number of folk who come across here in the summer from Scotland or wherever and get caught up in violence associated with football or parades, for example, in a bad year you could be talking about hundreds of applications. I would not like to put the figure higher than that, but that is the scale. If the individual involved does not get bail that day or in time to go back to their home, they have an overnight in Northern Ireland or, if it is the other way, an overnight in England or Scotland.

The Deputy Chairperson:

Are people using it to come under the threshold? Is that even possible?

Mr Andrews:

In all fairness, we have had no suggestion of that. A person is here and either faces a criminal charge that they have to answer or has an incident about which they must seek legal advice. We

are not concerned about the merit of why they seek legal aid; the issue is whether the financial application should be promptly assessed.

Mr A Maginness:

As ever, Mr Crawford is very persuasive. This is common sense and makes for a more efficient system, notwithstanding the problem that some may have in principle with a legislative consent motion. If that does not trouble colleagues, I think that we could proceed. It is that simple.

Mr Weir:

It is a win-win situation for everyone. There is always reluctance about legislative consent motions, but the aim is to close a small loophole in England. However, we can piggy-back to gain a high-level advantage, which is to be welcomed. Everyone will accept the principles and direction of travel. Are there any logistical barriers to implementation? Once the legislative consent motion is passed and becomes law, how quickly do you foresee the changes being fully implemented?

Mr Andrews:

To be perfectly honest, the real issue is IT. We already have the required specification to plug into the system, and my colleagues are in advanced discussions with DSD about how to put that in place. There would be a memorandum of understanding to safeguard personal data, which is a standard text under which my colleagues on the Scottish Legal Aid Board already operate. We have a ready-made architecture that we just need to put in place. Subject to agreement — I do not want to presume — it can be done quite quickly. It will take a matter of weeks to get the architecture in place following the —

Mr Weir:

With the intention that, once it becomes law, we would test the system.

Mr Andrews:

Yes.

Mr Weir:

That is very important. All of us, in different walks of government life, have seen the wheels come off whenever IT becomes involved. We are conscious, when faced with something that should be of gain to us, that the waters do not become muddied by an IT hiccup. It is a useful reassurance that there will be testing.

Mr Andrews:

The advantage to the commission is that if we need to apply resources to expedite the pace of checking we can do so; that is an advantage to us in the discharge of our business. In all fairness to what is a very small team in the SSA, they simply do not have that capacity. If we are overwhelmed by the volume of applicants that comes in at any point, they have the same number of staff to apply to it. I fully take your point about piloting the IT link, but, in addition, we have the capacity to put bodies at terminals to speed up processes.

Mr Lynch:

What evidence does the Department have that individuals have accessed legal aid fraudulently?

Is there evidence that access to legal aid has been granted on untrue or incomplete information?

Mr Andrews:

If I take it from my point of view, Mr Crawford can add anything that he wishes. The purpose of the criminal legal aid financial eligibility test is, in fact, to avoid such a scenario. Some 95% of applicants come back immediately as being in receipt of benefit. Some applicants are in receipt of a benefit, but that information has not been uploaded to the mainframe of the system, and in a couple of days' time, that position becomes clearer.

The benefit of the system is that a solicitor simply says to an applicant: if you are not in receipt of benefit, you must not say that you are because you will be found out. It is a preventative test.

In respect of civil legal aid, we tend to find individuals who are no longer in receipt of benefit when the bill is submitted but who were in receipt of benefit when they received the advice, as a solicitor would have had available to them the various documents that would prove an applicant's entitlement. This is an important safeguard. All parties should know that if, for example, it turns out that someone misrepresented their position to a solicitor — with documentation that appeared to be bona fide — and the solicitor acted on that basis, and we then do a spot check or query that finds the applicant not to have been entitled, we will not pay the solicitor. The solicitor, unfortunately, must then look to the individual to make good the loss. There is an important issue of prevention as well as the detection of abuse.

Mr Crawford:

I will add a couple of points to that on the interjurisdictional issue. We are told by DWP and our colleagues across the water in the Ministry of Justice that there is a problem because they simply cannot tell on their system, initially, whether somebody is from Northern Ireland and whether there is an authority for them to have got that data. Clearly, they have a problem, and are probably getting information at a level that they should not. That is why they want to fix that.

At present, we have no proper arrangement with the Department for Work and Pensions in England and Wales. That means that if somebody comes before a judge, or before the commission in the case of civil legal aid, the information on which they are assessed is, essentially, the information that they have given their solicitor. That could later turn out to be wrong or inaccurate, and it could go either way: the person might be refused legal aid or get it when they should not. That is an issue that we want to repair. That is probably one of the biggest benefits of getting the UK Parliament to legislate for it.

Mr Lynch:

We need to be careful that there is a balance and that people are not denied justice.

Mr Andrews:

If someone is in receipt of a mainstream benefit, they will automatically qualify for either civil or criminal legal aid before the Magistrates' Court. The point of the check is to demonstrate that the

money has been properly spent and that there is proper stewardship of public money. I am not aware of a person in receipt of a mainstream benefit being refused, unless they are in receipt of certain benefits that are not passported because of their particular tale. Tax credits can manifest themselves into quite an array of people's lives. However, traditional, basic-level benefits are a passporting mechanism that simply verify that someone is in receipt of benefits and therefore is entitled to legal aid.

Mr Crawford:

The passporting mechanism is designed to allow people to access legal aid as quickly as possible. There is no change in eligibility, and we have no concern that many people are getting legal aid who should not be getting it, other than the hypothetical possibilities that I mentioned. This is not designed to cut the number of people who get legal aid; it is designed to get the people who are entitled to it through the system faster. That is what we are aiming to achieve.

The Deputy Chairperson:

Have you been in consultation with DSD and DFP about this?

Mr Crawford:

Yes; we have spoken to officials in both Departments. The Minister for Social Development has already written to confirm that he is content with the proposal; we are awaiting similar correspondence from the Finance Minister. We understand from officials that they will advise him to agree with the proposals, but we have not yet received that correspondence. The Department for Work and Pensions Minister has also written confirming that he is content.

The Deputy Chairperson:

OK. No one else has indicated that they would like to ask any further questions.

Mr Crawford:

Chairman, may I urge you to recommend that the Committee, if it is minded to support this

measure, stress that it should be on the basis of reciprocity? We would like to feed that back strongly to our counterparts across the water so that we can ensure that we get what we need out of this.

The Deputy Chairperson:

Absolutely. I will seek members' views on whether we should support the legislative consent motion in these circumstances. I also advise members that the practice is for Committee staff to do a short report on our consultation.

Mr Weir:

It is a no-brainer. There does not seem to be a downside, and it can be of benefit to people. I also take on board what you and the witnesses said over the past few minutes. I am happy to propose that any approval we give be conditional upon reciprocity.

The Deputy Chairperson:

OK. Are there any other views?

Mr A Maginness:

I agree with Mr Weir.

Mr S Anderson:

I also support the motion.

The Deputy Chairperson:

I will make a formal proposal. Are members agreed?

Members indicated assent.