Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Access to Justice Review

6 October 2011

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 Seán Lynch
Ms Jennifer McCann
Mr Basil McCrea
Mr Alban Maginness
Mr Peter Weir
Mr Jim Wells

Witnesses:
Mr Jim Daniell)
Ms Catherine McClements) Access to Justice Review
Ms Angela Ritchie)

The Chairperson:

I welcome Mr Jim Daniell, head of the Access to Justice review team, and Ms Angela Ritchie and Ms Catherine McClements, who are here to brief the Committee on the findings of the final report into the Access to Justice review. Following that, members will have some questions, and, hopefully, you will be able to answer them.

Mr Jim Daniell (Access to Justice Review):

Thank you for the opportunity to talk to the Committee about the review. I know that you have had the report for some weeks and that you will have seen the Minister's statement on it when it was first published. You will be relieved to hear, therefore, that I am not going to summarise the whole thing. I will try to draw out three or four key points, after which we will be open to questions and discussion.

First, we are the review team; no one else was involved. It was a very big task. It turned out to be bigger and more wide-ranging than we anticipated when we started, not least because we got some very high-quality submissions from a range of organisations that went into a great deal of detail. Those submissions will be published on our website next week.

We would have liked to have gone into more depth on many of the issues that we examined. We want to make it clear that we do not claim a monopoly of wisdom on those issues. They are extremely complex, and we welcome the Minister's decision to listen to views and to consult before determining how to respond to the review.

In the review, we talk about principles that support access to justice. I want to emphasise our view of the importance of access to justice for all along with the rule of law, which we see as two sides of the same coin in any democracy. We are talking about individuals being able to defend themselves when accused of a crime, in line with our human rights obligations. We are talking about protecting the weak against the economically powerful or against arbitrary decision-making by public authorities and having access to a mechanism for handling breakdown in relationships, whether in the family, between neighbours or in the economic environment. We see legal aid as a critical part of that picture, as it enables those who could not otherwise afford it to have legal help and access to justice.

Despite economic difficulties and challenging times in public expenditure, we sought hard to retain most areas of civil legal aid in scope. It goes without saying that a large part of criminal legal aid remains in scope, unlike in England and Wales where substantial areas have been removed from scope, including private family law in many circumstances. There are a number of

reasons for that, one being our belief in the principles of access to justice in the first place. However, taking private family law as an example, there is the need to help and to protect spouses and children at a difficult time. It was apparent from court hearings that we attended that if removal from scope resulted in large numbers of unrepresented litigants, case management would be much more difficult, as would encouraging parties to negotiate and to come to solutions when cases were before the court. It would be seriously detrimental to the court system if major reductions were made in scope that led to an increase in unrepresented litigants.

One area that we suggest should be removed from the scope of legal aid and where we think access to justice would be enhanced is in the area of money damages. Given that the cases involve resources being made available, we think that we can use that to fund access to justice through conditional fee or insurance arrangements. That has the major advantage not only of reducing public expenditure but of providing a system whereby those who fall just outside financial eligibility for legal aid and who would find it very difficult to afford to take cases can do so through the conditional fee arrangement, for example.

However, legal aid is not about giving people a blank cheque to pursue claims indefinitely or to perpetuate disputes. When I was chairman of the Legal Services Commission, the most common area of complaint that I received was from people who were not legally aided. They complained that people who had legal aid could pursue cases almost indefinitely to the financial detriment of those who did not receive public funding. They felt that it put those people at an unfair advantage. Therefore, some of our recommendations are aimed at reinforcing the idea that those in receipt of legal aid should be subject to the same economic disciplines as those funding their own cases.

When we published the progress report, we received some criticism for focusing unduly on what people felt were financial savings. In the report, we make no apology for seeking value for money in this as in any other field of public expenditure. Ignoring the budgetary situation would have been irresponsible and would have guaranteed that our recommendations would have been ignored. Our recommendations will bring spend within budget by 2014-15. Subsequent to the publication of the report, I have had discussions with managers in the Legal Services Commission and elsewhere, and I am confident that what we have produced is a basis for making the £5

million savings that we are required to make if we are to come within budget in 2014-15; provided that all the savings that are expected on the criminal side are made and that nothing unexpected happens to the volume of legally aided cases. Our approach is not to seek savings at the expense of quality; several of our recommendations are about ensuring that quality of provision is enhanced.

Finance is a demand-led area of expenditure. It is not real to think that one can be absolutely precise about how much money will be spent on legal aid in three years' time. There has been a significant and welcome increase in police success in clearing up cases. However, I am sure that members understand that a corollary of that is that there will likely be an increase in legal aid for defence work. Everyone needs to take into account the impact of external factors on legal aid spend, be it the one that I just mentioned or more children being taken into care. Therefore, effective means of financial monitoring and forecasting to take account of those developments and to provide early warning are critical. It is not reasonable to expect absolute precision about what may happen to public expenditure in three years' time.

Although benchmarking financially against other systems is important, I want to lay down a marker and warn against taking too literally comparisons between expenditure per head in various jurisdictions. I will explain why, if members want to elaborate on that during questions.

I want to talk about a couple of key themes in the report. The first is that access to justice does not necessarily mean access to courts in all cases. At the Minister's request, and because we felt it absolutely right to do so, we focused very strongly on alternative dispute resolution, such as conciliation, mediation, collaborative law and the use of restorative techniques in neighbour disputes, antisocial behaviour and low-level crime. Such alternatives have many advantages, including cost and the early resolution of problems. However, although we make great play of that and other things in the report, we do not suggest that nothing is happening; a great deal is going on in those areas. The judiciary, through pre-action protocols, lays great stress on the importance of mediation and the exchange of information at an early stage to try to resolve issues before they develop into court cases. The Law Society and the Bar Council argue, quite rightly, that lawyers already spend a great deal of time in negotiations before they reach the courts.

I would like to mention the public information document 'Alternatives to Court in Northern Ireland', which was produced jointly by the ombudsman, the Northern Ireland Law Centre and Queen's. It gives an excellent overview of all the alternatives to resolving issues in court. In doing so, they have already gone a long way towards meeting one of our recommendations. Access to justice is not just about the services provided by lawyers. The voluntary sector has a role to play in providing advice on specialist areas, such as tribunals and housing, and that needs to be factored into our funding arrangements.

There has been much discussion of this recently, but I want to stress a fundamental point that we believe in: a healthy, independent, private sector legal profession is vital in safeguarding and sustaining access to justice on the criminal and civil side. We see its independence as an important pillar in ensuring public confidence in the justice system. However, that does not mean that the professions can be immune to change. Access to justice is partly about the legal profession, so we make no apology for referring to it. There is a range of issues here about structure, size, the relationship between the two parts of the profession and how it is regulated, some of which were covered by Professor Sir George Bain in his review five years ago. We do not go into that in great depth, but we identify it as extremely important for the future of access to justice in Northern Ireland and as something that may be worth further thought and discussion.

Finally — I am coming to the end — we make recommendations about the organisational structure for delivering access to justice and for the development of policy on it. With hindsight, the structures established by the Access to Justice (Northern Ireland) Order 2003, which followed England and Wales, might not have been best suited to the circumstances of Northern Ireland, which is a very different jurisdiction. In the report, we suggest that, through no fault of the people involved in the system, there has been some confusion about roles, some duplication and the governance and accountability systems have not been as straightforward as they might have been.

We have made recommendations about taking policy responsibility into the core of the Department of Justice and for a delivery body, which would be, in effect, an agency, to deliver legal aid. However, there is one very important caveat: although we recommend that that body should be an agency of the Department of Justice, there should be statutory provision that ensures

that individual decisions made on legal aid are made independent of government or of any sectional interest. We see the independence of decision-making by the legal services delivery body on decisions on legal aid as vital, alongside judicial independence, the independence of the Public Prosecution Service and having an independent legal profession.

A further organisational point on which I want to elaborate is the importance of investment in information technology. If our recommendations are to work and if, in the long term, significant savings in running costs are to be made, an upfront investment in improving IT systems is critical.

Although I will not go into great detail on it, I want to stress the importance of understanding that the substantive law and the procedural law, whether on crime, families or children, have a major impact on costs and the quality of access to justice. The Children (Northern Ireland) Order 1995, for example, provides for the procedures to be adopted when children are taken into care; it is a very court-based and expensive process. I think that England and Wales have had similar experience. Those may be issues that need to be looked at. We suggest that where Departments propose legislative or policy change, they should identify whether such changes are likely to have an impact on the courts or on the legal aid system and costs. If they do, the people who are initiating the change should be responsible for finding any additional resources to meet the additional costs.

In conclusion, we have made over 150 recommendations and concluding points. There will be a major challenge of implementation if all those are accepted. If that approach is adopted, it will require a rigorous regime of programme and project management and prioritisation. It will also require the Department of Justice and the Legal Services Commission to act as one in taking the agenda forward. It is not quite as daunting as it may look. However, not all the 159 points contained in the summary of recommendations and conclusions are action points. Many of the recommendations can be grouped together, because they are very closely interrelated, and they can be taken forward effectively as one project. It should be manageable.

The Chairperson:

Thank you very much. It is a very large piece of work. I think that you share my concern that it may get lost, because it is so large. What areas would you prioritise to make the biggest

improvements in the system?

Mr Daniell:

There are two or three. First, I would look at resources. It is worth bearing in mind that between the Legal Services Commission and the Court Service, there are 20 to 25 staff with policy responsibilities who can be charged with taking those matters forward. With the right skills set, it should be possible to programme-manage five or six identifiable key projects that can be taken forward. There may be some quick fixes, and there may be some on which legislation will be required.

One such project is the change in structure that will support service delivery. The preparation for that needs to start very quickly, otherwise it will be 2020 before anything happens. Another area that can be moved forward quickly is alternative dispute resolution, where a great deal of work has already taken place. To an extent, it is a question of bringing people together and looking at capacity to deliver against demand, looking at accreditation and quality and ensuring that the right steps are taken to make it happen. That can be moved forward quickly.

Another area that has to be addressed is the budget. We make the point in the report that it inevitably takes time to make changes that will have an impact on finances. There are some areas that will have to be addressed very quickly. How different types of cases are presented in court and remunerated, and the movement to standard fees across the board, is a very big task that will involve consultation and a great deal of research. However, it will yield dividends not just by saving money but by incentivising the early resolution of problems by having the right sort of fees structure and by encouraging people to think about the money that is being spent. The question of remuneration is crucial.

Another issue is financial eligibility for legal aid. It should be simplified to ensure that a transparent structure is developed that people can understand. We also suggest a far greater involvement of contributions. If more people made contributions — albeit small contributions in some cases — to the cost of their case, it would encourage them to think more as if they were paying for it all privately. Those areas are critical.

There are one or two other small things that can be taken forward without a great deal of effort. We mention children at an early stage in our report. The legal needs of children have not been addressed in the same way as the legal needs of others. It would not take much to move that forward quickly, because it would inform other decisions that might be taken further down the line. Finally, it is extremely important that people respond to the Minister's request for their views, as their responses will help him to make decisions on priorities.

Mr Weir:

Thank you for the report. The Chairperson mentioned the volume of stuff in it. I want to touch on just two aspects. First of all, you have highlighted mediation as an alternative to dispute resolution, and particularly, I suppose, as regards civil cases. I suppose, it is obviously an area, in which, I think, we will be keen to see greater use of mediation. I just wondered from a practical point of view, how we embody within the court system a greater sense of mediation and a greater need, perhaps, for diversion, particularly in civil cases. What are your thoughts on that?

I will ask you two questions at the same time. You mentioned, and I was intrigued by, one of the dilemmas that we often come across. You mentioned, shall we say, the limitations in drawing too much from other jurisdictions. Obviously, we are sometimes faced with either an argument about the unique circumstances of Northern Ireland or, on the flipside of the coin, particularly as regards expense, the feeling that we are out of kilter with other areas. I think it would be useful as guidance for the Committee if you could maybe expand on those remarks in terms of where you see the limitations, if you like, and, perhaps, what you would have concerns over. I appreciate that you could probably produce another volume on that.

Mr Daniell:

Those are two very different areas. As it came first in the report, I will deal with what I think is your concern about benchmarking on expenditure. Was that the key issue?

Mr Weir:

No. I have had dealings recently with constituents who have been involved in civil cases and who perhaps feel a little bit let down with the court system. They feel that they did not have sufficient opportunities for mediation or to look at alternative solutions rather than going directly

through the court system. I am also acutely aware of the constraint that, if mediation is going to work, you have to get both sides to want to be involved. Given those constraints, how could there be enhanced incentives to go down the mediation route, particularly as regards civil cases?

Mr Daniell:

On the civil side, a number of points can be made. You are absolutely right: there has to be a clear understanding that it takes two sides. Let me stress, however, that in several areas on the civil side, pre-action protocols issued by the judiciary already encourage people to think about mediation and negotiation to resolve issues before they come to court and at an early stage in the court process. However, other things can be done through the legal aid system and the legal profession to support that.

The Law Society already does a great deal of work to raise the understanding and knowledge of mediation on the part of its members. On the legal aid front, we can incentivise it by providing remuneration systems that encourage people to think at an early stage, particularly on the family side, that this is a road worth going down to secure results. If they can resolve a difficulty at an early stage through mediation, we can offer to make legal advice available to support them through the mediation process and provide legal aid to support the cost of a mediator. Should you decide not to go down the mediation road, or it does not work and you end up going to court, there may be cost implications.

I understand that the Committee will hear a presentation about the statutory charge later today. We might say: if you end up in court, it might cost you; whereas if you go down the mediation road it will not. Two things have to be going for this: there has to be the capacity, and there have to be trained mediators to make it happen. There is more to be done on that front to make it work. Both parties have to agree to go into mediation and want to make it work. A great deal hangs on the sort of advice that they are given at the outset. Encouraging legal practitioners to push at that open door is critical.

There is a different type of problem where all this can work very effectively. I was astonished at the amount of money that is spent on legal aid for injunctions. I found that many of them concerned neighbour disputes, antisocial behaviour, and cases brought under the Protection from

Harassment Order, and so on, where there is a civil process as well as a criminal one that can be gone down. We found cases where it was apparent that the courts were not being used to resolve disputes but to perpetuate them, to grandstand and to cause problems.

On that front, we want to develop processes whereby someone who comes with a neighbour dispute to the police, a lawyer or a citizens' advice bureau is not directed to the court system, as there are already many very good community-based groups and systems that work with people to resolve issues. In those circumstances, if a case goes to court, we should organise it in such a way that there is one court hearing, an order is made and that is it. Not what sometimes happens at the moment: there is a court hearing, a negotiation, everyone goes away thinking that they have resolved it, only to find in three months' time that they have not and the whole thing starts all over again. We should organise the remuneration system so that, whether in neighbour disputes or private family law, you have only one try and that is it. You cannot constantly take people back to court and get supported by public funds to do so.

That was a bit of a ramble, but that is the approach that we suggest. Capacity is important; if the capacity is there, it will help. However, I am not sure that the capacity is fully there at the moment. There is more to be done on incentivising legal advisers and citizens' advice bureaux and others to promote that as a way forward for both parties.

Mr Weir:

Can you answer my second question on jurisdictional comparisons?

Mr Daniell:

There are interesting jurisdictional comparisons. For example, in family law —

Mr Weir:

Sorry, you mentioned the broader bit, as regards access, that there was a limitation on reading too much across.

Mr Daniell:

There are limitations in the nature of what is provided and in finances. England and Wales is a

very large jurisdiction. I do not think that it has, in some respects, for example, the same degree of community infrastructure as Northern Ireland that can be exploited to help resolve issues and problems. The other point is that — and this is relevant to the financial issue — regions in England and Wales are very different. Some are more similar to Northern Ireland than others, and it is rather fatuous to try to make a comparison between Northern Ireland and England and Wales as a whole. It does not make a lot of sense. Even Scotland is a much bigger jurisdiction, as is the Republic, and we have to recognise that there are different solutions to different problems in different jurisdictions. It does not mean that we cannot learn from other people's experiences, but we do not have to follow blindly what they do. That is our suggested approach.

Mr McCartney:

Thank you very much for your presentation. Your report is a very lengthy and detailed piece of work. In his statement, the Minister said that this is an opportunity to reshape our justice system to meet the needs of people here. To assist us in interpreting that, could you give us a broad frame of where you think we will be reshaping? I am mindful that the introduction in the executive summary says:

> "It is apparent that change in this field has in the past not always proceeded at the desired pace".

If that is the case, how do we marry the need to reshape with what has happened in the past?

Mr Daniell:

I will answer the last point first because it is relevant. On the civil side, when the Legal Services Commission was set up, it was asked to undertake a big programme of civil reform. That was an enormous task, which was probably too big given all the other challenges that had to be undertaken to enable the work to be completed in the timescale originally envisaged. Most of what was proposed at that time on the civil side is now reasonably well advanced but has not yet been implemented. There are a lot of issues in the report, and I have mentioned one or two, such as the duplication of responsibility in various parts of the system, including the Legal Services Commission and the Court Service, as it was, that made life a little bit difficult. Moreover, from the outset, the commitment to effective project and programme management, which is a really disciplined exercise, was not as it might have been.

I will mention three or four areas where I think that this could significantly change the face of the system. The first is, as we have been discussing, alternative dispute resolution. In family law, a lot more can be achieved through alternative dispute resolution than is the case at the moment. I also think that, as we have mentioned, there are very different ways to approach local neighbourhood disputes, community disputes and antisocial behaviour.

We have raised issues about quality, which is a very difficult area. It is fair to say that we have not had large numbers of submissions calling into question the quality of service being provided through legal aid. However, on the other hand, none of us is really in a position to measure it. We will need to address very carefully the value-for-money aspect of how to create a system through which there can be an assurance that publicly funded money is going on services that are provided to a satisfactory quality. So, alternative dispute resolution, quality and financial discipline are important.

Another area to mention is public expenditure. We need to ensure as far as possible that public expenditure is managed and that decisions on expenditure are taken by the organisations and people who are being held to account for it. One problem was that accounting officers were expected to account for things that were completely outside their control. The work will include bringing the payment of fees, and so on, within the ambit of the Legal Services Commission or the Department of Justice's delivery body. That will help to enhance accountability in that sense. Those are some of the key things that I hope we can achieve.

Mr McCartney:

In the sentence that follows the previous one that I quoted, regarding how change can be slow, you say that you:

> "stress the importance of establishing at the outset effective *programme and project management* machinery".

Are you arguing for an implementation plan?

Mr Daniell:

Absolutely: I hesitate to use a hackneyed phrase about PRINCE methodology and that sort of thing, but there is a programme and a series of projects that are interrelated and that will also

require separate management. There has to be a programme plan to reflect all that and which includes the time frames required to achieve legislation, pass regulations, carry out consultation, and, very importantly, identifies the issues that are dependent on other parts of the plan happening. For example, we have recommended some things that will be carried out a lot more easily and effectively if there is a modern IT system in place in the commission. That almost goes through the whole programme — that we have business processes and an IT system that work and deliver.

Mr McCartney:

Forgive me; is that in one of your specific recommendations?

Mr Daniell:

Yes.

Mr McCartney:

I want to ask about value for money. You have set a target of saving £5 million. That will influence the way in which you approach things. As a representative for Foyle, I want to ask you about a local issue. You are recommending that the legal aid assessment office in Foyle be brought in-house. Is there a particular reason for that?

Mr Daniell:

There are a number of thoughts behind that, one of which is that that office effectively makes decisions on whether people are financially eligible to receive legal aid. That is a critical part of the commission's business. We are very clear that if we want to have an efficient approach to service delivery, having another body taking such a critical decision and deciding how many resources it wants to put into taking that decision is not going to lead to a holistic approach to coherent management.

The other thing that I need to say about this is that we are suggesting some new approaches to financial eligibility, and I think that the research that will follow our report will reflect that. Some of those new approaches will involve, on the civil side, less discretionary assessment. More standard allowances and disregards will be taken into account. On the criminal side, if, in

Magistrate's Courts, for example, a formal financial eligibility system is introduced, it will involve decisions being taken by the commission or, possibly, officers in the court rather than by the judiciary, as is the case now. There will need to be a system whereby access to benefits data, which is critical in determining financial eligibility, can be achieved directly.

The other day, I came across an example of what could happen in a judicial review of financial eligibility, which shows the way in which the system works. If someone wants, by judicial review, to challenge a decision on financial eligibility, it is not beyond the bounds of possibility that you would end up, in the court, with the Legal Services Commission there because it was, effectively, ultimately responsible for the decision; the legal aid assessment office there because it actually took the decision; and the Court Service as was, now the Department of Justice, there because it was responsible for the level of fees. I am not sure that that suggests a sensible way of approaching things. We have not made recommendations about the location of staff. However, we are making very clear recommendations that it makes a lot of sense for everyone involved in delivering the service being managed within one organisation.

Mr McCartney:

Has such a judicial review ever happened?

Mr Daniell:

I was told that as an anecdote the other day, but I will not swear to it having happened. However, it is a difficulty. The issue arises when different organisations have responsibilities for the same sort of issues and decisions. We will want to avoid that wherever possible. If an accounting officer is responsible for a decision, they should have control of the decision-makers.

Mr McCartney:

Have you made any recommendations on location?

Mr Daniell:

No, but we have made a recommendation that one organisation has responsibility for the issue.

Mr McCartney:

The initial fear is that there was a process of decentralisation and that this is nearly a clawback — when people say "in-house", others think of "in-building" rather than "in-house".

Mr Daniell:

I appreciate that, and I am sure that that point will be made to the Minister during the consultation phase.

Mr McCartney:

Thank you.

The Chairperson:

You are getting off lightly. I thank you and your team for coming along today. Thank you very much for your time and for the work that your team has carried out.

Mr Daniell:

Thank you.