Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Legal Aid Reform: Magistrates' Courts Remuneration

25 April 2013

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 Stewart Dickson
Mr Alex Easton
Mr Tom Elliott
Mr William Humphrey
Mr Seán Lynch
Ms Rosaleen McCorley
Mr Jim Wells

Witnesses:

Mr Robert Crawford	Department of Justice
Mr John Halliday	Department of Justice
Mr Jim Millar	Department of Justice

The Chairperson: I welcome Robert Crawford, who is the deputy director of the public legal services division in the Department of Justice (DOJ). I also welcome John Halliday and Jim Millar from the same division in the Department. Again, this session will be covered by Hansard.

Mr Robert Crawford (Department of Justice): I will summarise briefly how we propose to respond to the responses that were received in the consultation. This began as the outcome of a departmental internal review of Magistrates' Court fees. As members probably remember, by statute, we have to carry out a review every two years. That was the reason for that review. The consultation paper that went out set out three options for possible changes and invited suggestions on how to fill any gaps in the rules.

We did not, at that point, see any need for significant cuts in spending, and the review confirmed that the rules were operating very well and were delivering value for money. In the consultation paper, however, we set out three broad options for change. We received 11 responses, including four from representatives of the legal profession, namely the Bar Council, the Law Society, the Lurgan and Portadown Solicitors' Association and the Belfast Solicitors' Association. Along with colleagues, I met with representatives of the Bar Council, the Law Society and the Lurgan and Portadown Solicitors' Association at their request as part of the consultation.

Of the three options, we received most opposition to options 2 and 3. Option 2 was for a single-fee model, based on what applies in Scotland. Option 3 was similar to option 1 but had a 2% cut in all fees. Given the responses that we received, we have decided not to proceed with either of those options and are instead going for option 1, with some amendments that are based on the consultation.

To save time, I do not propose to say anything more about options 2 and 3, unless members have an interest in them.

There are three key proposals in option 1: the removal of the very high cost case (VHCC) status for Magistrates' Court fees; the removal of the guilty plea 2 fee; and an increase in fees for Police and Criminal Evidence Act 1984 (PACE) attendance at police stations where defendants are held in custody. A guilty plea 2 fee is paid where a case is listed for contest but the contest does not proceed. A guilty plea 1 fee is paid where the defendant pleads guilty prior to the case being listed for trial. So, if somebody pleads guilty at an early stage, they pay a guilty plea 1 fee, and, if they plead guilty later, they pay a guilty plea 2 fee. I just wanted to make you aware of what we mean by those terms.

In their responses, the legal profession representatives opposed the removal of the guilty plea 2 fee. There was quite a detailed discussion about that in the meetings that we had with members of the profession. The Legal Services Commission, the Public Prosecution Service (PPS) and the Police Superintendents' Association (PSA) supported the removal of the guilty plea 2 fee.

The Law Society, Belfast Solicitors' Association, the PPS, the Legal Services Commission and Police Superintendents' Association all said that the removal of VHCC status could or should be removed. The Law Society and Belfast Solicitors' Association said that, if it were removed, we should replace it with a page-count uplift that is similar to the uplift that is provided in the Crown Court fees under the 2011 rules. The Bar Council, Lurgan and Portadown Solicitors' Association and Disability Action opposed removal without suggesting any uplift or alternative.

Solicitors' representatives welcomed the increase in PACE fees but thought that the banded approach that we had set out in the proposals was unworkable. The barristers did not make any written comment, but the Bar Council representatives agreed at a meeting that an increase was justified. However, since the fee is not paid to them, they did not want to make any further comment.

I will detail our response to what we received. On the guilty plea 2 fee removal, we are proposing a new contest preparation fee of £100 that will be paid where circumstances require more work to be done beyond the first stage in case the defendant pleads guilty between then and the trial's beginning. That would cover circumstances where all the information that the defence team require has not been received. For example, that is for situations where there are issues of disclosure or matters on which further information has to be received before they can offer the client advice on whether to plead guilty. It could also apply in cases where the trial does not proceed because the PPS withdraws the charges but the defence team has put all the work in to advising its client in advance of that trial's taking place. Basically, we are saying that, where it appears that the work was necessary, the contest preparation fee of £100 will be paid. We have also made a change in that it will be paid to only one legal representative. If a solicitor is handling the case all the way through, that fee will be paid to them. If a barrister has been engaged and is working on the case, the fee will be paid to them. We are effectively saying that whoever does the work will get the fee. That is how this is intended to operate. I do not want to comment on the attitudes of the various legal representatives but, when we put that to them in discussion, there seemed to be a reasonable acknowledgement that we had gone some way towards meeting their concerns. Again, I am not speaking formally on their behalf.

In relation to the removal of very high cost cases, we are proposing to include an uplift for the more complex cases, where there are 750 pages or more of prosecution evidence. That is the same level at which we applied the uplift in the Crown Court fees rules, and we are therefore following the proposal that came from the Law Society and the Belfast Solicitors' Association. Again, without commenting on their formal position, that proposition appeared to be well received by the professional representatives.

On PACE, we propose to retain the increase. In other words, the amount of money that we were intending to put into PACE to increase the fees was £500,000. We had a particular banded approach set out in our proposals. Rather than persist with that, we are now simply suggesting that there be a 20% uplift in all the PACE fees. That will mean that the same money goes to the representatives and the same system that currently applies will be used. The representatives are comfortable with that, and it will meet their concerns about the banded approach, as we are not doing that any more. They will get the same increase in fees that, effectively, they would have got under our original proposal.

We have also agreed to include a number of new fees that were suggested to us by the legal profession. Those are detailed in the response to the consultation paper. Essentially, it is the list that was suggested by the legal representatives. We have taken on board just about everything that they put to us and we have created a new fee. There were genuine gaps. There were things that had

happened in the development of the law since the fees were produced, where a fee is just not payable because the rules do not provide for it. We filled those gaps by putting in a fee.

There is one slight change where we did not accept everything that they said, and that is in relation to third-party disclosure. That is where another organisation holds information and the defence team goes for a court order in order to get copies of that information. A good and common example of that is medical reports, where the health service holds medical reports, A&E reports, etc, in relation to an injury that is the subject of a criminal prosecution. Third-party disclosure applications may be made to get hold of those reports. The one slight change that we are proposing is that there would be only one payment for third-party disclosure application per case, because a lot of those reports can be held in different places. A single application can be made against a number of organisations, so there should be one appearance in court and one fee. What we want to avoid is a situation where, through inefficiency, a number of separate applications are made and, therefore, a number of separate fees are paid. We are saying: one fee per case. That will effectively be the norm anyway, because one set of reports will be required. We simply do not want to encourage any inefficiency in the way that defence teams take forward those applications.

In our meetings with the Law Society and the Bar Council, we discussed the length of time between the reviews of these rules. Since they generally seem to be operating very well, we propose that the next statutory review should be in three years rather than in two; and we propose to put that into the rules.

Some points came up in consultation that were not addressed in the revised rules. The Public Prosecution Service recommended introducing a public defender service for Magistrates' Court cases. We do not propose to put anything of that nature into these rules, because that is not what we went out to consult on, but we propose to consider that issue and bring forward proposals to our Minister. If he agrees, we will bring forward proposals for consultation. The timescale for that would be, we hope, by the autumn, if the Minister agrees to take it forward.

Disability Action expressed concern about access to justice for defendants who have difficulties with speech, language and communication. It expressed concern about the removal of VHCC status. We do not believe that that removal will change access to justice for those persons, but we recognise that that concern is real. Colleagues are taking forward a project to introduce a registered intermediary scheme, which will help with precisely those difficulties. Therefore, the Department will want to take forward remedies for those issues through that route, rather than through any legal aid provision. We do not think that the changes that we are making to legal aid will impact on those people at all.

Disability Action also gave us some helpful information on identifying and gathering statistics for persons with disabilities to help with our identification for equality impact assessment. We want to discuss further with it how we can use that in the future. We do not believe that it has an impact on this set of fees, but it was a very helpful response.

I will mention two other matters for follow-up. We received from the solicitors' profession a suggestion that we should examine the level of charging of offences that PPS applies. There is a perception among solicitors that the Public Prosecution Service will apply the highest possible charge for going to court and then reduce that charge before the trial begins. That is a problem worth pursuing with PPS, and we propose to take it up. The consequence for the legal aid fund is that the fee that is paid is the fee for the original charge. If somebody is charged with grievous bodily harm, and, before the trial, that is reduced to, for example, assault occasioning actual bodily harm, the solicitor and barrister will get the fee for the higher charge. The example that I have used could be a Crown Court case rather than a Magistrates' Court case, but it applies to both Magistrates' Court fees and Crown Court fees. We will address it across the board.

Finally, I should mention that, since the consultation went out — a brief mention of this was made during our meetings with the profession — there has been a judgement on fine default and how that should be processed. The essence of the judgement is that, before anyone is committed to prison, there should be a further hearing in front of a court. The Court Service and the Department are currently looking at how to respond to that judgement, and what procedures or processes to put in place. It is not certain at this stage that the only option is to bring somebody back to court. There could be a pursuing of the fees through civil action, for example. The issue has been in the media. We propose to put in a new fee, if one is required in the future, following the work that the Department and the Court Service are taking forward. We cannot do that at the moment because we do not know what that answer is going to be. However, we said to the profession — I promised that I would say it here — that we would put in an additional fee if required.

The Chairperson: Thank you. I have a couple of questions. On the guilty plea 2 removal, you named some organisations including the PPS and the police. Who also said that they would welcome its removal? I think that there were three.

Mr Crawford: The Police Superintendents' Association.

The Chairperson: What was its rationale for welcoming that? How did it see that benefiting the work in which it is involved?

Mr Crawford: Essentially, I would summarise the three contributions as saying that there was no need for a separate guilty plea 2 fee, and that simply having one guilty plea fee would be adequate and sufficient.

The Chairperson: The superintendents do not benefit from the legal profession getting fees, so there is obviously a business interest for the guilty plea 2 fee to be abolished. Did it elaborate on why it was a good thing for it to be removed?

Mr Crawford: Colleagues can help me, but the main point was that it did not see a need for it in the system.

Mr John Halliday (Department of Justice): There was also a feeling that it may, in some circumstances, encourage delay.

The Chairperson: That is what I was trying to get to.

Mr Crawford: The overall perception, which is set out in the Criminal Justice Inspection report on guilty pleas, is that there may be a perceived incentive for a case to be delayed because of the higher fee available at guilty plea 2 stage. We cannot fully substantiate that in the sense that we could find no evidence that that was the behaviour. That said, we believe that removing the guilty plea 2 fee removes any perception of that incentive.

The Chairperson: So, on one hand, we remove it, but you then bring in the contest preparation fee. I am sympathetic to the position that the police and others have indicated to me on removing the guilty plea 2 fee, but how will we ensure that the contest preparation fee does not continue that perception?

Mr Crawford: I will give an example. As it is paid to only one legal representative, if a case is more complicated and a barrister is involved, there is no incentive for the solicitor to extend the length of time for that case because he gets no extra money whatsoever. It will go to the barrister. The argument is that, effectively, that will happen only if the work genuinely needs to be done. The level of £100 is not so high as to create a massive incentive to do the extra work that is involved in many of these cases. In a number of cases, it is not the fault, if I can put it that way, of the defence team that the case is delayed. It may be that additional reports or evidence are required. It is simply not possible for a guilty plea to be entered before the case is listed. We felt that to remove the guilty plea 2 fee completely without providing some recognition that, in some cases, additional work will be required would be rather unfair, because there are a number and a class of cases that it will apply to.

I will tease out the difference in money terms. The savings that we had estimated from the removal of the guilty plea 2 fee were £567,000. That is a quite a chunk of savings. The cost of putting back in the contest preparation fee is £150,000. So you can see that it is not a simple replacement by any means. The cases that get it and the amount of money paid reduce that incentive considerably.

The Chairperson: I am interested in the cost of high page count. You said that 750 pages will be the threshold. Why is it 750 and not 700? Could people manufacture extra pages just to get them to 750? Explain that to me.

Mr Crawford: The page count refers to the number of pages of prosecution evidence. That is effectively the bundle that is created at the start of the trial. How that number of pages is determined is in the hands of the Public Prosecution Service, which has no interest in inflating it.

The Chairperson: I accept that.

Mr Crawford: It is a figure over which the defence team has no control. We have used the figure of 750 pages in the Crown Court rules as a good place to draw the line, based on an analysis of the number of pages of evidence in cases in Northern Ireland. England and Wales have a page count driven system that we think is overcomplicated, but they have different levels of prosecution evidence. It is not a direct comparator. The figure of 750 pages in the Crown Court applies to a tiny number of cases. We are looking at perhaps fewer than 5% of Crown Court cases, which, of course, entail more evidence than the Magistrates' Court cases. In the Magistrates' Courts, it would probably be about 1% to 2% at most, and possibly considerably less. Those are the exceptional cases that come along once every few years. It is not common to have more than 100 pages of evidence in a Magistrates' Court case.

The Chairperson: You mentioned public defenders. Can you comment on that idea again? Are you now looking at developing that as a policy that will be brought forward and consulted on?

Mr Crawford: The access to justice review recommended that we consider setting up a public defender service. In the programme of projects that the Minister published in the departmental action plan on 2 July last year, we said that we would consider it, but that it was not a high priority for us at that time. The Public Prosecution Service has now recommended that we introduce a public defender service for Magistrates' Court cases. In response to that recommendation, we have decided to do more detailed consideration and bring that forward as a project. If there is ministerial approval for that, we would aim to bring forward proposals for consultation in the autumn at the earliest.

The Chairperson: Why not Crown Court cases as well?

Mr Crawford: Public defender services in England and Wales were introduced at the lower tier first. That allows the service to develop and build up its expertise and experience before it is introduced in more complex cases where the penalties for the defendant are more significant. Scotland has a very well developed public defender service, whereas England's is rather less developed. However, one of the concerns about the current proposals, which were published a few weeks ago, is whether the public defender service might need to be enhanced, depending on how the proposals go through in the consultation. We aim to develop the thinking and to go out to consultation. As this stage, we are treating the issue as a response to a consultation response that we received. We have not, as yet, got the ministerial green light to take it forward as a proposal to consult on in the autumn. What we are saying is that we, as departmental officials, will develop the work in order to take it to the stage where the Minister can make that decision.

The Chairperson: I will be very interested to see how that develops. Maybe you cannot answer this next point; perhaps you do want to comment on the case in the media today around legal aid and the representation of an individual. However, if we had a public defender service and that had been applicable to Crown Court cases, would that have meant that the Department could have avoided the situation now where it is being ordered to find some way to remedy the fees issue and legal aid representation?

Mr Crawford: I will avoid commenting on that case because we have already indicated that we wish to appeal the judgment. However, I will make a couple of points about the general difficulty. First, the cases that a public defender service can take on would need to be defined in statute. So, depending on how the public defender service was set up, it might or might not have been an option in order to take on a case where there was no other lawyer to be found. The difficulty will depend on whether the lawyer who cannot be found is a solicitor or a barrister and the level of the case that the public defender service is experienced enough to take on at the time. I want to avoid speaking about an individual case, but I envisage that it will be some time before any public defender service set up in Northern Ireland feels experienced enough to take on a very serious criminal charge in the Crown Court. Certainly, our proposal is to examine, in the first instance, only Magistrates' Court provision. In England, Wales and Scotland, they certainly do take on some Crown Court work, so it is clearly possible for a public defender service to do that.

The Chairperson: It would certainly help to have a public defender service because, if the legal profession decided to withdraw its services again, it could kick in to make sure that the system did not grind to a halt.

Mr Crawford: I think that that is an argument in favour of a public defender service. Another strong argument is that seeing how much work is done on cases and the time taken on them provides a very good benchmark for assessing what levels the fees should be set at, because you have an automatic understanding of the level of work, time and effort that is required.

The Chairperson: I look forward to seeing some of that work.

Ms McCorley: Go raibh maith agat. Thank you for the presentation. Following on with the same theme, can the public be assured that we do not end up in a situation where, because of the removal of the very high cost case provision, somebody cannot get legal representation? What if nobody wants to take on that case because they might not get their costs, even though those costs might be genuinely applicable?

Mr Crawford: There are a couple of points that arise from that. In relation to Magistrates' Court fees, we definitely do not think that removing very high cost case status will have that effect, simply because the actual amount of additional money was not enormous. By putting in the page count for the genuinely very big cases, we hope that we have addressed most of that. The comments that we got from some of the legal representatives were that it could be removed, providing that there was a page count uplift. We think that we have dealt with some of that concern. That is the Magistrates' Courts. In the Crown Court rules, effectively we dealt with that issue a couple of years ago when we removed very high cost case provision. Of course, there was a strike by solicitors, but, once the strike was over, we have not had a refusal by legal representatives to take on cases because of the lack of very high cost case provision. The case that was in court today is not about that. It is about the lack of a particular fee. Again, I do not want to get into the detail of that.

You asked whether we can be sure that we will always have a supply of lawyers to take on cases at particular fees. That is one of the statutory criteria that we have to consider. We have to make a judgment on that. As well as making a judgement on that, the other statutory obligation of care is to the public purse and ensuring value for money. It is a balancing act. Throughout all the consultation processes, we try to get the balance right. However, your concern is one that we always have to consider when we bring forward any rules. In relation to these rules, we are confident that it should not be an issue.

Ms McCorley: I have one other question. In the consultation responses, in the third part of option 1, you report that the PACE fees are being increased but that the legal representatives bodies did not accept any of the three measures. Why would they be opposed to that?

Mr Crawford: They very much welcomed the increase in PACE fees.

Ms McCorley: Maybe it is just the way that it is written, but it seemed like —

Mr Crawford: Sorry, it was maybe the way that I presented it. They welcomed the increase in PACE fees and did not quarrel much about the level by which they were increasing. They seemed reasonably content with the 20% increase. What they did not like was the way we had set out a banded approach of up to one hour, then up to three hours, etc. They preferred to calculate the precise number of hours that they worked and put in a claim on that basis, which is what they do at present. We looked at the money that we put into our system, which we thought was very clever but they said was unworkable, and put the same money into the old methods. So they will get a 20% uplift but will be able to use the familiar old way of claiming it.

Ms McCorley: Thank you. I wondered about that.

Mr Crawford: It was probably the way that I presented it. Apologies.

Mr McCartney: I want to go back to the commentary around the page count issue. You said that it would not be in the interests of the prosecution service to go over 750 pages. Why would it not be in its interest?

Mr Crawford: Really, what I was trying to say there is that it is not in the interest of those in the prosecution service to put in more prosecution evidence than they need. They certainly will not have in their mind that 750 pages means anything at all because it does not, from their point of view. If they have 100 pages of evidence to put to a Magistrates' Court trial, which would be quite a significant

number, they have certainly no reason to put another 50 pages in and give the defence more material and take more prosecution time to present the material in court. That is managed by those in the prosecution service. It is always in their mind that they do not put in material that is not relevant. Apart from anything else, they would be criticised by the magistrate for that.

Mr McCartney: I thought maybe the temptation was there because, when you go over 750 pages, there is a cost implication.

Mr Crawford: Not directly. That is not the driver.

The Chairperson: Thank you very much.

Mr Crawford: I would like to add something, Chairman, on the paper that we provided to the Committee, since you mentioned it. We put in the key legal aid reform projects. If the Committee felt that there were any gaps in that or wanted us to broaden that out to the other projects that are different, we would be happy to provide more information.

The Chairperson: Just finally, I picked up in the paper that the changes are pretty much cost neutral. There was a small saving — I believe it you anticipated £200,000 — but primarily it is cost neutral.

Mr Crawford: I was hoping to get away without that question because, when we calculate the changes that we made to the proposals, they work out at about £50,000 more. However, we are costing the very high cost case figure on existing figures as an £83,000 saving. The forecast from the Legal Services Commission was that, if we did not do anything, the cost of that would rise considerably to maybe £300,000 or thereabouts, so we still hope to make a saving when it all works through. At the moment, however, I am afraid that we are putting a little bit of money back in.

The Chairperson: My summary is that this is about making the system more equitable in respect of these legal aid changes. It is not really driven by a cost saving.

Mr Crawford: Our internal review found that the rules were working well and the operation was very good. I will give you figures from 2011-12. The average cost of a Magistrates' Court case in Northern Ireland was £484. The average cost in England and Wales was £474, so we are close to the most comparable jurisdictions. It is not like Crown Court fees, where there is a big difference. Furthermore, in Northern Ireland, Magistrates' Courts deal with more serious offences, so a little bit more expense is justified. That gives us the confidence that we do not need to make deep cuts here.

The Chairperson: All right. Thank you.