Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Civil Legal Aid Consultation: Department of Justice

24 September 2014

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 Tom Elliott
Mr William Humphrey
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Patsy McGlone

Witnesses:

Ms Laura Davison	Department of Justice
Ms Deirdre McDaid	Department of Justice
Mr Mark McGuckin	Department of Justice
Mr Mark McGuicken	Department of Justice

The Chairperson: From the public legal services division in the Department, I welcome Mark McGuckin, deputy director; Mark McGuicken; Laura Davison; and Deirdre McDaid. You are here to talk to us about the scope of civil legal aid. You will be aware that representatives of the Bar Council and the Law Society were here last week. The Committee will write formally to the Department about that, but it might be helpful if you touched briefly on some of the key points addressed in that session. If we can deal with the scope first, we will then revisit the issues brought up last week.

Mr Mark McGuckin (Department of Justice): Thank you very much, Chairman, for your introduction and for the opportunity to present to the Committee today. The purpose of our visit is to outline our proposal for a consultation on options that could lead to a reduction in the scope of civil legal aid.

The Committee has before it a draft consultation document that we propose to issue. We do not normally take up the time of the Committee with an oral presentation at this stage in the process. However, given the nature of the topic, I welcome the opportunity to brief the Committee on some of the rationale for the approach.

We recognise that any proposals to reduce the scope of legal aid will not be popular and will be seen as potentially representing a reduction in the level of service available. That is why we want to consult on a number of options before developing firm proposals. However, because the resource available to support publicly funded legal services is not unlimited, it is important to ensure that the available budget is properly targeted.

Where alternative mechanisms are available, it is important that their use is maximised. Where issues could be better dealt with outside the adversarial arena of a court room, doing so should be encouraged. Where individuals can afford to cover the costs of the legal action, they should do so, thus helping to secure provision for those most in need.

Spend on legal aid still exceeds the available budget, so there is a need to prioritise the increasingly scarce resource available. We also need to develop the debate started in the access to justice review and follow up on some of the areas highlighted in its report. That work dovetails with the further review recently launched by the Department, which is being undertaken by Jim Daniell, namely the access to justice review part 2. It also complements the consultation issued by the Department for Social Development this week to consider a strategy for the future delivery of generalist advice services. It is important to emphasise that that is an open consultation with options presented for consideration. The document does not contain proposals; we want to hear what people have to say.

Civil legal aid absorbs about 50% of legal spend, and, in 2013-14, that amounted to a cash spend in excess of £50 million. That involved almost 57,000 acts of assistance across a wide range of issues, from advice in a solicitor's office on a point of law to providing representation in complex public family law cases.

The access to justice review and our research identified areas where alternative provision is available, or even where recourse to a solicitor is not necessarily the most appropriate approach. In developing the options for this consultation, we sought to ascertain how changes might be made that would have the least overall impact but reduce the overall spend.

Consequently, our consultation seeks views across three levels: first, where sources of advice and assistance are already available, such as in the areas of benefits or immigration; secondly, where money or property is at the core of the dispute, so there is clearly an alternative source of funding; and, thirdly, the consideration of restricting or removing private family law.

As I said, these are options on which we are keen to hear views. We have set out in the document the background to the particular issues involved and how the specific needs might be met by an alternative approach, which, in many cases, is already available. So, for example, in benefits, a citizen can approach a solicitor under the legal advice and assistance scheme: the so-called green form scheme. No doubt, they will get professional advice, but specific expert advice is available through a range of providers including Advice NI, Citizens Advice and Belfast Citywide Tribunal Service.

Other Departments and their agencies also offer advice specific to their areas of responsibility. The Social Security Agency, for example, offers online and face-to-face advice on the full range of benefits that they are responsible for administering. The Department of Enterprise, Trade and Investment also funds Debt Action NI, which provides free, independent and impartial debt advice services. The consultation, therefore, poses this question: if the legal aid budget is under pressure, why should these queries not be redirected to the bodies specifically set up for the purpose of providing advice? That has the potential to lead to a quicker and more effective solution.

Also in this area is the need for a realignment of the merits test so that it is appropriately robust and helps to ensure that funding is targeted properly. It would look, for example, at the prospects of success of a case and, where money is involved, the cost:benefit ratio. This would facilitate the application of a more robust test before awarding funding. The budget approach is likely to be more reflective of the consideration of a privately funded client.

The second area is where money or property is at the core of the dispute. That could cover issues such as contract, consumer issues and actions in respect of , for example, debt, inheritance claims and probate claims. Often, these are about practical rather than legal matters, and many do not require specialist legal advice to be paid for from the legal aid fund. The aim of our proposals is to discourage unnecessary and adversarial litigation at public expense. There is a need to avoid large expenditure for very little gain, which can happen with land cases involving boundary disputes between neighbours over very small pieces of land. Legal aid has been used to support cases on which a privately paying client would be unlikely to litigate. If there are changes in that area, it would be important to include appropriate safeguards. Therefore, debt cases where there is an immediate risk of homelessness would continue to be a priority area.

Finally, we have included a section on private family law. This has been removed from scope elsewhere, and there are lessons to be learned. However, it is likely that improvements can also be

made. We would like to hear views on family law and, in particular, the suggestion that legal aid can inadvertently lengthen the time taken to resolve disputes. There are examples of multiple hearings for relatively minor issues. It is not appropriate for the justice system to be used to try to resolve disputes that could be better resolved elsewhere. Legal aid funding in private family law disputes needs to be structured in such a way that facilitates resolution but does not involve the taxpayer funding parties to use the courts as a means of perpetuating and exacerbating a dispute. There is a reference in the document to the use of alternative mechanisms such as mediation to take forward and address effectively disputes in those areas.

As I said at the outset, measures that reduce the availability of legal aid are unlikely to be popular. In our consultation document, we have sought to identify options where alternatives are already available or where issues could be funded or resolved in a different way. That would allow the limited legal aid budget to be focused: on areas of high priority ; and in order to protect the most vulnerable. Once the consultation is complete, we will wish to analyse the responses quickly and come back to the Committee with our thoughts on how we should proceed. In the meantime, I am happy to hear any observations or address any questions that the Committee might have at this stage.

The Chairperson: Mark, I will not prolong this section too much. I am content that it goes out for consultation, subject to the Committee being of a similar view. It is inevitable that we have to head down that route, given how stretched the legal aid budget is. Whether or not I agree with everything being suggested, I will await the outcome of the consultation document. The status quo cannot remain, and there will have to be change because we simply cannot keep going the way that we are going. I have no questions on the specifics. There are areas that I have some concern about, but I am happy to wait for the consultation response to come in.

Mr Elliott: Thanks for the presentation. My one query is on private law and the Children (Northern Ireland) Order 1995. The suggested savings in that section are £9·2 million, so it is one of the bigger areas. My concern is the protection of the rights of the child. Would there be any impact on that?

Mr McGuckin: That is not a savings figure of £9·2 million; that is the cost of private family law overall. Within that, there is a hell of a lot of scope going on. Laura, would you like to talk about protecting the rights of the child, because there is a lot of stuff in public family law that we are not talking about at all?

Ms Laura Davison (Department of Justice): It is specific to private family law cases, which would be about the nature of a contact or residence. That is the most common application. The protection of the child would ordinarily come up in public law cases, such as article 50 cases, where the state would take the child into care. A solicitor would be appointed purely to represent the rights of the child by the Guardian Ad Litem Agency. The consultation document does not suggest any change to the funding of those sorts of cases. It is specifically looking at private law cases, where perhaps there are very prolonged legal proceedings regarding, for example, time or date of contact. If there were protection issues over the child, then exceptions would have to be made. We are trying to focus on the private law cases of residence and contact, which can sometimes be very prolonged over very small issues.

Mr Elliott: That explains it better.

Mr McCartney: This is going out for consultation and we will get a better interrogation of it as the consultation ends, but I have two observations. The proposal in option 2 is to rule out categories of cases. I see here that one category concerns debt, unless the home is at risk. However, there are other types of cases, such as bankruptcy measures or actions regarding land. If there was a follow-on and a home was at risk as a result of those actions, would provision be made for civil legal aid?

Mr McGuckin: The consultation document is looking at a broad brush approach at the moment and we will then look for issues coming back from it. In those sorts of cases, the home would not necessarily be at risk, but if it got across into that situation, we would need to look to see how provision could be made for those types of cases if they came up.

Mr McCartney: I know that we are in consultation, but, when a category is ruled out — and, in reading the document, I see that bankruptcy is ruled out — then if someone goes through a bankruptcy proceeding with no good legal advice and, as part of the bankruptcy, they lose their home, we are then not protecting them by giving them proper legal representation.

Mr McGuckin: I am not sure where that would come in as regards bankruptcy or debt, but, as you said, we are going through a consultation process in order to bring actual, firm proposals back to you. We will take that point on board and ensure that it is covered, identified, assessed and addressed.

Mr McCartney: Similarly, the contention is made that there are cases where there is over-representation; I have no doubt that there are such cases. Sometimes, it is presented that all cases are over-represented. It would be beneficial for us to have evidence of cases, and the number of cases, where the Department feels that there is over-representation. You could then put in place procedures and guidelines to make sure that there is not over-representation to the effect that people are not under-represented.

We saw that with two counsel. Two counsel became an issue but, under close examination, if the guidelines had been properly implemented then there would not have been two counsel in the majority of cases allowed to slip through the system for whatever reason. I think that we will have to do that here. There may be cases where there has to be multiple representation, but if you close that down, then you leave people unprotected and under-represented.

Mr McGuckin: It is about redressing the balance and getting the balance right as to where things should be.

Mr Lynch: You were saying, Mark, that there is a lot of duplication in advice services here. What are the estimated cost savings in that area?

Mr McGuckin: I think that we are looking at £400,000 in respect of cases where alternative provision is available. It is a small amount, but all those small amounts add up and help to address the wider issues.

Mr A Maginness: In relation to option 3, the total cost is £9 million. Is that over three years?

Mr McGuckin: No, that is a single year.

Mr A Maginness: It costs £9 million every year.

Mr McGuckin: Yes.

Mr A Maginness: You are saying that the removal of private family cases, as opposed to public law cases, would save £9 million a year.

Mr McGuckin: If you just took them out entirely.

Mr A Maginness: Yes, but you cannot do that.

Mr McGuckin: It is identified as a cost rather than as any sort of projected saving whatsoever.

Mr A Maginness: You talk about residence and contact with a child. Is that really custody? Is that how you would describe it, Ms Davison?

Ms Davison: It used to be referred to as that. Residence would obviously be where the child resides. Contact would be the arranged contact between two parents at a time and place of suitability. As we say in the statement, we recognise that some of those can present difficult issues, but the majority would not necessarily raise those difficult issues.

Mr A Maginness: I wish I could share that view. I think they are extremely difficult cases; not all of them, of course, but they are cases in which people are involved emotionally, where there are huge differences between the parties and where children are torn between parents. Those are awful cases. I am not saying that every case involves extreme trauma, but emotional ties between parents and children are so difficult.

Mr McGuckin: There are examples of cases that have those sorts of criteria attached to them. There may well even be cases where the child is used as a weapon between warring parties, and you certainly do not want to get into that sort of area. We have included it in the consultation document to

get some views, to highlight those sorts of issues and to identify the other issues so that, by redressing the balance in some way, you could actually grant better protection to the child and resolve the issues much more quickly. That is the sort of thing that we would really like to get a dialogue going on.

Mr A Maginness: Without going into the merits or demerits of those things, I will say that, if there were an alternative way of doing it, I think we would have discovered it a long time ago. Has any costing been done in relation to mediation? That is seen as an alternative. Who would pay for the mediation?

Mr McGuckin: That is one of the issues on which we would need to consult. There is a small amount of mediation currently paid for by the legal aid fund, but it is very limited. It is an expensive alternative. If you were looking at removing private family law or elements of that and making alternative provision through mediation, clearly you would have to do a cost-benefit analysis of that. It certainly can be effective, but it is not always effective and it is not necessarily a panacea. We have flagged that up in the consultation document as an issue that we will need to explore further, but it will be done in the context of the other proposals.

Mr A Maginness: It would not be paid by another Department. You are not passing the parcel.

Mr McGuckin: There is currently a pre-court mediation service within the Department of Health, Social Service and Public Safety. We require other Departments, when they are introducing new policies that will have an impact on the legal aid fund, to carry out a legal aid assessment. Sometimes we even try to get some money off them to cover the costs, but, clearly, if we were looking at alternative provision, that would need to be costed in the proposals, so the proposals would need to be holistic in that respect.

Mr McGlone: My apologies for running late. I had a couple of pressing constituency matters to deal with. One of them was a neighbour dispute, which brings me nicely on to this. *[Laughter.]* Most of us who have been about the system — been there and done it — know that there is nothing worse than a bad neighbour. Where that neighbour is using legal aid in a neighbour dispute, and their next-door neighbour is not entitled to legal aid, a further problem is created where there is often already an insurmountable problem in their relationship. If one neighbour is spinning things out, at no cost to them because they can go along to their solicitor and make the case for legal aid, then I find that to be very unjust when it comes to someone else who has maybe got limited resources and is having to dig deep into their pockets to counter accusations and claims around these matters. It is where somebody can sit back and say, "Ah sure legal aid will pay for it. I will go along and see the solicitor and make a case and be as inventive as I can about these matters".

This can add to a stressful situation and be quite a financial burden on someone who is doing their day's work for, maybe, not a lot of money. However, they may have no recourse to legal aid. Like my colleague, I am interested in mediation, where that goes, how it should go and the costings around that. I think that it is very unjust, particularly if the person who has been inflicted by the scourge of the solicitor of a bad neighbour because that neighbour can avail themselves of legal aid. It may be that in some cases the flak comes from the other direction, by someone abusing a system that is there to be abused.

The second thing, which, again, I have encountered and am intrigued by, is where there is a land dispute — and it can be within a family; you mentioned inheritance claims. Can you explain, to my simple mind, how this works. If someone uses legal aid and gets an amount of money from it, significant or not, and is consequently financially advantaged, such as through a successful inheritance, the acquisition of property, land or access to funds — whatever the dispute was over — what is the method of retrieval of the moneys expended from the public purse?

Mr McGuckin: OK. There are two significant issues there, and I will take them separately. On the first one, which is where a legally-aided party appears to have an advantage over an un-legally-aided party: part of what we are looking at in the specific options that are in this document is to level that playing field, to a certain extent, and avoid the circumstances where someone has access to legal aid in order to maintain a dispute but who would not necessarily do so were the costs privately funded. If some of the options in the document were to be implemented, the playing field would be levelled so that both parties would be in the same position. They would not necessarily be able to litigate on the matter, and they would find an alternative and more appropriate way of resolving the issue.

Mr McGlone: May I just stop you at that point, Mark? I may have missed something as I read the document. At what point does someone makes the judgement, "Look, don't waste my time here making an application for legal aid; go away and sort this out yourselves instead of coming with letter after letter from solicitors threatening this, that and the other"?

Mr McGuckin: Legal aid is provided for a range of issues. The assessment test is applied in line with the current statutory provisions. If an applicant for legal aid meets those tests, they are entitled to get legal aid. That will continue until those rules are changed. We state in the document that some of those things could be taken out of the scope of legal aid.

Mr McGlone: The alternative being the mediation course that you mentioned. That is the second part of my question.

Mr McGuckin: Mediation is particularly used for family disputes and so on. I am not sure of the extent to which mediation currently goes beyond family issues and into issues with neighbours. Other Departments are engaged in community-based issues and might have access to mediation. I am certainly not across the detail of that.

Mr McGlone: I have been there and done that, particularly with the Housing Executive, and I will venture that it might be helpful if you engage — maybe some of your colleagues already have — with the Housing Executive to establish just what it does, what the costs are and maybe even what in-house experience it has on those matters.

Ms Davison: As you say, the Housing Executive offers mediation for Housing Executive tenants. In a rural country situation, obviously that would not apply. But, as you say, the Housing Executive offers that if there are difficult neighbours or whatever and it funds the mediation itself. It would only be if that mediation had not worked.

Mr McGuckin: That is in the context of its role as a landlord as opposed to a wider obligation.

Mr McGlone: There is maybe a model that could be learnt from. I have been with people who have been up the walls as a result of this kind of stuff. Some have been funded by legal aid and others are sitting by them saying, "I cannot afford financially to meet the flak that is coming at me". It is that type of situation. I am not making any judgement on who was right or wrong, but, where someone is potentially abusing the situation and drawing down funding to use that as an axe against their neighbour, that needs to be looked at, because, in some cases, I have no doubt that it is waste of public moneys.

Mr McGuckin: As the situation stands, if that individual meets the various statutory tests in relation to their complaint, Legal Services Commission has no alternative but to award it.

Mr McGlone: My question to you is —

Mr McGuckin: Can we fix it?

Mr McGlone: Correct.

Mr McGuckin: Hopefully some of the things in this document will help in that direction, and we will look at the impact that will have and whether other measures can or need to be taken.

Mr McGlone: What about my second question?

Mr McGuckin: It was disputes over land and inheritance claims.

Mr McGlone: Aye. Where the public purse has been used to advantage a person and that person winds up with a whole lot of money or a whole lot of assets as a consequence, how do you establish retrieval of the money expended from the public purse to, in some cases significantly, advantage that person?

Mr McGuckin: Unless any of my colleagues are aware of the detail, I will need to take that away and come back. My understanding is that, in those sorts of cases, the subject of the dispute, the value,

cannot be used as part of the financial eligibility test. Is that right, Mark? So, in other words, if you take a dispute about a sum of money, that is the subject of the case that you are taking and the ownership cannot be used as part of the financial eligibility test. So, as far as I am aware — and I will need to check it — it is not open to the Legal Services Commission to say subsequently, "You have been awarded this sum of money. Now give us the costs".

Mr McGlone: Do you not think that it would make sense?

Mr McGuckin: It is an option.

Mr McGlone: There is a doability factor. You see it often with social security benefits and where there is and an overpayment. There can be a retrieval. If someone is placed in a much better position after £2,000, £3,000, £4,000 or even £10,000 from the legal aid budget winds up with them, that retrieval would make sense to me.

Mr McGuckin: As I say, I am not completely sure of my position on this. I will check it and come back to you. That is my understanding of the current position, but it could be looked at, and, without seeing the rationale for saying that in the first instance, I could not say anything about the merits of whether it would be an appropriate approach.

Ms Davison: Most articles taken under inheritance claims are exempt from the application of the statutory charge, which is the mechanism the Legal Services Commission uses to recoup moneys.

Mr McGlone: Sorry, what do you mean by that?

Ms Davison: If you have taken an inheritance case, are successful and get, for example, £10,000, most of the articles you would have taken that case under would be exempt from the application of the statutory charge. The statutory charge is the mechanism that the Legal Services Commission uses to recoup moneys. So, given the way it is drafted, most inheritance claims are exempt. If it was a different case, property and money could be subject to the charge, but, as Mark said, there are quite a lot of exemptions and technical rules around when and how it would apply.

The Chairperson: Hopefully, you can advise your constituent now.

Mr McGlone: I do not think that I can. *[Laughter.]* I will wait until we get it in black and white.

Mr Dickson: Thank you for coming along, Laura and Mark. I echo the sentiments of the Chair at the beginning of the session that we have gone round and round this subject. I think that there is a clear indication from a reasonable number of people around the table that things need to be resolved and moved forward, and I encourage the Department and others to take the matter forward so that we can get a resolution. The Chair was also right in saying that there are some areas in which we will have to go into a great deal more detail. In fact, Mr McGlone has just raised a number of such issues. Further investigation of mediation and how that is paid for and, indeed, who pays for it also needs to be encouraged.

In the same way as Mr McGlone referred to constituents coming to him with the type of financial disputes that he has dealt with, people complain to me about cases in which the other party is legally aided, particularly cases relating to children's issues. That is unacceptable. Quite often, it goes back and forth to the court, and that can be seen as part of a war of attrition between the parties in respect of times. Those things do not need to be the subject of legal aid. Once a decision has been made, if there are genuine disputes and the two parties cannot resolve those between them, the issues should be resolved by mediation rather than through expensive legal aid from the state for one party and real costs from the pocket of the other. Those issues need to be tackled urgently from the point of view of fairness, the reasonable application of the law and the whole process of legal aid. Another key issue that needs to be dealt with is a budget that is clearly very expensive and that is no longer fit for purpose in the sense of how it is delivered. We need to resolve those issues.

I am interested in the point that Mr McGlone made, and I would be interested in you coming back to the Committee to discuss the very complicated rules and regulations in those few cases that are funded through legal aid in which there is an income for individuals at the end. There is the old thing about no win, no fee. If you win, why is there no recoupment towards the legal aid purse? I

understand that there are very complex rules and that each case is very different, but that aspect needs to be explored.

Mr McGuckin: There are different factors there. If you are content, we are happy to write to the Committee about the statutory charge.

On the point about no win, no fee, legal aid currently supports a range of money damages cases. If the legally aided client wins the case, there is no charge to the legal aid fund. In that respect, the legal aid fund acts as a guarantor, rather than having an extra charge made against it. We will come to the Committee shortly with some thoughts in respect of money damages claims. That will be a further opportunity to look at that.

Mr Dickson: That is very welcome.

The Chairperson: Let us briefly revisit a little bit of last week's meeting with the Law Society and the Bar Council. The main issue that I picked up from their presentations was that the 2011 cuts have not been factored in by the Department, have not made any impact and it is only really this year that we will see the consequences of that; there has been a glut of cases; and we have the new judge in Belfast and the backlogs are being wiped out and therefore the cuts of 2011 have not made any impact yet and we should not do anything now. If you take away all the other issues, that was the main point that I heard from both bodies. Will you respond to that and, if you want, make a few comments about what you think were the key points? I do not intend to prolong this part of the meeting.

Mr McGuckin: There were a number of things. I am grateful for the opportunity to address some of the issues raised by the Law Society and the Bar Council last week. We have not yet seen the official record of the meeting, so I might miss some of the critical points. I agree that one of the key points was why we are moving ahead with these changes when, perhaps, the full impact of the reductions has not been felt. I have prepared some comments if you are content for me to go through them. I think that I have addressed that issue within them. If it is helpful to the Committee, I propose to address the points raised during last week's session in the following order: the purpose of the Department's proposals that are before the Committee; the impact of the reforms already in place; the specific concerns about the proposed fees; and why there is a need for reform now.

First, I echo the comments from the profession that, since the formal consultation period closed, we have had a positive engagement with them. In the final proposals, we have been able to reflect many of the points that were put to us during that engagement. However, as the exercise was about delivering value for money, which will mean reducing the fees paid, we were never going to reach complete agreement. In delivering value for money, the proposals will also help to reduce the overall spend on legal aid and contribute to bringing it within budget. As has been noted this afternoon, that is particularly and increasingly important in the current financial environment.

The review of Crown Court fees commenced in 2012, and the initial analysis was carried out using information from 2011-12. We recognise that the new fees had not worked their way through the system of actual spend in that year. However, the focus of our research was a comparison between the cost of actual cases in Northern Ireland paid at the new rates with the cost if they had been paid using the graduated fee schemes in England and Wales. That was how we were able to conclude at that stage that the value for money test was not being made. We originally assessed the difference to be in the region of 46% for solicitors and 40% overall for barristers. Following the consultation and reflecting the representations made to us, the final proposals deliver overall reductions of 27% for solicitors and 22% for counsel. The proposals would bring remuneration in Northern Ireland more into line with England and Wales before the latest rounds of cuts there.

As you said, Chairman, it has been suggested that it is not necessary to make the reductions as the volume of business is set to reduce in the Crown Court. We do not fully subscribe to that view. There will be a reduction now that the backlog in the Crown Court has been cleared, and that will help to ease the pressure on the budget. However, the basis of the exercise that was conducted was not just to help to bring the spend within budget but to assess the value for money of the 2011 fee scheme. The comparison demonstrated that, in respect of the cases dealt with in the Crown Court in Northern Ireland, we are more expensive than elsewhere. When implemented, our proposals will reduce the differential while solicitors and counsel will still be better remunerated than their counterparts in England and Wales.

Questions have been raised about the financial impact of the measures that have been introduced. As the Committee is aware, that is complex due to the mix of cost reductions and the volume increases over the period. It is true that the full impact of the reductions will not work through until next year, not least because of the time that it will take for the very high cost cases (VHCCs) to work through. However, we expect the final bills for VHCCs to be lodged this year.

It might be helpful if I referred the Committee to the DALO letter of 27 June in which we sought to separate the changes that resulted from the removal of the VHCC arrangements and the changes in the non-VHCC costs and tried to identity the impact that the extra Crown Court judge had. That confirms that the reduction has been made in relation to VHCCs and sets out the average cost for the new fees. There is also a suggestion that changes in the Crown Court fees in 2011 had a negative impact on barristers and solicitors' firms. We accept that there may have been some changes in practice in recent years; however, it has been impossible to quantify that or to assess the extent to which it is driven by changes to the Crown Court fees or the wider economic environment. We have attempted to obtain data to analyse the impact. We have invited those who responded to the consultation to provide any evidence of impact but have had little response.

The Law Society is the regulatory body for solicitors, and we understand that, to practice in Northern Ireland, solicitors must be registered with it and hold current practising certificates. We approached the Law Society to provide any information that it may have that would help that evaluation, but, unfortunately, it indicated that it was unable to help. The Bar Council has also indicated that the reduction in fees in the Crown Court has had an impact, in particular on junior counsel. Again, we have not been provided with any data to support that view or to suggest that the impact is due to the level of fees rather than the overall volume of business.

The Committee will recall that we are consulting on proposals for the introduction of a statutory registration scheme. Clearly, that will provide valuable data in future changes in the numbers of solicitors and barristers registered to undertake legal aid work. Until that is in place, we will have to rely on any material that can be provided from elsewhere.

For the Department, a critical factor in respect of the impact of the new fee structure is the impact on access to justice. There is no evidence to suggest that Crown Court defendants were unable to access the appropriate representation, and I believe that the Law Society confirmed last week that it had not had any difficulty in obtaining barristers to act within the current fee scheme. We have no reason to expect that that will change with the introduction of the new fee structure. We also take some comfort from the recent report by Criminal Justice Inspection, which indicated that there was no empirical evidence of an impact on access to justice. It also recorded that some of the bigger solicitors' firms were appearing on court lists and providing day surgeries in more rural areas.

I do not propose to take up your time with the detail of the proposed changes, which were clearly set out in the material presented to the Committee in May. However, I noted that two concerns in particular were raised by the Bar Council and the Law Society last week: the impact of the revised guilty pleas and the potential impact on lengthy trials.

Looking first at the guilty pleas, our original proposal was for a single guilty plea, but we adjusted the proposal in response to representations. Solicitors receive a single guilty plea, but with a three-band structure that provides enhanced fees determined by the number of pages of prosecution evidence. There will be an upper limit of served pages of prosecution evidence above which an additional set fee per page is paid. For counsel, the single guilty plea will be augmented with a trial preparation fee in appropriate circumstances. They will also attract the enhanced fees determined by the number of pages of prosecution evidence in the case. Again, counsel will have an upper limit of served pages of prosecution evidence and an additional set fee per page of served evidence when the upper page limit is exceeded. Those measures will ensure that solicitor and counsel will be appropriately remunerated no matter at what stage the guilty plea is introduced.

Turning to the trial fees, solicitors and counsels receive a basic trial fee determined in accordance with the class of offence involved, which is increased depending on the length of the trial. Solicitors' fees are in three bands, while counsel fees are in 10 bands. In addition, solicitors and counsel will both receive daily refresher fees that increase at various trigger points depending on the length of the trial. The combination of increasing basic trial and refresher fees means that the longer a trial lasts the higher the total fee that is paid. It is interesting to note that, in the Crown Court last year, over 50% of cases lasted only one day and 83% of cases lasted for four days or less. However, even the trials that lasted much longer resulted in a higher fee commensurate with the extra work involved. We believe

that the proposals properly ensure that the fees increase with the length of trial and reflect, as articulated by the Bar, the heavy lifting.

In response to the representations made, we have protected a number of other specific fees, so they will not be reduced at all in this set of proposals. They include most of the fees that involve attendance at court.

Mr Chairman, at the outset, you said that an argument had been put forward that no further reform of Crown Court fees should take place at this time and, instead, a fundamental review of the justice system needed to be conducted. The Committee will be aware that other measures aimed at improving efficiency and speeding up justice are under way, and the Committee has before it a progress report on speeding up justice. This exercise was aimed at assessing the value for money of the Crown Court fees that were introduced in 2011. The comparison clearly demonstrated that there was scope to improve the value for money and, at the same time, deliver fees that properly remunerate for the work to be done in individual cases. Our proposals, which have been adjusted in response to the representations made to us, improve value for money while providing appropriate remuneration that compares well with elsewhere. They will also reduce the pressure on the legal aid budget and help to ensure that the funding available is targeted where it is needed.

As the impact of the additional throughput in the Crown Court works its way through the legal services payment systems, there will be a reduction in the overall amounts of money paid against the Crown Court — that is unarguable. The Committee will be aware of the enormous pressure that the additional, fourth Crown Court judge put on the legal aid budget in recent years. However, in looking at these fees, we have compared their value for money against those that are paid elsewhere. We believe that the proposals before the Committee are proportionate and appropriate in those circumstances.

The Chairperson: OK. Thank you, Mark.

Mr McCartney: The Bar raised a point last week about the publication of lawyers' fees. We have raised that with the Minister. Is there a particular reason why the Department does that?

Mr McGuckin: It is done by the Legal Services Commission, and it reflects the position in all the other jurisdictions, where the names of the top 100 are published. As I understand it, it has gone through a number of iterations. Enquiries are made that have to be responded to and that got to the stage of thinking that, if enquiries are to be made, let us be proactive and publish the information. That is in line with the FOI arrangements. I noted that the Bar mentioned that it had raised that with the Department, and I have prepared a draft response to them. That sets out the custom and practice of what has happened in the past and states that it is consistent with the practice in other jurisdictions.

Mr A Maginness: I have one point. I think that it was the Bar Council that raised the point — it may have been the solicitors or both — that, even if there were no changes in the 2011 rules, there would still be a saving of at least £3 million to the Department. Do you accept that as a reasonable estimate?

Mr McGuckin: You can make any number of estimates on the volume of cases that will go through the Crown Court. There will be a reduction in the spend of the legal aid budget in respect of Crown Court cases because the volume is reduced. That is why it is important to look at the average cost per case. There is a need to reduce expenditure to live within the available budget, and there is a need to ensure that the available budget is utilised in the best way. We appreciate that the volume is going down and that that will address some of the pressures that were created by the fourth Crown Court judge in the last couple of years. However, in addition to that, our work was designed, as we are required to do by statute, to look at the value for money of the existing fee schemes. That exercise identified that there was scope to improve the value for money of those schemes while delivering an appropriate fee structure and level for the cases that go through the Crown Court. That is what the proposals that are on the table are. They are about ensuring that the right fee is paid, commensurate with the work to be done.

Mr A Maginness: The answer to my question is that there will be a saving and that it probably will be around £3 million.

Mr McGuckin: Depending on where the volumes go, yes.

Mr A Maginness: That was based on your figures. It is based not on any figures that they produced but on the figures that you in the Department gave them for an estimate of the throughput of cases. They extrapolated that and assessed the savings to the Department. Do you accept that?

Mr McGuckin: There will be less pressure on the budget; I do not necessarily accept that it can be classified as a saving. It is a pressure that was created by an increase in the number of cases and the workload going through the Crown Court. It created a pressure against the budget that was exceeded over the last couple of years. Savings had to be made from elsewhere in the Department to meet that pressure.

Mr A Maginness: I do not know what way you want to present it — you are obviously presenting it in a different format — but to the ordinary person and to me it seems to be a saving of at least £3 million. They said that it could be much higher.

Mr McGuckin: That is down to the volume of business going through the Crown Court. That is accepted, and it will bring us close to the available budget for legal aid. I guess that it will not bring it within the budget.

There are two separate issues at play: how much it currently costs to deliver a level of service at the demand at which it is currently running and what the cost is of putting a case through the Crown Court. Our research demonstrated that putting that case through the Crown Court in Northern Ireland was more expensive than putting the same case through a Crown Court in England and Wales. That is where the value for money argument comes into play and tells us that we need to get those fees to the proper level to ensure value for money going forward.

Mr A Maginness: I do not want to delay proceedings, but the argument that they put forward was that you are not comparing like with like. That has been a consistent argument. I know that you will not agree with that, but, nonetheless, that is what they said. They said that you are not comparing like with like when you compare directly with a Crown Court in England.

Mr McGuckin: You are quite right that I will not necessary agree with them —

Mr A Maginness: A higher level of case or more serious cases are dealt with by the Crown Court here.

Mr McGuckin: There is a bigger band in England and Wales for cases that go to the Crown Court. All the cases that go to the Crown Court in Northern Ireland would be heard in the Crown Court in England and Wales. We took a representative sample of 213 cases and said that those were the cases that represented the situation in Northern Ireland. Those cases would also go through the Crown Court in England and Wales and would cost less. That is where the comparison was done and why we believed that there was scope for reducing the fees.

As you will know from the papers and the post-consultation material that has been put forward, we listened carefully to lots of the representations that were made to us. We have changed and revised the proposals in important areas to reflect those, and, ultimately, we did not go for the full comparative cut. That was in response to the representations that were made to us.

You are quite right: the system and the fee structures are not exactly the same. However, you try to bring them down to the lowest common denominator and build it up from there. That is what we have done in the proposals that are currently before the Committee.

Mr A Maginness: Thanks very much. That is very helpful.

Mr McGlone: One of the issues that came up last week when we were talking to the barristers — it was highlighted in the letter from the Department — was the number of people who eventually wind up in prison, many of whom have mental health issues or special educational needs. Logically, the argument that was teased out with the barristers was that, should you reduce the expenditure on budgets for legal aid, the quality of representation and, indeed, the length of time of representation spent by people such as those who were with us could and would be reduced, placing people whom many would regard as being in a socially disadvantaged position in a more disadvantaged position. By extension, it was argued that an EQIA should be carried out on the likely impact on certain groups in society. How would you respond to that?

Mr McGuckin: We did a screening exercise in relation to an EQIA, and we got a response from one of the disability groups that indicated that there was a higher proportion of the population in custody as a consequence of that. However, I was also encouraged by the comments from the Law Society last week. Our issue is in relation to access to justice and whether people get the appropriate representation in order to represent them through the process in which they are involved. The fees that we have put forward in the proposals will ensure that that continuity is continued. The Law Society confirmed last week that it did not have any difficulty in getting the appropriate level of representation and the appropriate barristers involved in the cases that are currently going through.

Mr McGlone: I am sorry. I was not talking about the Law Society; I was talking about the Bar people. You can check Hansard when it comes out. I want to go back to my question about an EQIA. There are certain groups and you mentioned the consultation response that you received from Disability Action.

Mr McGuckin: We went through the screening process and, notwithstanding Disability Action's comments, the process determined that a full EQIA was not necessary at that time.

Mr McGlone: I am sorry; Disability Action represents a lot of people with a lot of disabilities.

Mr McGuckin: Absolutely —

Mr McGlone: It is not a group about which I would use the word "notwithstanding". It is a group on which you would place significant weight.

Mr McGuckin: We placed significant weight on it, but —

Mr McGlone: What did you do about it? You ignored what it was saying.

Mr McGuckin: We did not ignore what it was saying. We had to make a judgement based on the level of access to justice, which will continue once the new fee scheme is in place. On that basis, there was no empirical evidence that there would be a diminution in access to justice as a consequence of the introduction of the new fee scheme. That is borne out by Criminal Justice Inspection as well. The other point is that we will still have a fee scheme available to us that is more generous than that in England and Wales currently when the proposals are implemented and you have the same issues at play there as well. We can draw some confidence that the level of representation will not be adversely affected by the reduction in fees that is proposed.

Mr McGlone: Just to get it clear: are you opposed to the notion of an EQIA?

Mr McGuckin: Not in the slightest. We go through the process to determine what is appropriate in the circumstances.

Mr McGlone: Maybe I was misinterpreting you; I thought maybe I was getting reasons why not to do it. Will you conduct one, then?

Mr McGuckin: We do not plan to do a full EQIA because the screening process assessed that that was not necessary. Now, I am happy to look at that again. I am not sure whether we shared it with the Committee along with the proposals, but I am happy to do that.

Mr McGlone: Do you recognise the need for an EQIA?

Mr McGuckin: I recognise the need to undertake a screening exercise.

Mr McGlone: We all do, and I think that they are done on all policies. I just want to tie this down. I am not getting it very clear from you. Are you going to conduct one or not?

Mr McGuckin: It was not our plan to conduct a full EQIA because the analysis that was done at the earlier stage determined that it was not necessary in the circumstances.

Mr McGlone: We suggest that you look at that aspect of last week's dialogue with the barristers. That might emphasise the need for one.

Mr Elliott: Have all the discussions with the Bar and the Law Society been expended?

Mr McGuckin: In respect of Crown Court fees?

Mr Elliott: Yes.

Mr McGuckin: At this stage, yes. Our proposals are with the Committee now, but we will continue to engage with them on a range of other things.

Mr Elliott: In the previous presentation, on statutory time limits, some of your colleagues were here, and I think that there was an acceptance that there were inefficiencies in the justice system overall. I am not opposed to a reduction in legal aid fees by any means, but I have been keen to have an overall review carried out to try to curtail efficiencies wherever they are and do legal aid fee reductions or whatever needs to be done within that review. It appears that there is reluctance in the Department to do that.

Mr McGuckin: There are a range of actions being taken to improve efficiency across the justice system. Each individual body is engaged in internal and individual actions and in collective actions. The Committee has before it this afternoon an update report on speeding up justice. The introduction of statutory time limits is another area that will help to speed that up. I am not sure that the resource is available to sit down and undertake a fundamental review, nor do I subscribe to the view that we need to pause any other actions that are being taken while such a review might be commissioned or take place.

As I mentioned, we have also commissioned the access to justice review part two. Although the focus of that is on legal aid, it will also look at things that could improve efficiency and effectiveness in the justice system in order to reduce the demand on the legal aid budget.

Mr Elliott: What type of things?

Mr McGuckin: Jim Daniell has issued a scoping document that, I think, is before the Committee. It is a wide-ranging review, and, for the life of me, there is nothing on the tip of my tongue about the specific things in it, but he is seeking comments on a range of issues.

Mr Elliott: OK, but it is not a wide-ranging scoping review that you would like to see done only for resources.

Mr McGuckin: There are a range of things already being done across the various organisations that will improve efficiency and effectiveness. A range of Departments are involved in doing that.

Mr Elliott: Do you believe that a wide-ranging review would be better than the piecemeal one that we are doing, or are you content with the bit-by-bit process that we have the moment?

Mr McGuckin: I can see advantages in both. I am quite relaxed about the current process.

Mr Elliott: You do not think that there is a need for a wide-ranging review.

Mr McGuckin: It would not be for me to commit the Department to that, but the steps that we are currently taking will inform the agenda going forward and will allow us to take forward change in a measured and effective way.

Mr Elliott: If there was a suggestion about a wide-ranging review, what would your opinion be of it?

Mr McGuckin: If that was required and the suggestion was that it should be taken forward, I would work along with that.

Mr Elliott: OK. Thanks.

The Chairperson: There are no further points. Thank you. I appreciate your time today.