Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Justice Bill: Parts 7, 8 and 9

2 December 2010

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Lord Morrow (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Lord Browne
Mr Thomas Buchanan
Sir Reg Empey
Mr Paul Givan
Mr Alban Maginness
Mr Conall McDevitt
Mr David McNarry
Mr John O'Dowd

Witnesses:

Mr Robert Crawford	)	Northern Ireland Courts and Tribunals Service
Ms Geraldine Fee	)	
Ms Laurene McAlpine	)	
Mr Gareth Johnston	)	Department of Justice
Mr Adrian Colton	)	Bar Council of Northern Ireland
Mr Dermot Fee	)	
Mr Brendan Garland	)	
Ms Gillian Clifford	)	Women's Aid Federation Northern Ireland
Ms Noelle Collins	)	
Ms Sonya Lutton	)	
Ms Patricia Lyness	)	

Mr Norville Connolly) Law Society of Northern Ireland
Mr Alan Hunter)
Mr Brian Speers)

The Chairperson (Lord Morrow):

With us again is Gareth Johnston, deputy director of the justice strategy division in the Department of Justice. From the Northern Ireland Courts and Tribunals Service (NICTS), we have Robert Crawford, head of the public legal services division, Geraldine Fee, head of criminal policy and legislation division, and Laurene McAlpine, head of civil policy and legislation.

The first briefing on the legal aid clauses will last 10 minutes, followed by five minutes for clarification on any issues that might arise. That is the procedure that we will use. Mr Johnston, will you lead off?

Mr Gareth Johnston (Department of Justice):

Thank you, Chairman. Today we are presenting on Parts 7, 8 and 9 of the Justice Bill, which deal with legal aid, miscellaneous matters and supplementary provisions. My colleagues here from NICTS are very much in the lead in those areas, and I will defer to them shortly and let them present the provisions to the Committee. However, there are a few provisions in the miscellaneous matters in Part 8 that fall to the Department. I will cover those briefly at the end of the short descriptive presentation, and I will also outline the provisions in Part 9. In line with the structure that the Committee has set out, I now hand over to Robert Crawford, who will discuss Part 7 of the Bill, which relates to legal aid.

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

I am conscious of the time, so I propose to run through the legal aid clauses of the Bill quite quickly. Clause 85 contains a new power to introduce a fixed means test for criminal legal aid. There is already a means test for criminal legal aid. If a judge considers that a defendant has insufficient means, that will satisfy the means test. The power in clause 85 would allow us to set a fixed test; in other words, it would allow us to set a specific income or assets limit to rule someone ineligible for legal aid.

Clause 85 attracted the most concern during the consultation process. The responses were mainly about the possible impact on access to justice, and I reassure the Committee that we are alive to that concern. At present, more than 95% of defendants receive legal aid in criminal cases here. In England and Wales, where there has been a means test for some time, the level is around 93%, even with a fixed means test in place. We commissioned an independent economist to look at what impact a fixed means test will have and to examine different ways of assessing that. We expect that analysis to be with us on 20 December, and, as we said in previous meetings, we will share that analysis with the Committee and place copies of it in the Assembly Library so that anyone with an interest can see exactly what it says.

The final outcome of any proposal would be subject to subordinate legislation, which would be subject to scrutiny by this Committee and a full equality impact assessment (EQIA). We do not have fixed ideas on the level of the fixed means test at present. We need to look at the costs of administering such a test. It is certainly not a foregone conclusion that we will go forward with the test after the detailed analysis has been done; the costs may prove to be such that it would not save a great deal of money.

Clause 86 relates to the recovery of defence costs orders. Under this clause, we hope to bring in a power to allow for the recovery of defence costs in cases in which it is clear that a defendant has ample means to fund his own defence. That would operate at the end of a trial, at which stage a judge could make such an order. We intend that it would be used only in cases that are very clear — where the defendant very clearly has the money to pay for his own defence. We intend to bring it in for Crown Court cases first. The average cost of a Crown Court case is £9,000, so there are significant sums of money to be recovered if we decide to use it. We anticipate that, if it works, we will extend it to the Court of Appeal in future years.

Clause 87 adds the guarantee credit element of the state pension scheme to the passporting benefits for the purposes of eligibility for civil legal aid. That is very much a technical thing. There are a number of passporting benefits that give automatic eligibility for legal aid. The guarantee credit element of the state pension scheme came in after those were specified in the existing legislation. It is right to add that. It is currently dealt with by ministerial guidance; we

are putting it into the regulations because the opportunity is there to do that.

Clause 88 deals with compassionate bail and repeat bail applications. Clauses 100 and 101 introduce new provisions for those. It is right that legal aid should be available for compassionate bail and repeat bail applications, and, again, we are taking the power under the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 to make sure that that is available.

In clause 85 we apply the power to make a means test to the 1981 Order. Clause 89 applies that power to the Access to Justice (Northern Ireland) Order 2003. The criminal legal aid provisions of the 2003 Order are not yet in force, and when they come into force they will largely replace the 1981 Order, hence the need for two separate provisions here.

Clause 90 repeals article 41 of the 2003 Order. That repeal is necessary to allow the Legal Services Commission to put money into what is called a litigation funding agreement (LFA). Money damages is the area concerned in civil legal aid. It is not a high priority for legal aid when resources are tight, and we anticipate that when the funding code comes in, it will be a low priority for such funding. That is why an alternative approach is being explored by the Legal Services Commission with the legal profession in discussions with the Bar and the Law Society. That has not produced an agreed way forward yet, but we anticipate that, if an agreed way forward is found, there will be a need for start-up funding for such an arrangement. We need to repeal this particular article to allow that to be done. Again, it is not clear yet whether agreement can be reached and whether the funding will be proceeded with.

Clause 91 makes a number of minor changes that largely extend the scope of civil legal aid. The first change is to ensure that legal aid is available for a person specified in a protection from harassment order. That ensures that the person who is protected by the order can get legal aid to argue against the variation or discharge of a restraining order made to protect him or her.

The next change replaces references to the Asylum and Immigration Tribunal with new references to the First-tier Tribunal and Upper Tribunal. The functions of the first Asylum and Immigration Tribunal have transferred to the new First-tier and Upper Tribunals, so that is a straightforward change of terminology.

The third technical change ensures that legal aid is available for a witness who is protected by a witness anonymity order or investigation anonymity order. That is an extension to allow such a protected witness to contest any application by another party to have that protection order varied or discharged.

Next, we have a technical change to ensure that legal aid is available in respect of an order under section 215A of the Proceeds of Crime Act 2002 relating to the sale of seized property. That is to ensure that people have the legal assistance that they require to contest such an order.

Finally, we have a change to ensure that legal aid is available in respect of the variation, renewal or discharge of a foreign travel restriction order under the Counter-Terrorism Act 2008. Again, we are expanding the scope of legal aid to make sure that it is available for people to contest that order.

The Chairperson:
Does anyone wish to raise any point around clarification?

Mr McDevitt:
On a point of clarification on clause 85, did you carry out a full equality impact assessment?

Mr Crawford:
We have not carried out an equality impact assessment on the change that we are proposing in the Bill, because we do not have the detail that we would want to put out to anyone to seek their views. When we are preparing for subordinate legislation, we will carry out an EQIA on the proposals before we bring them to the Committee.

Mr McDevitt:
So, we do not know the actual impact yet?

Mr Crawford:
We cannot assess the impact until we have some idea of what the level is going to be set at.

Mr McCartney:

I have a number of questions about the process. Clause 85 contains an enabling power to make the rules.

Mr Crawford:

Yes, it does.

Mr McCartney:

The rules are then subject to subordinate legislation, which is open to scrutiny.

Mr Crawford:

That is right.

Mr McCartney:

I notice that the clause keeps referring to "his" disposable income and so on.

Mr Crawford:

That means his or her.

Mr McCartney:

But it does not say that. Does that pose any problems?

Mr Crawford:

That is standard legal terminology; the word "his" includes her.

Mr McCartney:

Who initiates the order to recover costs?

Mr Crawford:

The judge could initiate that at the end of the trial. Our thought is that, in most cases, the Legal Services Commission will initiate it, as it is the body that will recover the cost. That money will

then go back into the legal aid fund.

Mr McCartney:

Will the reasons be listed for scrutiny purposes?

Mr Crawford:

The order to recover costs would be acquired by going to a court, so the reasons for seeking the order would be specified in the request. Any person could approach the court for an order, but we anticipate that, in most cases, the Legal Services Commission will do so.

Mr McCartney:

The explanatory and financial memorandum state that applicants in receipt of the guarantee credit element of state pension credit are deemed as:

"automatically meeting, in certain circumstances, the financial test for civil legal aid."

It seems a wee bit contradictory to say that something is automatic but only in certain circumstances.

Mr Crawford:

It is a passport benefit, so a person in receipt of the benefit will automatically get legal aid. There are other circumstances that might apply to someone's legal aid application that make it ineligible; in other words, it might not be the type of case for which legal aid is available.

Mr McCartney:

The litigation funding agreement is an agreement by which a person can enter into that process and incur no legal costs if he or she is unsuccessful. If the person is successful, then he or she will pay.

Mr Crawford:

The idea is that, if someone is successful, a proportion of his or her claim will go back into the fund to support other claimants.

Mr McDevitt:

Will the secondary legislation that you anticipate under clause 85 be passed by negative or

affirmative resolution?

Mr Crawford:

Negative resolution is the normal procedure for legal aid, but, again, that is still subject to Committee scrutiny.

Sir Reg Empey:

I picked up on Mr Crawford talking about passport benefits. Would any of the proposed changes, such as the single benefit that might come in in the next year or so, have any impact on the proposals?

Mr Crawford:

Where there is a change in benefits that are considered to be appropriate to use as passporting benefits, we use ministerial direction and allow those benefits to be used for passporting purposes. Under the direction given by the Minister, we then bring them into legislation when the opportunity comes up. So, the answer is yes, we want to take account of any benefit that comes into force, because, if the benefit is given on the basis that someone has need, he or she will generally need legal aid as well and would need to be eligible.

Sir Reg Empey:

If a universal credit comes in, a lot of other benefits may disappear. Do you feel that there is adequate provision?

Mr Crawford:

At the moment, we use ministerial direction. That is what is happening with the guarantee credit element; people who receive it are getting legal aid. However, at the first available opportunity, it is appropriate to bring that into the legislation.

Lord Browne:

Has the Department received any legal advice to indicate that the changes to legal aid in the Bill are consistent with article 6 of the European Convention on Human Rights (ECHR)?

Mr Crawford:

We have not sought specific legal advice about the legal aid provisions. We have our own legal advisers who proof the provisions for us, and we are content that they are consistent with article 6.

Lord Browne:

So, you have not sought opinion from any other source.

Mr Crawford:

We have not sought counsel's opinion, because we have our own internal legal advisers in my division and in the Courts and Tribunals Service generally.

Mr Johnston:

The Bill has gone through the Attorney General's office, which has advised the Minister that it is within competence. That includes consideration of ECHR issues, so there were no concerns raised about that part of the Bill.

The Chairperson:

We move on to Part 8, "Miscellaneous", and Part 9, "Supplementary Provisions". Again, the same rules will apply; we will go for a 10-minute presentation and five minutes for clarification.

Ms Geraldine Fee (Northern Ireland Courts and Tribunals Service):

I will be as quick as possible. As Mr Johnston has outlined, Part 8 contains a number of miscellaneous provisions that are mainly designed to enhance court powers and to make certain other improvements to how business is conducted.

Clauses 92 and 93 make adjustments that are intended to open up the court tiers at which certain types of bail can be granted. Clause 92 provides Magistrate's Courts with a power to grant compassionate bail to a defendant who has previously been remanded in custody by that court. Compassionate bail is bail to a remand prisoner for a specific purpose and for a temporary period. As the Committee will have noted from the briefing paper, at present, compassionate bail can be granted only by the High Court or the Crown Court.

Clause 93 allows an application for repeat bail to be made to the Crown Court where bail has been refused by a Magistrate's Court and there has not been a change in circumstances. At present, only the High Court can hear such applications. By widening the range of courts that can hear those applications, the provisions are intended to free up High Court time and to allow its resources to be used more efficiently. The provisions have the support of the judiciary. We conducted a targeted consultation with the professions and other interested groups, and no negative responses were received.

Clause 95 creates the power to allow court rules to be made to specify the circumstances in which information on family proceedings concerning children can be shared without the need for the express permission of the court. For example, that will allow a parent to discuss a case about a child with an elected representative or with a professional adviser such as the Children's Commissioner. At present, such a conversation could potentially be a criminal offence or a contempt of court. The purpose of clause 95 is simply to make it easier for information on family proceedings concerning children to be shared in certain circumstances. It is important to highlight that the clause does not provide for media attendance in family courts. As indicated, clause 95 is an enabling power only, and any court rules that are made will be subject to full public consultation to ensure that they are in the best interests of children in Northern Ireland.

Clauses 96 and 97 make adjustments to the membership of the Crown Court Rules Committee and the Court of Judicature Rules Committee and are designed to enhance the expertise that is available to those committees. The committees make the rules that govern the practice and procedure that should be followed in the Crown Court and the High Court respectively. Membership of those committees is prescribed in statute and includes the Lord Chief Justice, certain members of the judiciary and solicitor and barrister representatives.

Clause 96 amends the membership of the Crown Court Rules Committee to include a public prosecutor nominated by the Director of Public Prosecutions and a person nominated by the Attorney General. Clause 97 extends the membership of the Court of Judicature Rules Committee to include the Attorney General or his nominee. Members may have noted from the briefing paper that we had intended originally to amend only the Crown Court Rules Committee

membership to add a public prosecutor nominated by the Director of Public Prosecutions. However, at the suggestion of the Attorney General, we looked again at the proposals and took the view that, as well as including a public prosecutor on the Crown Court Rules Committee, there is benefit in including a person nominated by the Attorney General. The Attorney General also suggested that he or his nominee should be a member of the Court of Judicature Rules Committee. Again, we considered that proposal and agreed that it would be desirable to enhance the expertise of the committee.

Clause 98 is a very technical amendment to the Criminal Appeal (Northern Ireland) Act 1980. It amends the 1980 Act to ensure that the Court of Appeal deals with any appeal against a sentence imposed by the Crown Court following committal to that court for consideration of a confiscation order under section 218 of the Proceeds of Crime Act 2002. There is currently no statutory provision to allow such an appeal to be heard by the Court of Appeal, which is the normal venue for such appeals. Effectively, the clause will address a gap in the current legislation. As the Committee will be aware from the briefing paper, the clause, as currently drafted, contains a minor typographical error that was not picked up before the Bill's introduction. Therefore, we will table a small amendment to the clause at Consideration Stage to enable renumbering.

Finally, clause 99 contains a provision that will expand the powers of Magistrate's Courts in criminal proceedings to allow them to issue a witness summons to direct a third party to appear and produce any item of evidence where the court is satisfied that that person is able to provide material evidence. At present, the powers of the Magistrate's Court are limited to occasions when such an item would be admissible in evidence.

This amendment will bring the powers of the Magistrate's Court into line with those of the Crown Court. As a result, it is hoped that more cases that are capable of being dealt with by the Magistrate's Court will remain there rather than defendants choosing to be tried in the Crown Court to avail themselves of its wider third-party disclosure powers. Again, no objections were received to this provision in our targeted consultation and it was welcomed by the Bar Council. That finishes my section, and I will pass over to Mr Johnston.

Mr Johnston:

We have reached the aspects of the Bill that concern necessary things and detail rather than

exciting things and headlines. Clause 94 tidies up a remaining bit of legislation on crimes with offensive weapons, including knives. It brings the available sentences into line with those for other sorts of knife crimes, following indictment and conviction, that mean up to four years imprisonment. Being armed with a dangerous or offensive weapon with intent to commit an arrestable offence is not prosecuted often, but it is a useful offence to have because it can be prosecuted in respect of having offensive weapons on private property, and the police have confirmed that they would like to keep it.

Clause 100 enables AccessNI to issue a copy of a criminal conviction certificate to an employer when the application is for employment purposes. At the moment, AccessNI is authorised to issue only one copy of the certificate, which normally goes to the applicant but can go to the employer. Very often, both want a copy, so the clause will allow two copies to be issued at the same time by AccessNI. It makes things more convenient and speeds up the process. The change will mean that Northern Ireland will be the only jurisdiction in the United Kingdom to provide that service.

Clause 101 concerns the accounts that the Northern Ireland Law Commission needs to provide each year. The original provision, we feel, was over the top. The commission is an advisory, as opposed to an executive, NDPB and the money that it spends is already accounted for through the departmental accounts. Asking it to produce a full set of commercial accounts is overkill and is costing quite a bit of money. Clause 101 tidies that up. The commission will still produce a financial statement but on a simplified basis that will feed into the departmental accounts. The Northern Ireland Audit Office is content with the changes.

In Part 9, there are seven clauses concerning supplementary or transitional provisions. They are about regulations and orders that can be made in respect of other aspects of the Bill, and they are about commencement provisions. They are the standard legislative provisions that appear in Bills, and if the Committee has any questions about them, I am very happy to answer them. The purpose and effect of each of the powers is set out in the regulatory powers memorandum, which the Committee has seen.

Mr McDevitt:

Will the subordinate legislation under clause 95 also be passed by negative resolution?

Ms G Fee:

Yes. That is correct.

Mr McNarry:

Clauses 96 and 97 mention the Crown Court Rules Committee and the Court of Judicature Rules Committee. You welcomed the inclusion of the Attorney General on those committees. The clauses mention his nominee. Will you tell me about the status of the Attorney General's nominee?

Ms G Fee:

It is anticipated that it would be someone from the Attorney General's office, but it is a matter for him.

Mr McNarry:

But, the Lord Chief Justice, members of the judiciary, barristers and solicitors and their status have been described in the Bill. I am not challenging it. It is just the looseness of the words "a person nominated". Can that not be more specific? A lot of people work in his office.

Ms G Fee:

We can take that back and look at it.

Mr McNarry:

It would tidy it up. Thank you.

The Chairperson:

The explanatory and financial memorandum, when referring to clause 95, says:

"This disclosure will be between specified persons and in specified circumstances."

Will you elaborate on that?

Ms G Fee:

The detail of the rules needs be worked through, and we propose to undertake a full public consultation exercise on that in which we will consult with all the interested parties. As I said, we took the enabling power simply to allow us to bring that forward.

The Chairperson:

So, we will hear more about that?

Ms G Fee:

Yes.

The Chairperson:

Thank you for your presentation. Please remain in the Public Gallery. Other issues may arise later.

We now have representatives of the Bar Council, who will outline key points and issues regarding Parts 7, 8 and 9, which are legal aid, miscellaneous and the supplementary provisions. I welcome Adrian Colton QC, the chairman of the Bar Council; Dermot Fee QC, a member of the Bar Council; and Brendan Garland, the chief executive. Mr Mark Mulholland is not here. You are very welcome. You will have 10 minutes in which to outline your brief, and after that we will have a question and answer session, which will last for a maximum of 20 minutes.

Mr Adrian Colton (Bar Council):

I thank the Committee for the invitation to address the Committee. You have already met me and Mr Garland. I asked Mr Fee to come because he has a particular interest and expertise in civil legal aid. That subject might be of interest to the Committee. I apologise for Mr Mulholland being unable to attend. He is a real barrister and is in court at the moment.

The Chairperson:

Somebody has to do it.

Mr Colton:

Indeed. Before I address Parts 7, 8 and 9, I acknowledge the significant amount of work that has clearly gone into drafting the legislation. It is a pleasure and privilege to consider legislation drafted in Northern Ireland rather than in Westminster. It is a welcome piece of legislation.

On another positive note, the Bar Council particularly welcomes some features of the Bill. We very much support the adjustment of the membership to the Crown Court Rules Committee and the Court of Judicature Rules Committee, although I take on board Mr McNarry's comment that it should be clear that it is the Attorney General. Those appointments will add to the expertise of those committees. I encourage this Committee to take on board the views of those committees when it considers legislation. They can provide relevant insights into some of the matters that this Committee has to consider and I urge it to liaise with those bodies if appropriate.

I also make similar comments about the Law Commission. The Bill deals with the accounts of the Law Commission, but I encourage this Committee to proactively engage with the Law Commission. It can come forward with very good, substantive law. It is not always attractive or headline grabbing material, but it has come up with some excellent reports that have, in the past, gathered dust in libraries. I urge that the Committee to take on board the advice and views of the Law Commission. It has recently completed extensive work on land law which might commend itself to this Committee, even if it is not something that will necessarily attract any media attention.

Clause 99, which is about the power of a Magistrate's Court to, in essence, obtain third-party disclosure, is particularly welcome. The legislation is detailed and comprehensive, but, in effect, it will provide for fairer trials in the Magistrate's Court and we feel that those provisions are long overdue.

Many of the miscellaneous provisions, which are set out in Part 8, are tidying-up matters that fill gaps in legislation. Certainly, in our view, they are unobjectionable. I do not have any particular comments to make on them, unless I am asked to do so.

There are, however, two particular matters in the Bill about which we have reservations and

want to raise concerns. If permitted, we would like to address those with you. The first relates to clause 85, which deals with eligibility for criminal legal aid, and the suggested change to the means test for that. The other relates to clause 90, which deals with litigation funding agreements (LFAs). Both those clauses will potentially impact significantly on access to justice. If it is acceptable to the Committee, I propose to deal with criminal legal aid and Mr Fee will deal with LFAs.

On a general level, it might be worth remembering the Bill's policy objectives, which are set out in its explanatory and financial memorandum. They are to reduce costs, do business better and improve access to the justice system. It is fair to say that there is obvious tension between those laudable objectives. On one hand, to reduce costs may well be desirable for the legal aid budget. However, in certain circumstances, it is bound to impact on access to justice. What we should seek to do, and what my submission focuses on, is to ensure that we get the balance right. I have concerns about that balance with regard to those two provisions.

Of course, the other declared objective of the Bill is to deliver better and enhanced services for victims. The victims who are envisaged in the legislation are, primarily, victims in criminal law. However, it is important to remember that, in the context of civil litigation, there are also people who sustain serious injuries at work or as a result of clinical negligence and so on, and they are also victims. Their rights and entitlements should also be borne in mind. It is significant that less than 1% of the legal aid fund is spent supporting those who are victims in the civil sense — those who sustain personal injuries. That should be borne in mind when considering support for people in money damages claims.

I want to turn to the means test for criminal legal aid, which is dealt with in clause 85. Clearly, what drives that provision is the objective to reduce costs. The Bar fully accepts that there is a need to reduce the legal aid bill in this jurisdiction. Indeed, we have been engaged for over a year in discussions with a view to reducing the legal aid bill from £104 million to £79 million. We support that move. We are determined to ensure that legal aid fees will meet that objective. This is a different matter, however, as it will impact on people's access to justice and levels of representation.

I want to raise a number of matters about the outworkings of clause. The first is that it is our strongly held view that the decision to grant legal aid should remain a judicial function: it should remain the function of the court and not of the Legal Services Commission or some other body that is appointed by the commission. The court and judges are best placed to judge what is in the interests of justice. Remember that, in the granting of legal aid, there are two tests: interests of justice and financial eligibility. That function and those decisions should remain with the judiciary. They should not be transferred to the Legal Services Commission.

The second matter to consider, if there is to be a financial eligibility test, is the levels. I understand that the legislation is closely modelled on the English and Welsh systems. I am subject to correction by the Northern Ireland Courts and Tribunals Service when its representatives respond; however, it is my understanding that, currently, in England and Wales, someone whose gross income is less than £11,000 per annum, or £12,500 if they have dependants, is automatically entitled to legal aid. If someone earns between £11,000 and £20,000, or between £12,500 and £22,500 with dependants, it depends on their disposable income. Anyone who earns over £20,000, or £22,500 if they have dependants, is not eligible for criminal legal aid. If that sort of provision is introduced in this jurisdiction, it will have serious consequences indeed for legal representation. It cannot be right that a schoolteacher, for example, or someone with a reasonably good standard of living who earns more than £22,500 a year, would be denied legal aid if they were faced with a serious criminal charge. What are the levels to be? That is a very important question.

The next issue is whether the levels will be different for different courts. I can well understand that the test for someone who is facing a minor charge in a Magistrate's Court would be very different from that for someone who is facing, for example, a murder charge or a serious fraud charge in the Crown Court. The Committee needs to look at that. Will there be different levels for different types of crime in different courts?

Moving on from that: if there is to be a financial limit, how is that assessment to be made? It seems that there is going to be a very high level of administration if there is to be some sort of formal assessment of means. Applications will have to be made; committees will have to be set up to review those; there will have to be a right of appeal for those applications; and, certainly if

the civil experience is anything to go by, that will result in very significant administrative costs. Perhaps more importantly, it will also result in delay, and I know that this Committee and others that are dealing with legislation are very anxious to speed up the criminal process and to root out avoidable delay. It seems to me that, if that type of test is introduced in the Crown Court, it will inevitably result in delay. People are entitled to say that they are not ready for trial because their legal aid application has not yet been considered. There are inherent dangers in approaching criminal legal aid in that way: it will result in further administration and could well result in delay.

Most importantly, our view is that those measures carry the serious risk of injustice. I gave the example of a teacher, perhaps a vice-principal of a school who is faced with an allegation that, 20 years ago, he or she abused a child. In the current climate, that would be likely to go to trial. Is it seriously being suggested that someone in that position will not be entitled to legal aid to defend a serious charge such as that? It seems to me that such a person is bound to be in excess of the sort of —

The Chairperson:

Mr Colton, I will have to stop you there.

Mr Colton:

Have I run out of time already?

The Chairperson:

You have run out of time.

Mr Colton:

Mr Fee will deal with the LFAs. However, I could finish the point on injustice within one minute. There is a danger that people will be forced to defend themselves without legal aid. Will they be able to challenge DNA evidence, forensic evidence, or engineering evidence? Corners will be cut. I am saying that there is serious risk of injustice if this provision is passed. Hopefully, Mr Fee will now address you on LFAs.

The Chairperson:

Unfortunately, Mr Colton took up your time, but anyway.

Mr Dermot Fee (Bar Council):

I will make just a couple of short points. I will focus on the litigation funding agreements in clause 90, which allows the Legal Services Commission to enter into those agreements under the Access to Justice (Northern Ireland) Order 2003. The situation in respect of money damages cases, which have been mentioned — essentially personal injury cases — is that those are no longer a priority within the Legal Services Commission's funding of legal aid. The Committee should look very carefully at that position.

At the moment, there is a legal aid budget of £104 million. The funding of personal injury cases represents between £1 million and £2 million — 1% of the overall budget. That gives access to justice to people who might be described as victims: people who are injured in industrial accidents, road traffic accidents, etc, sometimes very seriously. The problem is that, if legal aid is not available to those people for money damages cases, what is the alternative? The alternative that is being suggested is litigation funding agreements, which would allow third parties — essentially insurance companies — to finance that type of litigation. That access would be very restricted. We think that the effect of that would be to prevent access to justice for victims who have claims that are entirely justified and for which they are entitled to compensation.

The reason for the amendment is to try to allow the Legal Services Commission, to take, as I think it was put, an "alternative approach to funding". However, I am asking this Committee and anyone else who is considering this matter to look again at the question of whether money damages should be excluded from legal aid. If £104 million is spent, and if most money damages cases are successful, and if it costs only £1 million or £2 million — 1% of that overall budget — is it appropriate to use another untried way of providing assistance that may be unsuccessful? The question is whether one should look again at continuing to provide civil legal aid at a very small cost to victims of injuries. The reason why the costs are small is because most of these cases are successful. They are genuine cases.

I apologise as I am running on a little bit, but we can all see the current concept of a compensation culture, which is repeated over and over again. Most of these cases are absolutely genuine, they are successful and do not cost the legal aid budget one penny. Only a small minority are unsuccessful.

A system of third-party funding would open up a whole nightmare scenario, is what I was going to say. What has happened in England and Wales is that people, through insurance companies, are trying to finance and live off litigation, and one has to ask whether that is appropriate. The questions are whether, if someone is injured, they should have access to the courts; should obtain their compensation at a reasonably low cost; should be able to be funded by legal aid if they qualify under those provisions; and should be funded by legal aid at a very low cost.

The Committee should also note that, because it is available to so few, there has been a 250% reduction in applications for civil legal aid over the past eight years, so it is a very small area. I suggest the Committee look at it, should it be retained. I apologise both for speaking quickly and overrunning.

The Chairperson:
You can talk to your colleague outside about that. *[Laughter.]*

Mr Colton:
That would be the first time.

Mr McDevitt:
Clause 85 was mentioned. We are talking about something that would still be subject to secondary legislation and a full EQIA. Is it not a premature debate?

Mr Colton:
We have to flag up the important issues. Our experience is that, once you provide the enabling legalisation, it builds up a momentum and a degree of inevitability occurs. I was anxious to flag up the issues, and I was perhaps more temperate in our written response. However, I have serious

concerns about where it is going, particularly when considering the England and Wales provisions, which, it seems to me, these are largely modelled on. However, I take your point that there will be another chance to look at it.

Mr McDevitt:

This would be secondary legislation by negative resolution, so it would provide for a very limited degree of scrutiny, certainly by this House. What is your opinion on that?

Mr Colton:

I regret to say that I am not overly familiar with the significance of what you said about negative resolution and so on, but, I am opposed to it. I do not think it is a good idea. However, I would be concerned if there were to be no further scrutiny of it, because, of all the clauses, that is potentially the most significant around access to justice.

The Chairperson:

As a point has been raised about negative resolution, the Committee Clerk will give a 60- to 90-second brief on the subject.

The Committee Clerk:

Negative resolution rules would give the Assembly and this Committee the least amount of opportunity for control. There will be consultation at the draft stage, but once the rule is laid, the Committee either has to agree to adopt it in its entirety or pray against it. It cannot amend it. Other forms of statutory legislation, such as affirmative of confirmatory resolution, give more control and more chance to debate.

Mr McDevitt:

Mr Fee, I have a question for clarification. On the face of it, LFAs sound like a good thing because they are incentivising the legal system to pursue money damages cases that have a high chance of success and they are underwriting themselves.

Mr D Fee:

We are not totally opposed to them, but I think they need careful scrutiny. At the moment, article

40 of the Access to Justice (Northern Ireland) Order allows for LFAs. That is where a third party funds the plaintiff for a case, gets a benefit from it and tries to pass that on to the defendant. In some ways, they are selling the case, which can give rise to conflicts, because the person who is promoting or financing the case, essentially an insurance company or similar, has a money interest. The difficulties in England and Wales have been clear and are significant. I cannot go into them in detail at this stage, but we have to be careful about that.

Article 40, in my understanding, has not yet been brought into force. Article 41 of the 2003 Order says that the Legal Services Commission could not engage in litigation funding agreements. If we abandon article 41, it will mean that the Legal Services Commission will move towards becoming a provider. It means, then, that other third parties will become a provider. One has to be careful about what that could lead to in a small jurisdiction, and whether we get the situation that exists in England and Wales, where the cost of litigation became phenomenal. There are all sorts of difficulties. Most cases are genuine and successful. I am saying that, if those very few cases that are unsuccessful cost only 1% — £1 million to £2 million — of the £104 million legal aid budget, is it not a good idea to, instead of looking for an alternative approach through LFAs, maintain the current approach, which costs very little? That is the point that the Committee should look at.

Mr McCartney:

I have a couple of questions about the litigation funding agreements. I am reading here about pursuing money damage cases including personal injuries. What are the other types of money damage cases? Do those include medical negligence?

Mr D Fee:

Clinical negligence is a money damage case. The vast majority money damages are awarded for personal injury. However, if you are suing someone for crashing into the front wall of your house, for flood damage or for any damage to property, those are money damage cases, should you avail yourself of legal aid.

Mr McCartney:

So, this is not an attempt to open up access? There are people who do not take up a case because

of the cost if they lose.

Mr D Fee:

LFAs could, arguably, give greater access to people who would not qualify for legal aid, although the Legal Services Commission's approach would simply be to cater for those who would qualify for such aid. There is a possible benefit, in that the LFAs would give access to people who do not qualify. I am not saying that one should argue totally against them; I think one to be careful about what they might open up. I go back to the point that, if 90% of the cases of those who have been injured and who cannot fund their own cases are successful and cost very little, would it not be better, if at all possible, to keep the current arrangement?

Mr McCartney:

I understand that, but are there occasions when people do not take cases because they cannot indemnify themselves against costs, and they walk away?

Mr D Fee:

Yes. The legal profession in Northern Ireland is such that, over a long number of years, in a very small legal service, the Bar, and solicitors in particular, deal with clients and their families. Those solicitors will proceed with litigation in the hope that it will be successful, and charge a small amount. In England, it is all front-loaded and costs an absolute fortune. Here, people try to keep the costs down, proceed towards the case, and try to settle the case and avoid court if at all possible. Our system works quite well in that way. A clinical negligence case costs a lot of money because a lot of experts are required. The funding of such a case can be difficult for a person who does not qualify for legal aid. That is one of the major areas of concern.

Mr McCartney:

Adrian addressed the issue with clause 85. There is a financial aspect, but the interests of justice must also be taken into account. Someone earning £35,000 could still be eligible in the interests of justice.

Mr Colton:

Yes; provided that is left in the hands of judges and that it is made clear.

Mr McCartney:

Is that why you would argue that that decision should be left with the judiciary?

Mr Colton:

Yes.

Sir Reg Empey:

Approximately how many individual cases are taken in a year? You made the point that it was roughly 1% of the total. Do we know how many cases we are talking about?

Mr D Fee:

In terms of civil litigation? I am not sure that I have access to that. I am sure that it is reported. The figures from the various publications talk about percentages, so I am not sure what the actual figures are.

Sir Reg Empey:

Just as a matter of interest, if it does come across your desk, you could let the Clerk know what that amounts to.

Mr D Fee:

Is it the total number of civil cases?

Sir Reg Empey:

I want to know the number of individuals. Out of that 1% or 2% of the legal aid budget, approximately how many people are affected?

Mr D Fee:

I am not sure if that is available. The Court Service may have it. It is not in any of the publications —

Sir Reg Empey:

Well, if anybody has it —

Mr McNarry:

It must be, if you have a figure of 1%. What is it 1% of?

Sir Reg Empey:

You were making the point that it is significant —

Mr D Fee:

It is 1% of £104 million. That is a published figure.

Sir Reg Empey:

I just wonder how many individual citizens are involved in that.

Mr D Fee:

It will certainly be a significant number of cases, but I do not have the actual figures. The Legal Services Commission will have the precise number of applications in any particular year from people who qualify for legal aid and have suffered injury. The 1% is 1% of the overall cost.

Mr A Maginness:

Have you been in negotiations with the Legal Services Commission or, indeed, the Department about LFAs? I thought that at an earlier stage the Department indicated that both the Bar and the Law Society were in favour of the proposal. If I am wrong about that, correct me.

Mr D Fee:

No, I am not saying that. In fact, I hope that we made it clear that, if it does give access, we are in favour of it. The caveat that we have is whether the difficulties and practicalities of dealing with it are fully appreciated. The other issue is whether there is any need for it if the cost is so little at the moment.

Mr A Maginness:

It is a small number of cases. You talked about the experience in England and Wales, and you mentioned success fees. Has that in any way inflated the price of litigation?

Mr D Fee:

It certainly has. There is a lot of criticism; the Jackson report and so on have been critical. The legal profession in Northern Ireland has a lot of concerns about success fees. I put it that way because I am sure that there are certain lawyers who would like success fees and who see them as an opportunity. In general, the legal profession has difficulties with them and fears and concerns about them. The idea of a success fee is that you bring a case and, if you are successful, you charge maybe another 50% in fees.

Mr A Maginness:

So it is a premium on top of the normal fee.

Mr D Fee:

People then perhaps pick a case that is likely to be successful and do not take the cases that are likely to be unsuccessful. They charge extra fees, and the cost of litigation, particularly to the defendants, is significantly increased. The overall cost of litigation goes up; that has been the problem in England and Wales.

The Chairperson:

Thank you very much for your presentation and for coming along.

We move on to a briefing from Women's Aid Federation Northern Ireland on the key points and issues regarding the miscellaneous and supplementary legal aid provisions in the Bill.

I welcome the team: Gillian Clifford, regional policy and information co-ordinator for Women's Aid Federation Northern Ireland; Patricia Lyness, management co-ordinator for Belfast and Lisburn Women's Aid; Noelle Collins, team leader for Belfast and Lisburn Women's Aid; and Sonya Lutton, deputy helpline manager. Ladies, you are very welcome. You have 10 minutes in which to outline your brief. There will then be 20 minutes of questions. I know that

we digressed marginally earlier, but we made up for that in our own time in the session with the lawyers. However, I suspect that, if I were not as flexible with you, you would remind me of that.

Ms Patricia Lyness (Women's Aid Federation Northern Ireland):

Good afternoon, Chairman and members. On behalf of Women's Aid, I thank the Committee for the opportunity and invitation to give evidence today on two issues that are of great importance to the women and children who use our services across Northern Ireland and to the wider community. We want to talk about access to legal aid for women who have experienced domestic violence, specifically the cost of legal proceedings and of obtaining a non-molestation order. We also want to highlight the treatment of women as both victims and witnesses in legal proceedings involving domestic violence and to make recommendations in that regard. We will endeavour to respond to any of the Committee's questions or issues. The Chairperson has already introduced us, so I will skip the introductions.

Women's Aid in Northern Ireland has over 35 years' experience of dealing with domestic violence and of providing and developing safety and support protection and safety services for women and their children. Domestic violence is one form of violence against women that occurs across the world. It is a crime and a violation of the most fundamental human rights: the right to live free from torture, violence and the threat of violence, and, indeed, the right to family life. Those principles are enshrined in European international human rights standards and conventions, of which the UK Government are signatories.

Our work includes challenging the attitudes and beliefs that perpetuate domestic violence and promoting healthy and non-abusive relationships. Across our 10 local groups, we have 12 refuges providing a total of 300 bed spaces. In 2009-2010, over 1,000 women and almost 900 children sought refuge with Women's Aid. We also have a floating support service that supports and enables women to remain in their home, if it is safe to do so. Last year, that service dealt with almost 3,000 women and over 3,000 children. In 2009-2010, the 24-hour domestic violence helpline managed over 32,000 calls, which represents a 70% increase on the previous year.

Women's Aid welcomes the Minister's victim-centric approach to the Department's ongoing review of the justice system and the proactive, positive and highly productive engagement that we

have had with departmental officials, representatives from the Northern Ireland Legal Services Commission and others during the consultation process on a number of key issues.

It is not our intention in this presentation to make generalisations about the conduct of the legal profession in its representation of women who have experienced domestic violence. Rather, we wish to illustrate the issues raised by the women with whom we work and the concerns that we as an organisation share. We fully acknowledge that there are numerous excellent examples of practice in the legal profession. Indeed, that has been our experience. However, we feel that best practice, particularly in family law, needs to be clearly established, identified and standardised across Northern Ireland.

Non-molestation orders and access to civil legal aid have become matters of increasing concern to Women's Aid, particularly regarding the cost of obtaining such orders. Non-molestation orders come under legal aid advice and assistance legislation. The income threshold for that form of legal aid is extremely low. In 2010, a woman must have a disposable income of no more than £234 a week to receive legal aid for non-molestation order proceedings. The figure of £234 a week does not take into consideration mortgage or childcare payments. It is, however, inclusive of benefits, child maintenance payments and any income from part-time work. Through the exclusion of tax credits, a single mother working part time is brought just over the threshold of legal aid.

In seeking a non-molestation order, the initial ex parte order can cost up to £400. Within two weeks, the pursuit of a full non-molestation order can cost a further £400, or considerably more, particularly if the order is contested by the respondent. Full orders are frequently contested, and, depending on the duration and complexity of the proceedings, it is not unusual for a contested order to cost in excess of £2,000. Our legal consultants have stated that, if the respondent has a criminal case pending that is linked to domestic violence, the respondent's legal representatives will frequently encourage the respondent to contest the full non-molestation order as a failure to do so may prejudice the outcome of the criminal case.

For many women who are unable to access legal aid, those costs can be prohibitive and are an additional, unsustainable financial burden at a time of enormous fear and uncertainty. It is a

source of particular concern to us that our legal advisers have highlighted that, in the vast majority of cases in which women have been asked to pay for a non-molestation order, they have decided not to pursue proceedings. We are currently attempting to quantify the information from the women with whom we work, and we will be happy to submit those findings to the Department and the Committee when they become available. Solicitors have reported to us that there are cases where financial constraints have forced a woman not to pursue an order and where they have felt strongly that there has been a clear and demonstrable risk to the safety of the woman and her children as a result of not doing so.

It has been suggested that an alternative approach for women may be the pursuit of an injunction against harassment. Although we note that harassment orders have a much higher threshold for legal aid — currently a disposable income of £9,937 per annum, inclusive of mortgage, rates and childcare payments — we also note that, in cases of injunction against harassment, there is a strict adherence by courts to a policy that the complainant must be able to demonstrate that two recent incidents of harassment have occurred. In that context, it is also a matter of concern that women not resident with partners cannot obtain a non-molestation order, as resident boyfriends or partners are not considered to be an associated person for the purposes of an order. We are increasingly seeing young women reporting violent behaviour from partners, and it is essential that those young women are able to report that violence and seek legal protection at the earliest opportunity. They should not be forced to wait for a subsequent incident to occur. From a humanitarian and risk-management perspective, that is a highly dangerous practice. Similarly, to be in receipt of legal aid for an injunction against harassment, the applicant must demonstrate that the merits of bringing an injunction are satisfied.

Although the breach of a non-molestation order constitutes a criminal act, Women's Aid is troubled by the apparently subjective nature of interpreting the breach of an order and the inconsistent arrest policy. The PSNI is charged with determining what constitutes a breach, and we would welcome clarification on its operational policy and guidelines for arrest in cases of breach of a non-molestation order. We fully support the key recommendations in the Criminal Justice Inspection Northern Ireland report on domestic violence and abuse in respect of decisions to arrest, specifically its recommendation that supervisors should be more proactive in reviewing the approach taken in domestic violence cases, especially where decisions not to make an arrest

have been made.

We also note that provision exists in the legislation for costs to be awarded in non-molestation order proceedings. However, costs are seldom awarded. Through more than three decades of work, Women's Aid has observed that financial abuse is often a characteristic of domestic violence. Indeed, perpetrators often utilise the legal system and processes to further abuse by intentionally prolonging legal proceedings to create financial hardship for the victim. That is particularly problematic when the perpetrator is in receipt of legal aid and the victim is not. We understand that the awarding of costs will be an additional burden on the legal aid fund. However, the awarding of costs in those cases, or a reduction of legal aid moneys paid, might well serve to prevent vexatious litigation or behaviour that is designed to frustrate the process. It may also serve to discourage unnecessary delay.

Women's Aid continues to call for an immediate amendment to the legal aid rules and for an automatic right to be given to all victims of domestic violence to access legal aid and justice free of charge. It is our strong opinion that, as a minimum requirement, Northern Ireland should be brought in to line with existing provision in England and Wales. Since April 2007, the Legal Services Commission in England and Wales has been able to waive all eligibility limits —

The Chairperson:

I am sorry; I have to stop you there. Your time is up. We will have to leave it there.

Mr McDevitt:

I want clarity on a point. Clause 85 deals with a change to article 31 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. Is the current provision for non-molestation orders in article 31 of that Order?

Ms Gillian Clifford (Women's Aid Federation Northern Ireland):

I am not sure about that. Our understanding is that non-molestation orders rest with civil legal aid. That is one of our concerns. We thought that the Bill might have provided an opportunity to include provisions on legal aid.

Mr McDevitt:

It might be helpful to get clarification on that. Are you asking us to make positive amendments and introduce new elements to the legislation?

Ms Clifford:

Yes.

Mr McDevitt:

Your basic call is for an automatic right for all victims of domestic violence. Do you mean domestic violence or sexual assault?

Ms Clifford:

We want to include domestic violence and sexual violence, because women who experience domestic violence frequently experience sexual violence in that context. We would have welcomed an enabling power, and the Bill would have been an excellent opportunity to create that.

Mr McDevitt:

You are effectively looking for a possible new clause that will put in the Bill a power to provide free guaranteed access to justice for all people who allege that they have been a victim of sexual violence.

Ms Clifford:

Yes.

The Chairperson:

I am trying to get my head around your position on non-molestation orders. Are you more concerned with the lack of legal aid to impose those orders, or are you talking about a lack of consistency in the imposition of non-molestation orders?

Ms Lyness:

Cost is primarily the barrier for women who need a non-molestation order. The cost is

prohibitive because of the threshold and because of all the factors that are taken into account.

Ms Sonya Lutton (Women's Aid Federation Northern Ireland):

A lot of women who work call the 24-hour domestic violence helpline and access other Women's Aid services. Because they work, they cannot get protection, and they do not have the same rights as those that are afforded to their counterparts in England and Wales. There are similar schemes in those jurisdictions where women can pay a contribution towards the costs of the case or can pay monthly. We looked at introducing that kind of scheme as well as at the waiving of fees.

Ms Clifford:

A number of solicitors have already set up payment plans to help women to do that. That is one reason why we want best practice to be explored and rolled out across Northern Ireland. We have major concerns about situations where, for example, working family tax credits will take a working single mum just over the threshold for legal aid. That affects a lot of women whom we deal with, and it is, to us, intolerable for a woman to be faced with having to balance her financial stability with her safety and security and that of her family.

The Chairperson:

The paper that you tabled is not definitive about that. Paragraph 7.10 says:

"However in England and Wales, women in domestic violence situations may not have to meet financial eligibility criteria".

What does that mean?

Ms Clifford:

There is the capacity in England and Wales to —

The Chairperson:

Sorry to interrupt you. So, you are not saying that those women do not have to meet the criteria, rather that they may not have to.

Ms Clifford:

They may not have to. That is the existing position of the Legal Services Commission in England

and Wales. There is capacity to take into consideration domestic violence, affordability and the income threshold and to make an adjudication based on that. However, similarly, there is a system in place there where, depending on the income threshold, a person can, if necessary, make repayments over time. However, people are entitled to legal aid and can repay based on their income.

Mr McCartney:

I want clarification on a number of points in your briefing document about non-molestation orders. Do you keep any figures on the amount of women who do not pursue those orders because of the legal aid aspect?

Ms Lyness:

That is one of the areas of work that we will be concentrating on to gather evidence and statistics.

Mr McCartney:

Do you have a process for doing that? There may be a lot of women who do not come forward.

Ms Noelle Collins (Women's Aid Federation Northern Ireland):

As part of a woman's support plan, we ask her that when we contact her. We worry about the women who call to solicitors, are quoted a price for a non-molestation order or an occupancy order, cannot afford it and return to abusive relationships.

Mr McCartney:

It would be good for us to have some idea of the numbers who currently take out those orders and their financial positions, particularly when we are considering clauses. It would be interesting to see whether the people who pursue them are those who have the ability to pay. If so, that would help to prove the point that you are making.

Ms Clifford:

It would be very helpful for us if solicitors were able to collate those figures, because not every woman who has experienced domestic violence will come to Women's Aid. It may well be that there are women who go into a solicitors' office only to be told that they cannot get legal aid.

Those women will then walk away. We never encounter those women, so we are not getting the full picture.

Mr McCartney:

In a previous presentation, we were told that the limits were £11,000 for those without dependants and £12,500 for those with dependants. There does not seem to be anything built in to take account of the number of dependants or whether there is a mortgage involved.

The Chairperson:

Are you saying that when it comes to enforcement of non-molestation orders, the police are found wanting in many cases and that there is a continual inconsistency in their approach? Do you have any figures to support that, or is it an anecdotal observation?

Ms Lyness:

Are you talking about police action on breaches of those orders?

The Chairperson:

Yes, I am talking about the number of cases in which you felt that the police did not act correctly in enforcing them. Would those cases make up 50%, 20% or 10% of the total number?

Ms Collins:

We only have figures for the women that we have experience of. There are affected women who have never contacted Women's Aid, so we cannot put a number on them. However, we have certainly found the approach to breaches of orders to be inconsistent across the police areas.

Ms Lyness

That is an area that we are looking at. The issue is also our capacity, because our main aim is to deliver services. However, those are the issues that are coming up for us, so we have to look at them within our capacity. We are also looking to the police to provide some of that information. If you consider the Criminal Justice Inspection report on domestic violence that was published yesterday, you can see that one of its recommendations was that the PSNI should consider monitoring cases in which no arrests have been made, including cases of breaches of orders. So,

we need the police to help us to get robust figures. At the minute, what we are saying is anecdotal, but we have to look at how we can gather evidence to support that.

The Chairperson:

What is the figure for the incidence of domestic violence? Is it one incident every 21 minutes?

Ms Clifford:

Yes, and one crime every 53 minutes.

The Chairperson:

Are those the figures for Northern Ireland?

Ms Lyness:

Yes, there were over 9,000 crimes with a domestic motivation in 2009-2010.

The Chairperson:

Thank you very much for coming, ladies.

The next item is a briefing by the Law Society. Again, the briefing will outline the key points and issues on the legal aid, miscellaneous and supplementary provisions clauses of the Bill and the withdrawal of the draft solicitor advocacy clauses. I welcome Brian Speers, who is president of the Law Society, Norville Connolly, who is senior vice-president, and Alan Hunter, who is the chief executive. You are very welcome. Mr Speers, I understand that you are just starting your term of office.

Mr Brian Speers (Law Society of Northern Ireland):

This is my one-week anniversary, which is a significant milestone.

The Chairperson:

We wish you well.

Mr Speers:

Thank you very much. I am still standing, or sitting, after one week.

The Chairperson:

You have 10 minutes. I said that to your other legal colleagues, but they did not pay much attention to me. *[Laughter.]*

Mr Speers:

I thank the Committee for allowing us to come along and make some observations. I will ask our chief executive to talk about the issues under review.

Mr Alan Hunter (Law Society of Northern Ireland):

First, I thank the Committee for inviting the society to make representations today, as the president indicated. The society has a specific interest in a number of proposals in the Bill, and I am aware that the Committee has our written statement, so I do not propose to restate those, given the time constraints. However, I will flag a number of the issues that we highlighted in our submission.

Clauses 12 and 13 relate to the examination of an accused through an intermediary and are modelled on the Coroners and Justice Act 2009 in England and Wales. Our submission voices concerns that the provisions may lead to the prosecution of the mentally unfit. We acknowledged that the Bill contains important safeguards, including that a direction is given only when the court is satisfied that it is required to ensure that the accused receives a fair trial. However, we felt it important to bring that particular matter to your attention. The relationship between the intermediary and the defendant's legal team is a further issue that we highlight.

Our submission mentions the view held by criminal law practitioners — and none of us here today is a criminal law practitioner — that defendants appearing via live links find it difficult to understand and participate in the proceedings. We highlight a particular concern with respect to those who are suffering from a mental disorder, and we note that the Bill contains important safeguards. However, we think that it is important to bring that to your attention today.

As regards the diversionary factors and penalty notices set out in the Bill, we have highlighted to the Committee that those, effectively, operate outside the justice system, and we raised a number of concerns about how the scheme will work. We pointed to some safeguards that we think are required, particularly relating to the conditional caution, where we highlighted the need for appropriate safeguards.

There are two significant proposals on legal aid in the Bill. First, there is the criminal legal aid means test. A copy of the executive summary of our submission to the Courts and Tribunals Service was annexed to our response to the Committee. Members will have noted that the society considers it appropriate that those whose earnings are sufficient and who are found guilty of crime should not benefit from legal aid. However, the prescribed financial limits will require scrutiny. It has already been brought to your attention, and I will bring it to your attention once again, that, in England and Wales, the prescribed levels are likely to remove from the scope of criminal legal aid such diverse groups as nurses, cleaners, teachers, firefighters, civil servants, and ambulance drivers. A further factor is that defendants are likely to be suspended from their work while on trial or awaiting trial.

The society welcomes the removal of the prohibition on the Legal Services Commission funding legal services under litigation funding agreements. We are working with the commission in that context. However, we are keen to ensure that access to justice for all is guaranteed.

The principal issue that we would like to raise is that of rights of audience for solicitor advocates. The Committee is aware that it was the intention that the Justice Bill would contain proposals for the extension of rights of audience for solicitor advocates in the higher courts and for them to appear in cases certified for counsel in the Magistrate's Court. This proposal was withdrawn prior to the consideration of the Bill due to a decision by the Attorney General that the Bill may be in breach of article 25 of the services directive. That came as a disappointment to the society and the Minister. The society was particularly surprised about the basis for the Attorney General's opinion, and we sought our own opinion on the matter. The Committee is aware of the opinion provided by Sir Sydney Kentridge QC. He stated that he could see no basis upon which the Attorney General had based his opinion. A copy of Sir Sydney's opinion has been provided to the Department, and we await its views. We also requested sight of the Attorney General's full

opinion.

The society considers that the current position is most unsatisfactory, leaving, as it does, members of the public in Northern Ireland without the choice of their solicitor or another solicitor as advocate in the higher courts. Members of the public in the South, England and Wales and Scotland all have that choice.

We understand that, latterly, there have been discussions with the Minister and the Attorney General. We understand that the Minister is hopeful that clauses can be introduced to the Bill, by way of amendment, to give rights of audience to solicitors in the higher courts in accordance with the policy intention of the Minister and the Department. We are, therefore, hopeful of a satisfactory resolution.

However, I invite the Committee to consider two points. First, given the short time available for passage of the Bill, particularly Committee Stage, this matter must not go by default. There must be sufficient liaison between the Committee and the Minister to ensure that, prior to completion of Committee Stage, there is a clear commitment to introduce the clauses by way of amendment. That will require the Minister to settle the clauses and consult with the Committee and the society to ensure that the clauses achieve the policy objective. We invite the Committee to ensure that, one way or the other, clauses are ready to be introduced, by way of amendment, in a timely fashion during the passage of the Bill.

There is one final important point. We do not know what resource impact assessment has been carried out on the measures to be introduced by the Bill. The Bill will create new administration. Has that been costed, and have funds been set aside to deliver it? There will be a legal aid impact, new cases, new offences, a need for new legal aid defence certificates and an inevitable rise in legal aid spend. We query whether that is provided for in the estimates and funds that have been set aside to meet those costs. Those are important questions.

We are happy to answer any questions.

Mr McDevitt:

I wish to pick up on the point about the solicitor advocate. The introduction of the clause, as originally drafted, would have been subject to regulation. A series of rules would have been formulated. How does the society feel about the nature of regulation that will be required to ensure that standards are not compromised in any way while solicitors are given rights of audience?

Mr Norville Connolly (Law Society of Northern Ireland):

We feel that the highest standards should be maintained. In anticipation of being granted solicitor advocacy rights, our council has already had the debate. We passed a proposal that we will have regulations to allow two major policy changes. One is that a client who has the possibility of using the solicitor advocate will be advised that there is a choice of advocate. That choice will be explained, and it will also be explained that, if a person selects an advocate, that advocate will earn higher fees as a result being so employed.

Our council's second policy change is that each solicitor will keep a detailed note of the type of advice that he has given to the client. That will ensure that it is clear and transparent that advice has been given on higher fees and choice. That goes even further than what happens in England and Wales or Scotland. We want to keep the standard as high as possible.

Mr McDevitt:

We will be looking only at enabling legislation at this stage, of course.

Mr Connolly:

Yes; but we will obviously pass the regulations after that.

Mr McDevitt:

I note the Law Society's support for LFAs. I do not know whether you heard Mr Fee's evidence earlier. He expressed support in principle but raised concern about the law of unintended consequences. What is your opinion on that? Do you see a potential risk or downside with LFAs in that you could end up denying access to people who may have had it otherwise?

Mr Brian Speers (Law Society of Northern Ireland):

We are more accepting than the position that Mr Fee outlined. We see that alternatives need to be explored. Indeed, we are engaging in an exploration of alternatives that may achieve the goal of providing access to justice for predominantly civil claims in which money damages are pursued. We also see that there is a need to consider the administrative costs of that within the Legal Services Commission. At this stage, it is a matter of remaining in active discussions with the Legal Services Commission, but being broadly in support of the principle of exploring alternatives to the current arrangements.

Mr McDevitt:

For clarity, do you have an objection to clause 90 as it stands?

Mr Speers:

No. We do not.

Mr Connolly responded to the point about the solicitor advocacy. I just want to add that, in order to be a solicitor advocate, a rigorous and high-quality course is offered. As Mr Connolly said, we are anxious to ensure that there is a quality of service provided. We are extremely confident that the solicitor members will be well able to meet any quality standards and that the additional training that we have set in place will address any reasonable concerns about quality of delivery of advocacy services.

The Chairperson:

What do you say, Mr Hunter, to those who say that the lack of access to justice, if legal aid is not available, is overplayed? I have heard it said that that is overdone.

Mr Hunter:

I suppose, Mr Chairman, I might say a very great deal, but I will try to be succinct.

Access to justice is not an optional extra for the state. It is a foundation of the state and an emanation of it. Secondly, it is important, if there is to be equality under the law, that people have recourse to enforce their rights or to defend themselves against prosecutions or actions brought by the state whether or not they have means. Therefore, it is ultimately a key

requirement of the state to ensure that people have access to the courts, whether or not they have means. Although it may not be particularly popular at any time, it underpins society, and says a good deal about the type of society and state that people want to live in and want to have their rights respected in.

The Chairperson:

So, you defend it to the last?

Mr Hunter:

Yes. Absolutely.

Mr Givan:

I think all of us around the table agree that access to justice is vitally important, but the level of representation is in question. The question is about how much legal representation someone should be entitled to and how much should the state pay for. Access to justice is very important. Some would say that, compared with other parts of the United Kingdom and beyond, we have a gold-plated version.

What do you say to those who say that, when a client is granted legal aid, the individual members of the legal profession who represent that client ensure that the case goes on to maximise the fees that they can receive? I have heard the accusation that those in the legal profession deliberately attempt to ensure that they receive the maximum amount, once the client is deemed eligible for legal aid.

Mr Speers:

You have to remember that, when a solicitor engages with a client, he is obliged to do his best for the client, pursue their remedies, argue points and make representations on the client's behalf. If, in your suggestion, there is any sense that someone should do half a job, rather than all of it, we must reject that. Professional conduct rules say that we must act in the best interests of the client and pursue their interests ahead of our own. As president of the Law Society, that seems to me to be well worth emphasising at all times. That is what our members are expected to do.

I know the point you are making. It is difficult without looking at individual cases, but, when

legal aid is granted, there are other controls. The courts can intervene and case-manage the process, so I do not think it is a by-ball for people to exploit the system to the maximum in the way you suggest. I support what the chief executive said, namely, that the entitlement for equality of arms and to pursue rights is a very important feature of civilised democracy.

The Chairperson:

Mr Speers, do you accept that a much more efficient and practical way to do it is to establish an upper limit on an case, irrespective of the number of times it goes in and out of court, and that it is it, full stop? The barristers and lawyers can then win 100 times if they wish, but the legal bill would never change. Would that be an efficient way to do it?

Mr Hunter:

In principle, the society works on a basis of fixed standard fees in a number of areas. Certainly, much of the recent negotiations around fees have been on the basis of trying to identify a reasonable fixed fee for a particular case, but elements of a case can be unpredictable, and circumstances can arise. For example, the defence's responsibility might be how the prosecution has conducted a case, or there may be other circumstances that arise that need to be considered, so there is always a need for some exceptionality and provision to deal with those exceptional circumstances. However, yes, the society has been working on the basis of seeking to establish a set of fees that would apply to certain types of proceedings, and that has been the basis of the negotiations.

Mr McCartney:

I have a couple of points for clarification. Your submission states that levels of eligibility must be set appropriately. Have you put forward any suggestions or is that just a wide —

Mr Hunter:

Yes, it is a wide statement. We have not put forward any suggestions, but we have done some research and looked at the standards set in England. I noted in my presentation, with some alarm, the types of people who would be excluded, and I think it is important that there is proportionality in how those rules are brought forward, and that regard is given to the equality of arms. The Public Prosecution Service (PPS) will have resources and will have a series of other agencies

behind it providing resources, so, it will be important that there is a proportionate and acceptable response brought forward. We will have an opportunity to discuss that in due course.

I noted in particular the point about negative resolution. I support that, where these proposals are being brought forward that are going to have such a major impact, they should be by way of affirmative rather than negative resolution.

Mr McCartney:

The next paragraph of your statement refers to defence cost orders and says that they will be rolled-out in Magistrate's Court first. Have you been told that?

Mr Hunter:

That is what we understand the position to be. However, once they are in place, I suppose it is for the Department to decide as and when it will roll them out. Again, I think we are looking at the issues of proportionality and equality of arms, and the impact on people's lives generally and in the long term.

Mr McCartney:

What is the average cost in a Magistrate's Court compared to those in a Crown Court?

Mr Hunter:

I do not have that information. May I write to you and give you that detail?

Mr McCartney:

I sat this without prejudice: if there was a sense that people were getting legal aid who should not be, it would be more in the high profile cases, which would be in the Crown Court rather than the Magistrate's Court. Do you have an opinion on that?

Mr Connolly:

There are set fees for solicitors appearing in the Magistrate's Courts. For a straightforward plea, it is £290, and, if there were a contest, I think it is around £500. It does not make any difference, as the Chairman said, how many times the case is adjourned. Those have been in place only for

around a year and three months, and they appear to be working quite well.

Mr McCartney:

The headline would not be defence costs of around £290 or £500. Rather, it would be about a big case that costs whatever amount and the fact that the individual concerned may have all sorts of property and so on.

Mr Connolly:

To add to what the chief executive said: the weakness is when the prosecution withholds evidence, which it does quite often. If there is a set fee, it is very difficult for the solicitor to do the preparatory work required. A huge amount of preliminary work is done prior to the case's first appearance in court. However, if there is a set fee, no payment is given for all the investigation work that is done for serious cases. There may, therefore, be miscarriages of justice, unless suitable exceptionality clauses are added to the set fees. In principle, set fees can work very well, and that is what all sides are moving towards.

Mr McCartney:

Where should justice standards be tested in granting legal aid? Should the responsibility remain with the judiciary or be given to the Legal Services Commission?

Mr Connolly:

As we said before, the difficulty is that the Legal Services Commission is driven by budgets. However, this issue, which affects everyone in the community, is about ensuring that justice is carried out regardless of budgets. We would not be happy if such decisions were taken by the commission, because it is driven by only budgets.

Mr McCartney:

You think that it should remain with the status quo, then?

Mr Connolly:

Yes.

The Chairperson:

We know that you feel strongly about solicitor advocacy, Mr Hunter, and that you have sought legal opinion about the issue from elsewhere. Have you had any recent correspondence from the Minister about how he feels about it of late?

Mr Hunter:

I have been in correspondence with departmental officials, and I understand that a meeting was held between the Attorney General, the Minister and officials. I also understand that some proposals may be coming forward for consideration. I am sure that the departmental officials can confirm whether that position is factually correct.

Our concerns are two-fold. First, given how late in the day the initial objection came to everyone's attention, the issue will be resolved only if it is brought forward in a timely way to allow everyone to consider the situation properly and, therefore, ensure that the proposed new clauses are included in the Bill. Secondly, the policy objective needs to be achieved through the new model, whatever that is. Of course, we will not know whether that is achievable until we see the proposed new clauses. That is our understanding. I may or may not be corrected about the positions that were set out in the discussions between the Department, the Minister and the Attorney General. However, that is my clear impression.

The Chairperson:

You say that you understand that the Department may be coming forward with some proposals. Do you reckon that you will agree with those proposals?

Mr Hunter:

Our difficulty is that we have absolutely no detail, even in broad-brush terms, about those proposals. I am, therefore, not in a position to comment on them. I very much wish that I was in such a position, but I am not. We need to see the proposals, so that we can comment on them as quickly as possible.

The Chairperson:

On 26 November, the Minister sent me a letter about the issue. In the last paragraph, he states

that he has since shared the opinion — the one that you shared with him — with the Attorney General and is meeting him to discuss the solicitor advocacy issue, which he hopes to table as an amendment. Is that the sort of news that you are looking for?

Mr Hunter:

Yes. We hope that the Minister will table an appropriate and adequate amendment.

The Chairperson:

That is very diplomatic, Mr Hunter. Well done.

Mr A Maginness:

Clause 90 removes the prohibition on the commission funding legal services under litigation funding agreements. What is the net effect of that? It removes prohibition; therefore, it opens up alternative funding methods. Does it necessarily remove the idea or the position of funding clients directly under the current legal aid system? Do you envisage a situation in which you had a dual system: in other words, you could have litigation funding agreements and the present position?

Mr Hunter:

Yes. As I understand it, the clause's objective is to remove the prohibition of any public money being used to start up, run or underwrite a litigation funding agreement. However, that would not necessarily require such an agreement to be in place, nor preclude any other type of funding. I want to make another point about that to aid the Committee's consideration, which is that those types of agreements would, of course, extend beyond those who are eligible for legal aid. Therefore, those types of agreements might aid people who do not qualify for legal aid at present and who are thereby potentially occasionally unable to bring their cases forward in some circumstances.

Mr A Maginness:

They do not qualify for legal aid because they are outside the financial limit?

Mr Hunter:

Precisely.

Mr A Maginness:

There has been a lot criticism of the situation in England and Wales. Is there any way to avoid the problems that have arisen there, particularly with regard to success fees?

Mr Hunter:

I am sure that you are aware of the Jackson report, which looked at that topic. Part of the painful experience in England and Wales when legal aid for personal injury actions and money damages was removed was the enormous amount of satellite litigation around trying to work out what would be an appropriate success fee, what was reasonable and what was not. The Jackson report sets out good lessons from the experience of England and Wales, which I am sure that we would all want to take into account in developing a suitable system for this jurisdiction.

Mr A Maginness:

You do not suggest that we introduce the English and Welsh systems here?

Mr Hunter:

At present, we have a working group with the Legal Services Commission, as does the Bar, to look at various options, of which litigation funding agreements are one. I do not think that those discussions are at the stage yet where anything has been ruled in or out. Whether this goes through is very much a precursor to any final decision.

Mr A Maginness:

I want to ask about the comment that was made about lawyers spinning out trials or legal processes. Is there any evidence to sustain that particular suggestion? Is it remunerative for lawyers in this jurisdiction to, as it were, spin out trials — pre-trial hearings or things of that nature, I presume. What is your experience of that?

Mr Speers:

I have a particular interest in the resolution of disputes. It is fair to say that there has been some

encouragement from remarks that have been made by the Lord Chief Justice and the Minister that, perhaps, a focus should be on early resolution. I am simply comfortable with the fact that solicitors act in their clients' best interests. In many cases, that will be to advocate strongly, to litigate and to have adjudication on the issues. In some cases, however, it is in their clients' interests to explore more effective resolution options. Certainly, during my year as president, we will bring forward initiatives to increase resolution-type work through mediation training and through solicitors becoming involved as resolvers of disputes, which, traditionally, was often a solicitor's role as a counsellor and adviser as well as a representative and champion. There is much to be explored in looking at ways to satisfy the court and litigation process that all attempts have been made to resolve disputes before they get too far down the line.

In answer to your question: there are checks and balances. It is easy to say that lawyers are spinning it out, but in reality, you often have determined and energetic clients who want particular points to be espoused. In doing that, lawyers are simply representing their clients' instructions.

The Chairperson:

We are marginally over our time for this session, but Sir Reg wanted to ask a question.

Sir Reg Empey:

Have you met and consulted your colleagues at the Bar on the legislation? I know that the situation can sometimes be complex, but I wondered whether there had been any co-operation on the matter.

Mr Speers:

There is generally co-operation and frequent contact. However, the Law Society's submission was compiled only by us and is not the result of any joint approach. That can be seen in the differences of emphasis this afternoon.

Sir Reg Empey:

I just wondered whether you had consulted or talked to the Bar. I also wondered whether you had attempted to marry your different views together. However, perhaps that is not the case.

Mr Speers:

Not yet.

The Chairperson:

Gentlemen, we must stop there. Thank you very much. If you wish to take a seat in the Public Gallery to listen to the officials, you are welcome to do so.

We welcome back Gareth Johnston, Robert Crawford, Geraldine Fee and Laurene McAlpine. The officials will respond to the issues that were raised during today's briefings. I understand that Mr Johnston wants to raise a point about clause 95. Will you do that at the beginning and we will take it from there?

Ms G Fee:

Thank you, Mr Chairman. It was actually me who wanted to raise a point. I want to correct an answer that I gave to Mr McDevitt when he asked me about the level of scrutiny that would apply to the rules that would be made to give effect to clause 95. There are two sets of rules that will be made to give effect to clause 95. The family proceedings rules that will apply in the High Court and the County Court will be subject to negative resolution, but the rules that will apply in the Magistrate's Court will be made in accordance with the Magistrate's Courts rules procedures. Those are not subject to any formal scrutiny in the Assembly, but will be subject to the scrutiny of the Justice Committee. I had rolled those into one before, and I wanted to differentiate.

Mr McDevitt:

That is helpful, and I thank Ms Fee for that. I am relatively new to this game, so perhaps the Committee Clerk could tell us about the rules that are made in the Magistrate's Court? They are not subject to any formal scrutiny, yet they are scrutinised by the Committee, so what it the status?

The Committee Clerk:

The officials may want to help me out. My understanding is that the Committee will be consulted on what will be in the Magistrate's Court rules, but those rules will not actually be laid in the

Assembly. That procedure also applies to another type of court rule.

Ms G Fee:

That is correct. Court rules are made for the various court tiers and most of them are subject to negative resolution. However, County Court rules and Magistrate's Court rules are not subject to any Assembly procedure, and we have liaised with the Committee Clerk and the Committee to look at how those procedures dock in to the Assembly procedures. We plan to give the Committee access to any draft rules and members could chose whether they want briefings from officials on those.

Mr McDevitt:

For clarification: is it correct to say that, if the Committee was unhappy with the draft rules, it would be powerless to do anything about them and that we would simply be consulted?

Ms G Fee:

If the Committee was unhappy, I hope that the Department would take the issues away, apprise the rules committees of those concerns and reach some form of accommodation.

Mr McDevitt:

Does the Minister have to approve all those rules?

Ms G Fee:

There are different enabling powers for different court rules and for the different tiers. In the case of the High Court and the County Court, the Minister allows the rules. In the case of the Magistrate's Courts, he is simply a consultee. The rule-making power is vested in the rules committee. It is quite complicated. We provided a submission to the Committee previously, but we can reissue that to you if it would be helpful.

The Chairperson:

The rules of the Magistrate's Courts and the County Court are not subject to Assembly procedures. Is that correct?

Ms G Fee:

Yes.

The Chairperson:

Why are they not?

Ms G Fee:

I suppose that it was a continuation of the procedure that applied pre-devolution in Westminster. They were not subject to any procedure at Westminster, so it did not follow through that the rules would be subject to Assembly procedure.

The Chairperson:

I may be asking a stupid question, but why not? What was the thinking behind it? What was the rationale?

Ms G Fee:

As I understand it, the rationale is that those are procedural and technical rules. It was thought that there would be a sufficient level of scrutiny of the rules through consultation with the Lord Chief Justice and the Minister. It was a historical issue. During the process of moving across to the devolved arrangements, it was decided to preserve the arrangements.

The Chairperson:

Do you think that the rules should be subject to Assembly procedure?

Mr Johnston:

Curiously enough, there is quite a wide range of bodies that have legislative powers to make various sorts of rules for straightforward procedural matters. I am not sure that they would come before the Committee as standard. The one body that always springs to mind is the Pharmaceutical Society, which has power to make certain rules that apply to how its members are regulated. The rules committees are just a couple of bodies on that whole list. It is just that what they are doing is about implementation. When legislation is changed and goes through the Assembly, different bodies have to implement it. The police implement it in their way, as does

the Public Prosecution Service. The Courts and Tribunals Service implements legislation through those rules. In many ways, I would compare it with the method of implementation of the other criminal justice bodies.

Ms G Fee:

I will just add that most of the rules are technical and procedural in nature and deal with how an application should be made and what time limits will apply. Sometimes, they touch on more substantive issues, such as, in this particular instance, the sharing of information. The secretariat and the Department have been very cognisant of that, and this will be subject to a full public consultation exercise so that the views of stakeholders are taken into account. We will come back to the Committee in order that the details of the rules are considered before we even get to the point of having a draft instrument.

Mr McDevitt:

I take the point. There would be very good reasons for devolving power to make rules for a lot of practical procedural issues. However, this is a substantial issue. It is a question of whether one is or is not in contempt of court, so it is an important point of law. Two issues arise; I am not sure whether this is a matter for the Committee, but I will express a personal opinion. I am not sure that it is particularly consistent with the separation of powers that the Minister is not the final decision-maker in a situation in which the law is going to put someone in contempt of law or not. Following on, if the Minister is not even the decision-maker as the executive arm of the legislature and if this Committee and this institution would have no legislative role, that seems to me to be a matter worthy of further debate, to put it diplomatically, at the very least.

Ms G Fee:

The rules committee make the rules under the statutory powers that were conferred on them previously by the Westminster Parliament, and now, under the devolved arrangements, they will have carried through. I suppose, constitutionally, at some point, that was considered by elected representatives to be an appropriate conferral of the powers. I am not sure that I can comment at this juncture on the wider constitutional point. However, in order to enable scrutiny for the Committee, we have been liaising with the Committee Clerk to provide a forward look at all rules that will go to the rules committees. That will provide the Committee with the opportunity to say

that it wants to see that information and to be consulted. In turn, that will ensure an appropriate level of engagement with the Committee in recognition of its role.

Mr McDevitt:

I have made my point.

The Chairperson:

Mr Johnston, will you respond to the issues that have been raised by the different groups?

Mr Johnston:

I will ask Robert to respond to the points on legal aid, which comprised the majority of points. There were also some issues on domestic violence.

Mr Crawford:

I will deal first with the points on means testing that were raised under section 85, which occupied quite a lot of the discussion. The resources for legal aid are limited. We spent £104 million last year and £104 million this year on a budget of £85 million. Therefore, we are, essentially, looking at every area where we might be able to save a few pounds, and that is largely the justification for introducing a financial fixed means test for criminal legal aid.

We agree that all the points made by the Law Society and the Bar need very careful analysis, and I hope that my earlier presentation reassured the Committee that we will do that and will come back to the Committee with the research that will be available later this month. Furthermore, if the Committee wishes, we will give it a flavour of our plan and analysis on that issue before the consultation that will need to take place on any proposals before they come to the Committee as legislation.

Therefore, we will look at all the points that have been raised. They are not, for the most part, new points. The issues on the impact on access to justice and the fact that some people may not get proper representation have all been raised, and we will consider them. However, at this stage, we are looking at introducing an enabling power rather than the detail. We still think that it is worthwhile to have the enabling power in place. If we can find a way to resolve a lot of the

issues satisfactorily, we may well want to proceed to make further, more detailed proposals. However, we do not assume that we will be able to solve them satisfactorily. We will need to look at them in detail.

A point was made about the litigation funding agreement. Again, I stress the point about resources. It is a very small area of legal aid funding, because it is given a low priority by the Legal Services Commission. I want to correct one point about who makes the judgement. We are changing nothing to do with the interests of justice test in criminal legal aid. That will stay with the judge, and the means test will not impact on that at all. The Legal Services Commission will not make the means test judgement in criminal legal aid cases, but it will carry out the assessment or will, perhaps, ensure that the assessment is carried out by others. The applicant will put in a lot of personal financial detail, but, ultimately, the granting of legal aid will remain with the judge and those two tests will be a matter for the judge.

Sir Reg Empey:

That seems to be in conflict with your earlier comments. We were quite clearly advised that it has been recommended that the judge will continue in that role and that the court will determine whether legal aid is granted. However, you are now saying that there will be an assessment.

Mr Crawford:

I think it is in the language. If a fixed means test is put in place, it will not be discretionary. If a person has income or assets that take him or her outside eligibility criteria, the judge will have no choice but to find that the means test has not been met. However, it is still the judge's final decision. I am not playing with words, but there would be no subjective assessment by the Legal Services Commission on a fixed means test — it would either be met or not met. The point that the legal representatives made was that, at the moment, the judge makes a subjective assessment on whether the defendant has insufficient means. That subjective assessment would go. It would not be open to the judge to say, "This person has more funds than would make them eligible for legal aid, but I am going to ignore that."

Sir Reg Empey:

Are there not circumstances where a judge might feel that the interests of justice are better served

by the provision of legal aid? Is the discretion of the judge being restricted?

Mr Crawford:

There is a limiting of the discretion of the judge in the sense that a financial means test would have to be applied and the judge would not have the discretion to waive it.

Sir Reg Empey:

That is significant.

Mr Crawford:

It is significant, and I am not taking away from what has been said. However, it does not move the subjective assessment to the Legal Services Commission.

Mr McCartney:

Will the interests of justice overrule the means test?

Mr Crawford:

No. Both tests will have to be met. That is why it is so important to find a way to get it right so that there is not a big impact on access to justice. If a financial means test rules people out, they are out and that is it, even if, in the interests of justice, the judge felt otherwise.

Mr McCartney:

That nearly renders the interests of justice test of no consequence.

Mr Crawford:

It does, because a person can still be ruled out in the interests of justice test, even if they are eligible financially. There are two separate tests, and one is not greater than the other. However, I confirm the importance of —

Mr McCartney:

I know what you are saying exactly. I would have assumed, wrongly, that the interests of justice test would have overruled the means test.

Mr Crawford:

It is not that you can get in if only one test is satisfied. The rationale behind all that is to look at whether there is a way of trimming the cost of legal aid. However, we take fully on board the concerns that have been expressed, and we want to make sure that we try to address them.

Mr McDevitt:

Mr Crawford, I thank you for your frankness, because this is a very important point. Given that, do you not think that, at the very least, we should be considering having this enacted by the affirmative resolution procedure rather than the negative resolution procedure? It is the sort of point that will need to be debated and considered further by legislators, even if we were to accept the clauses.

Mr Crawford:

It will be debated further. The difference between negative resolution procedure and affirmative resolution procedure is that, in the affirmative resolution procedure, provisions can be changed by the Assembly. It does not mean that, under negative resolution procedure, the Assembly does not debate or discuss them.

Mr McDevitt:

We have done a lot of procedural stuff, and the difference between the two is substantial. We do not debate regulations under negative resolution procedure unless we pray against them. So, we would debate them then, but that is only because we have prayed against them.

Mr Crawford:

My point is that, before we even get to that stage, we would come to the Committee with draft proposals for public consultation, and we would not go to public consultation unless the Committee is happy with them.

Mr McDevitt:

We may just take a Committee view on that. Surely, given the substance of this, if you are defending clause 85 as it stands, it is in your interests to defend it to be enacted by affirmative

resolution so as to ensure that there is the maximum opportunity for future scrutiny in the fullest parliamentary sense.

Mr Crawford:

If the Committee were to recommend that, I am sure that the Department would look at it. Having come before the Committee on other matters, I, personally, do not feel that there has been any lack of scrutiny. I would get the same questioning whether negative resolution procedure or affirmative resolution procedure is adopted.

I want to say a bit about the litigation funding agreement. The access to justice review is under way, and it will look at alternatives to money damages legal aid. It is not a case of having either money damages in legal aid or the litigation funding agreement. That point was picked up at the end of the Law Society's presentation. However, there may well be other areas and other ways of doing bits of that kind of work. For example, if a state agency is involved in a medical negligence case against a hospital, there may be a way of putting in a procedure that does not go near a court.

The issue of criminal injuries was mentioned earlier. That system operates in such a way that there are no legal fees at all. A solicitor will ask an applicant in a criminal injury case to sign upfront that he will hand over an amount — usually 15% — of the claim. That is not a part of the scheme, but that is how the arrangement is made, because a free service is provided by Victim Support for people making criminal injuries claims.

In a case where the action is against a state body, it may well be possible to put in place arrangements that do not need legal aid at all. Proper support and advice may be funded separately and at a lower cost. That is one of the areas that the access to justice review will look at. We will have an interim report on that at the end of February. Therefore, there is a point to be made there.

If, however, we have a limited budget, money damages will be seen as a lower priority by the Legal Services Commission. That is a certainty because there are other areas — indeed, Women's Aid mentioned some them — that will be seen as a higher priority: those that involve

safety, for example. That will be a consequence of having limited funds available.

I would like to offer some reassurance on civil legal aid. In Northern Ireland, based on 2008 figures, 44% of the population are eligible under the current means test arrangements. In England and Wales, that figure is 29%, and that reflects the levels of deprivation and lower incomes in Northern Ireland.

The Chairperson:
But it represents only 1% of the legal aid bill.

Mr Crawford:
I do not have the figures in front of me to confirm that. Perhaps we could write to the Committee with a breakdown of where that funding falls.

The Chairperson:
That would be useful.

Sir Reg Empey:
I would be very interested to know how many individuals are involved on average, just to see the scale of what we are talking about, because it is very hard for us to judge. We are told that it is between 1% and 2% of the total bill, but we do not know what that represents in terms of individuals.

Mr Crawford:
We should be able to provide that breakdown from the Legal Services Commission. If members have questions about that area, we are happy to take them. If not, I will move on to the issues raised by Women's Aid.

The Chairperson:
Do any members have any other points around the legal aid issues? I think that everyone is content.

Mr Crawford:

I think that the Women's Aid representatives were actually being quite careful and discreet in their presentation to you, because we have had some discussions with them about this issue, and members may recall that, during the debate on the Justice Bill on 2 November, the Minister indicated that he hoped to bring forward proposals that would be of assistance.

I will give you a little bit of detail on what we think may be possible, although I must stress that we do not have the Minister's final approval yet, nor are we absolutely there yet in confirming that it will work. However, we are looking at a system whereby, for non-molestation orders and related actions, the person who is at risk would be able to access legal aid automatically right away. However, there is a question of a contribution that might come into play at a later stage. In our discussions with Women's Aid, it felt that that would largely solve the problem that it is concerned about.

First, if the actual legal aid costs were ever applied, it would be done in a way that was sensitive to the needs of the individual in that the costs could be paid in stages, etc. Secondly, because legal aid rates are far lower than would be asked for outside that system, the costs would be very much lower anyway. The third point is that the contribution scale for that level of funding is actually quite low. The contributions are not massive, and I think that we would want to work with Women's Aid to ensure that we get the outcome that it wants and that we want, namely that people who are at risk are not put off applying to a court for an order by the possible high cost of legal assistance. We believe that that can possibly be done by ministerial direction. We have identified a power in the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. We need to do a little bit more checking on that, but, if we can do it that way, I think that we would recommend to the Minister that we do that to get it in place quickly.

Sir Reg Empey:

Would that include what is often a feature in these cases: the need to go back to court to deal with the enforcement side? That is almost as critical.

Mr Crawford:

We would want to include that in the direction. A legal aid certificate would still be issued by the Legal Services Commission. In those situations, the legal aid certificate could state that legal aid would follow through to any further orders. There would be some limits, but the point that you are making is valid in that we would not want the person to have to come back with a new application every time. Women's Aid has said to us that non-molestation orders are frequently challenged and that there is a need to go further. One of the comforts of getting people into the legal aid system and getting that certificate in place at the outset is that, if an order is challenged, they know that they will be able to contest it.

The Chairperson:

Mr Crawford, will you be bringing the proposed amendments to this Committee?

Mr Crawford:

If we can do it more quickly without legislation, there would be no formal Committee procedure, but we would be quite happy to come back and brief the Committee. I am sure that the Minister would want us to come and brief the Committee on that if you would find it helpful. I should say that the Legal Services Commission is examining this area anyway. It is under review. This idea came from the Legal Services Commission, and we have worked together on it.

The Women's Aid representatives talked about inserting a clause in the Bill. What they want, which is a complete waiver and no contributions, can be achieved through subordinate legislation. It does not require primary legislation, and it could be done by amending the existing legislation. Another way of doing it, depending on the Committee's agreement, is to move the non-molestation order application into criminal legal aid. There is currently no means test, but, if we were to look at introducing one in the future, non-molestation orders could be excluded from that. That would have an instant effect, because there is a fixed means test for civil legal aid, and that is their problem.

Mr McDevitt:

I am trying to get to the bottom of where your mind is, Mr Crawford. It sounds to me that you are

quite determined to meet these ladies' requirements. Is it the policy objective to meet the basic requirement, which is that women presenting as victims of domestic abuse would have an absolute right to free access to justice?

Mr Crawford:

It is not quite in those terms. Free access to justice would be available, but there might be a contribution at a later stage if someone's means were found to be fairly significant. It would still be considerably less than they would have to pay outside the legal aid system. In the longer term, the Legal Services Commission, which is the civil legal aid policy lead, will consider the issue of completely free access.

Mr McDevitt:

Am I hearing you right that your advice to us is that this is not the right place to try to have that debate now?

Mr Crawford:

It is unnecessary to put it in primary legislation anyway. There will be an opportunity to put it in subordinate legislation if there is a desire to do that. I do not want to speak for Women's Aid, but I think that it is quite happy with the proposals that we have made as an interim measure. It will also give us the opportunity to see whether they are working and whether any other changes need to be made.

Mr Johnston:

Women's Aid had a number of thoughts on how the system could cater better for women who are going through domestic violence proceedings. Only yesterday, the Criminal Justice Inspection report on domestic violence and abuse was published, and I am sure that the Committee will want to look at that in due course. A specific point was made regarding concerns about what constitutes a breach of a domestic violence non-molestation order and about the police taking a common approach to that across Northern Ireland.

Particular reference was made to the first recommendation in the Criminal Justice Inspection report, which is about PSNI supervisors proactively monitoring the approach to domestic

violence cases to ensure consistency of approach. Yesterday, the police welcomed the recommendations in the report. They said that they are currently in the process of exploring the operational outworkings of the recommendations but that they are committed to working closely with victims. If the Committee wants a fuller briefing on the report, the Department will be in a position to provide it.

There was also a concern that proceedings provided opportunities for perpetrators to perhaps further the abuse, and I will mention two specific points on that. First, there is concern on the part of the organisations that represent victims of domestic and sexual violence about questioning by barristers during cross-examination in court. In the sexual violence action plan, we are committed to exploring that matter with the judiciary. There has been some initial contact, and there will be further discussions on that in the new year.

Secondly, victims have been concerned that, in preliminary proceedings, which are called committal proceedings, for sex cases in particular they might be exposed to quite rigorous questioning that is then, in a sense, repeated at the trial. We are looking at reforms to the committal proceedings, and we hope to issue a consultation paper next year.

In addition to the points on legal aid and on solicitor advocates, which I will come to in a moment, the representatives of the Law Society made a few comments on live links. That was really just by way of confirming that they had raised issues and were exploring them with the Department. We can certainly address with them the points made in their submission.

The Law Society mentioned alternatives to prosecution, which we will discuss with the Committee next week. It flagged up the importance of putting sufficient safeguards in place to ensure that any admission by an offender is made in the full knowledge of the case before him and of the consequences. Guidance will be issued on those alternatives to prosecution — fixed penalty notices and conditional cautions — and I will make sure that those points are considered in the preparation of that guidance.

Finally, I wondered whether Laurene wanted to say anything about solicitor advocates.

Ms Laurene McAlpine (Northern Ireland Courts and Tribunals Service):

As the Law Society indicated, we intend to bring forward fresh clauses on rights of audience for solicitors. I am fairly confident that it will be possible to bring those forward as an amendment to the Bill. We had helpful and constructive discussions with the Law Society and the Attorney General, and I think that we can devise provisions that meet the concerns but still deliver the Minister's policy.

The Chairperson:

I take it that all those clauses will be made available to the Committee beforehand?

Mr Johnston:

Yes, certainly. Our intention is that any amendments that we plan to introduce at Consideration Stage will be made available to the Committee when it starts to look at the Bill clause by clause.

Mr Crawford:

There was one point that I forgot to mention. Concern was expressed about delay, particularly in the Magistrates' Courts. We believe that the Magistrates' Courts legal aid rules that were made in 2009 largely removed any perverse incentive to string out a case, whether the motivation was money or whether things were just not managed efficiently. The way in which the rules are now structured provides the incentive to get matters to move ahead. So, we endorse what the legal profession said about that.

There have been concerns and perceptions over the years. Those rules were made only last year, so the beneficial effect is only now becoming apparent. The complaints are still around, but we believe that those rules have largely fixed that problem.

The Chairperson:

I do not see anyone nodding to indicate that they have something pressing to ask. I thank you again for coming. No doubt we will meet again. Thank you.

Mr Johnston:

We will see you again next week.

The Chairperson:

Yes, I suspect that you might.

Mr McDevitt:

Could we do with a bit of research on the issues raised on clause 95? There seems to be a very grey area when it comes to where they start and stop. Two of the paragraphs relate to criminal offences, not procedural issues. They relate to people potentially being found guilty of contempt.

The Chairperson:

Maybe we should look at that.

The Committee Clerk:

A paper was tabled for the Committee a while ago, and we can take bits out of that. However, in that paper, it was clear that, with at least two rules committees, there is an undertaking to come to the Committee with proposals but that neither the Committee nor the Minister can require them to do that. The committees themselves makes the rules. The rules do not come through the Assembly, and they do not go to the Minister for agreement either. So, that definitely does not happen with at least two committees. With the higher committees, it does. We can pull out that paper and provide the information for next week. I suppose that the issue then becomes whether that is satisfactory.

Mr McDevitt:

I do not want to delay too much, but, Ms Fee said that this would have been subject to parliamentary scrutiny at some point along the way. However, the reality is that, if these were enacted during direct rule, they would not have been subject to that scrutiny, so this would have ended up on the statute book without anyone thinking of the consequences.

The Committee Clerk:

I think Ms Fee's point was that somebody decided at one time that that is the way it would be set up, but I do not know whether we could trace that back. If it would be any help, I could have a discussion with the Assembly's Examiner of Statutory Rules. He has quite a lot of experience of

all types of rules, and I could ask whether he has a view of how the system works and whether there is anything else that we could add to it.

Mr McDevitt:

It does not rest easily with me at all as it stands, so I think any advice would be welcome.

The Chairperson:

OK. That is agreed.

We will move on to the consideration of evidence received on clauses relating to sports law. You will recall that, at our meeting last week, it was agreed that the Committee would discuss, at this weeks' meeting, the evidence taken and the issues raised about the clauses relating to sport and that the departmental officials would not be in attendance.

I advise members that they have copies of papers that highlight some of the key issues that the Committee may want to discuss and reach a view on. Members also have a copy of a letter from the Minister of Justice regarding the flexibility for implementing clause 43 in relation to rugby. The letter indicates that that is not Ulster Rugby's first preference and that it would prefer to be removed from the clause altogether, but it is a possible way forward.

This is the first consideration of evidence on clauses relating to sports law, and there will be further opportunities in the new year to discuss them. However, if there are clauses that the Committee clearly agrees should be amended, it is helpful for those to be identified as early as possible to enable appropriate action to be taken. Does any member wish to comment on the evidence that we heard on sports law? If so, please feel free to speak.

Sir Reg Empey:

We have a letter from Ulster Rugby. The good behaviour of fans at Ravenhill has been talked about. In the main, that is true, but as someone who has represented that area for a long time, I have to say that it is not the whole picture. I was speaking to the police today, and there are occasional issues that are largely connected with the social activities in the beer tent and so on where there is a certain amount of antisocial behaviour, such as people urinating in gardens in the

surrounding area. There is quite a bit of disturbance in the evenings with taxis arriving and so on, so it is not a totally benign environment. Generally speaking, I agree with the thrust of where Ulster Rugby is compared with others, but I would not want the impression given that —

The Chairperson:
It is not paradise.

Sir Reg Empey:
It is not as simple as that.

I thought that the big issues in general at the meeting, which I think was a fortnight ago, were whether we felt that existing common law dealt with a number of the potential problems, as opposed to superimposing another set of offences. Take, for example, the possession of containers on the bus: if somebody was coming back from Scotland on a bus and was bringing things back from there, it could constitute an offence. This is a very important issue and a matter of grave concern to people, but there is always the risk of us being a wee bit OTT on these matters. Now, I am no expert, and you have been chairing this Committee since its inception, but I just wondered whether the clash between existing legal remedies and existing law, where the crossover relates to some of the new clauses, is an area that the Committee would want to focus on in its further consideration?

The Chairperson:
Some things struck me about the evidence that we took from the three major sporting organisations. The Bill seems to be trying to fix something that is not broken — or that is my perception — and there is a tendency here to go for legislation for the sake of it. I thought it ironic that the IFA, which was very up front in its attitude to the Bill, said that if such provisions have to be in it, go ahead, it can live with it and that is all right. Ulster Rugby and the GAA came at it from a different perspective.

However, and I hope I do not misread the writers of the Bill, it seems to me that soccer is the one sport in focus. It may well be that provisions will be put in the Bill which, at the end of the day — and here I am thinking out loud — will be applicable to every organisation but applied to

only one. Maybe members do not agree. However, the soccer officials who attended the Committee were content to live with it, no problem. The supporters' organisation was not as enthusiastic and did not see the real need for it. The more I think it over, the closer I come to the conclusion that this is legislation for the sake of it. It will not fix very much. Other members are free to comment.

Lord Browne:

I concur. Many of the offences contained in the Bill are already criminal offences and can be dealt with in that manner. The legislation goes too far. We can proceed with parts of it, but, as I said this morning at the Committee for Culture, Arts and Leisure, there is an offence of "being drunk"; what does that mean? It is a very loose definition. It you are drunk, and you become disorderly, there is already criminal legislation to deal with it.

Sir Reg Empey:

There are people who are less disorderly when they are drunk. *[Laughter.]*

Lord Browne:

I repeat myself, but offensive chanting, if it leads to a racial offence or it incites hatred, is already covered in legislation. This Bill goes too far.

Mr McDevitt:

There are two aspects to this. The regulations around drinking in grounds enjoyed no support from anyone. All the sporting associations felt that they could regulate that aspect and that it should not be criminalised. However, the issue of throwing missiles onto the pitch is one of genuine concern, and it is something we should think more about. I was not here for all the evidence, but I read over it.

The Chairperson:

Does present law not cover it?

Mr McDevitt:

No. If you go back to the evidence, you will see that there was a coherent and credible argument

presented that was worthy of consideration. I cannot remember it exactly.

Sir Reg Empey:

It is that intent has to be proven.

Mr McDevitt:

Yes. You are absolutely right, Sir Reg. Throwing the missile is not an offence. It has to be demonstrated that the missile is thrown at someone with the intent of hitting the individual.

The Chairperson:

I recall a soccer match — I was not at it, but I saw it on television — where someone let off a rocket that went across the pitch. That individual was identified and dealt with. He was banned from the ground and I suspect that news of that travelled through the crowd. For instance, if someone throws a coin at a goalkeeper, and it smacks his head and splits it open, that is still an offence.

Mr McDevitt:

That is an offence if the coin hits the goalkeeper, and if guilt can be proven. As I understand it, the Bill would change things so that it would be an offence to throw a coin on the pitch, per se. Therefore, the act of throwing missiles onto the pitch will become an illegal act, in contrast to the law at present, whereby it is illegal to throw something that hits someone. The law as it stands means that if someone throws something and misses, that person is not committing an offence, whereas if someone throws something that hits a person, it is an offence. That is worthy of further consideration. That point came across in the evidence that we heard.

As for chanting, the difference is that the Bill signals a strong intent. Putting something in legislation codifies things and means that offensive chanting is unacceptable. I heard no strong objections from the sporting bodies about that.

Lord Browne:

How is that going to be enforced if there are 100 people chanting? Who will be picked out of the crowd?

Mr McDevitt:

That is a fair point. The issue is whether the purpose of the law is to find people guilty of an offence or to deter people from behaving in a certain way. When we talk to lawyers and lecturers, they will say that the purpose of the law is both, and that the law should act as a deterrent — as a normative measure.

On those two points, my instinct is that we should continue to reflect on them. The one thing that I am pretty sure of is that nobody thinks that it is particularly necessary to become normative in respect of the alcohol regulations. People feel that the law at present deals with the situation.

The Chairperson:

When I go to Ravenhill, which is not very often, I see people drinking in the stands. If I go to a football match, I do not see that.

Mr McDevitt:

That is right; those are the association rules. If you go to a GAA game, you cannot drink in the stands. You will remember what the rugby officials said when I asked them what happened when Irish rugby went to Croke Park for three years. The GAA rules applied. In other words, people were not able to bring their beer into the stands, and they were fine with that because those were the stadium rules at Croke Park. However, as you rightly point out, when you are in the terrace at Ravenhill or in the far stand — not in the main stand — you are allowed to bring beer.

I wonder whether association rules are working well in that regard and whether we need to make criminal law about matters that are sorted out stadium by stadium, or association by association.

The Chairperson:

If it is any comfort, members do not have to make any decisions today. That does not mean that you will miss anything because we will be returning to this issue early in the new year when we will have to decide the road ahead for taking on these issues.

Mr Givan:

We need to be very sure that some of the provisions that we are talking about will be enforced. The provision on the possession of alcohol in a vehicle that is travelling to or from a match will be very difficult to enforce. For example, if there is alcohol on a bus carrying a group of lads, I question whether that provision would ever be enforced.

The other point that I want to make is about offensive chanting. The issue is how to define what is offensive. For example, I was at the recent Northern Ireland friendly match. There is still an element of the crowd who shout an expletive every time the goalkeeper kicks the ball. I find that particularly offensive and would not bring my child to the match for that reason. I ask myself how "offensive" will be defined and how the provision will be enforced. Should that problem not be addressed without legislation? A proactive attempt should be made among supporters and organisers to stamp out that type of behaviour without the need for legislation. The chanting element should be put out, but legislation is not necessarily required to do that.

The Chairperson:

In most cases at rugby matches, there is usually stunned silence and respect when a player is taking a conversion. That has slipped a little, but not much.

Mr McDevitt:

Just a bit.

Mr McCartney:

In cricket, decisions never used to be questioned. Even that is changing now.

The Chairperson:

How do members want to proceed? Are you happy to come back in the early part of next year with your decisions firmly in your mind? The various groups may want to formulate where they stand on each issue before they come and talk to us about that.

Mr McCartney:

As Lord Browne said, we discussed the matter this morning at the Committee for Culture, Arts

and Leisure. We have had a number of discussions. Perhaps, the Committee for Justice has more of a rationale. At times, what is missing is people's understanding of what we are trying to achieve. Earlier, we made the point that some of those provisions are lifted from English law. At the time that its legislation was introduced, England had a problem with hooliganism, particularly at soccer grounds, which needed to be tackled and has been tackled. In the main, that has been successful, notwithstanding what happened last night. The same problem does not exist here. Therefore, some of the legislation seems unnecessary.

Lord Browne:

Another point is that, to enforce legislation in England, it has cost clubs in the second league, which is equivalent to the former fourth division, in excess of £100,000 on CCTV, marshals and policing. We must consider how clubs will cope if all that legislation is introduced. They already suffer financially.

Mr McCartney:

We talked about alcohol on buses. We have all been on the way to a big game and saw buses lined up on the side of the road on unofficial pit stops. However, many supporters' clubs provide buses and enforce a strict no-alcohol policy. Therefore, it is a matter of the relationship between the supporters' club, its members and the transport company.

The Chairperson:

I think that that is where the issue lies. I really do. The matter very much comes down to codes of conduct and voluntary determination by clubs etc. At the few football matches that I get to on Saturdays, I hear announcements at the commencement that clubs do not and will not tolerate chanting or sectarian and racist remarks and that anyone who is identified participating in that will be removed and barred from the ground. In the main, that is working. I accept that it is not perfect.

I draw your attention to the Department's submission. According to this, the clauses are about sending a positive message that sports grounds are places where people can be safe, bring their families and have fun. Nobody around the table would disagree with that. Should the creation of criminal offences in those clauses be used to send out a message of what behaviour is acceptable

and what is not and to create a deterrent, as suggested by departmental officials, or would self-regulation and strengthening of individual codes of conduct for each sport be a better approach? I take the latter view. I believe in clubs enforcing their own codes of conduct. It is all very well to have a stack of legislation, but it comes down to enforcement. Without that, legislation becomes a laughing stock. We must ponder those issues.

Lord Browne:

Is it right that a young person should be criminalised because he has thrown a small object onto the pitch that has not caused injury to anybody? Should he get a criminal record and his opportunities for employment be affected? It might just have been a rush of blood to his head.

The Chairperson:

Is it right to criminalise someone who steals a dummy at £1·78?

Sir Reg Empey:

It was £1·79, Chairman. Get your facts correct. *[Laughter.]*

The Chairperson:

Yes. We must weigh up those issues. As I said, I suspect that the various parties will have their own deliberations privately and will determine what stance they will take on them. I suspect that, at the end of the day, common sense will prevail.

Sir Reg Empey:

It might be useful to get clarification on Conall's point about the throwing offence. As I recall, a specific issue that related to that was raised in evidence.

The Chairperson:

Therefore, if someone throws a missile, their intention must be determined: whether they intended to hit someone or miss. What happens if they were a bad shot and hit someone when they intended to miss?

Sir Reg Empey:

In other words, if I throw something at Alban and hit Conall, I am innocent. *[Laughter.]*

Mr McDevitt:

That happened to me in my brief footballing career.

The Chairperson:

We will leave that matter there, but we will return to it.