Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Remuneration for Defence Counsel in Crown Court Cases

10 February 2011

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 Paul Givan
Mr Alban Maginness
Mr Conall McDevitt
Mr David McNarry
Ms Carál Ní Chuilín
Mr John O'Dowd

Witnesses:

Ms Elizabeth McCaffrey	)	Law Society of Northern Ireland
Mr Pearse MacDermott	)	
Mr Peter O'Brien	)	
Mr Adrian Colton	)	Bar Council of Northern Ireland
Mr Brendan Garland	)	
Mr Mark Mulholland	)	
Mr Martin O'Rourke	)	
Mr Tony Nicholl	)	Goldblatt McGuigan
Mr Robert Crawford	)	Northern Ireland Courts and Tribunals Service
Mr John Halliday	)	

The Chairperson (Lord Morrow):

I welcome to the meeting Elizabeth McCaffrey, chairman of the Law Society's access to justice committee; Pearse MacDermott, chairman of the Criminal Bar Association; and Peter O'Brien, assistant secretary for policy and law reform. You may brief the Committee, after which there will be an opportunity for questions. I was going to confine your time to 10 minutes, but we can give you a bit more flexibility because we got through our other business marginally quicker than I had anticipated.

Ms Elizabeth McCaffrey (Law Society of Northern Ireland):

It is dangerous to offer lawyers extra time, because they will be inclined to take it.

Good afternoon, and thank you for the opportunity to come here this afternoon and to discuss the issues raised by the draft Crown Court rules 2011. I am the chairperson of the access to justice committee of the Law Society, and I have been a member of the Law Society's council for the past four years. I am a solicitor in private practice, and I am principal of the firm Copeland McCaffrey in Strabane. In fact, when I was just a few years qualified, I served for some years as legal assistant to the House of Lords Select Committee on the European Union — or European Communities, as it was then known. Therefore, I appreciate the hard work that is carried out by parliamentary Committees, particularly by your support staff, if I may refer to them.

On my return to Northern Ireland, I returned to practice in Strabane. We are a general practice that deals with whatever comes through the door. I specialise in employment law, conveyancing, probate and estate planning, but my practice deals with all aspects of legal practice.

Given that criminal law is not my specialism, I am particularly glad to have with me Pearse MacDermott, who is a criminal defence practitioner with the firm McCann & McCann. Pearse is spokesman for the Solicitors' Criminal Bar Association and has been a key member of the society's negotiating team on this issue. Peter O'Brien is the assistant secretary of policy and law reform with the society, having practised previously with the Magherafelt-based firm John J McNally & Co. Therefore, we represent a fair geographical spread.

We are here to discuss the draft Crown Court rules 2011. Before we discuss the detail of the

rules, I will take some time to consider the importance of the services for which the rules will provide. As you know, the Crown Court deals with the most important serious criminal offences, such as murder, rape and offences related to terrorism. It is in the Crown Court that many of the high-profile criminal cases that we read about in our newspapers are heard. It is through the way that the state and, more importantly, the courts deal with such cases that members of the public assess the effectiveness and the fairness of the justice system. The 2011 rules will provide remuneration for solicitors and barristers to provide legal advice and representation to defendants, whether they plead guilty or innocent.

We all accept that it is essential that justice is not only done but is seen to be done. One of the ways in which the public see justice being done is through the adjudication of a criminal trial. The prosecution puts forward the case against the defendant, the defence tests the prosecution case by producing its own evidence and legal argument on issues of fact and law, and the jury makes a decision, based on the facts of the case, as to the guilt or innocence of the accused. The judge will give directions on legal issues and will hand down a sentence if the accused is convicted. In those circumstances, the defence solicitor plays a crucial role in testing the weight of state evidence, preparing the defence's case and instructing counsel and witnesses. That work requires significant skill and time, and we say that it is complementary to the role that is played by barristers. It is essential, therefore, that solicitors are adequately remunerated.

The proposed rules would do three things. First, they would abolish the very high cost criminal cases (VHCCCs) regime. Secondly, they would abolish provision for exceptional Crown Court cases. Thirdly, they would reduce the fees payable in standard cases by 25% for solicitors and 20% for advocates. I should add that there is provision for additional payments to defence solicitors on the basis of the pages of prosecution evidence and to defence counsel, depending on the length of the case. That is not related to the complexity of the issues or the seriousness of the offence, as you might reasonably expect.

The current proposals do not meet with the society's approval. We believe that they do not address the significant concerns that the society has raised throughout the negotiations and, indeed, may jeopardise access to justice and lead to the diminution of defence services before the Crown Court. Throughout negotiations, it has been clear that the Court Service's two objectives

have been to, first, lower the fees and, secondly, to create a wholly objective system for the remuneration of Crown Court cases.

Although the society has raised concerns throughout the negotiations, we are conscious of current streams of public finances, and we have, at all times, sought to identify mechanisms for meeting the Court Service's objectives. That has proved testing, given that the Court Service's position on various issues has moved in the course of negotiations. It is worth noting, however, that those negotiations began with a proposal to simply transpose the system for remuneration of standard Crown Court cases in England and Wales to Northern Ireland. That was strenuously opposed by the society as it gave limited consideration to the particular circumstances of this jurisdiction. Following an informal indication during negotiations, the society suggested that the very high cost cases (VHCC) scheme be abolished and that fees for standard and exceptional cases be retained. That proposal was made after much discussion in the profession in an effort to prevent the imposition of the English system along with all its failings. The Court Service accepted our proposal that the VHCC regime be abolished but required that the exceptionality provisions also be abolished and that the fees payable in standard cases be reduced by 30%.

Our discussions then focused on the need to deal with complicated cases that were previously classified as either an exceptional case or a VHCCC. At that stage, the Court Service informed the society that it would only be willing to accept a wholly objective system administered on a tick-box basis. That placed our negotiating team under further strain. The society produced a model on the basis of pages of evidence and provided objective criteria for the determination of the case. While we expected the Court Service to propose a system that had two limbs, one based on the volume of the case and another on its complexity, we now have a scheme that is based entirely on the volume of prosecution evidence only. Furthermore, the willingness of the society to accept significant reductions in the scheme for complex cases has not been greeted with any significant change to the proposed — we would say draconian — reduction in fees for standard cases.

Our negotiation with the Court Service had been strained by the difficulties in identifying projected savings. That is most stark in relation to VHCCCs. The Committee will be aware that VHCCCs have, for some time, been highlighted as the most significant cost driver to the legal aid

fund. Throughout negotiations, the Court Service was unwilling to take full account of the savings that the abolition of the VHCCC regime will yield. It is now understood that the Courts and Tribunals Service accept that, by 2013-14, the abolition of the VHCCC scheme will yield an annual saving of £16·16 million. I will repeat that figure because it is substantial: £16·16 million. From that figure, the society calculates, on the basis of the actual spend for 2008-09, that there will be an overall 53% reduction in public funds invested in criminal defence representation in the Crown Court. We further calculate that the Department could reduce solicitors' fees by only 10% and still stay within the revised 2013-14 budget.

At this juncture, I would like to express the society's disappointment that the legal aid budget has been reduced from £79 million to £75 million. The legal aid budget was ring-fenced to ensure confidence in the justice system. We cannot understand how the proposed reduction is justified. It is understood that the Committee shares our concerns, and we suggest that, if the Budget is restored, additional provision should be made for the complicated Crown Court cases. I would add that our figures are based on the Department's figures, and, therefore, the accuracy of those figures is dependent on the accuracy of the Department's figures.

The current proposal is based on two assumptions that, in the society's view, are questionable. First, the Court Service takes the view that a wholly objective system for the remuneration of criminal defence services in the Crown Court is sufficient to ensure a fair trial for the defendant. The Committee will be aware that article 6 of the European Convention on Human Rights places an obligation on government to provide legal assistance to a person charged with a criminal offence. Case law from the European Court of Human Rights indicates that it is not sufficient simply to provide informed assistance; it must be effective assistance. The assistance that a defendant requires may vary substantially depending on the circumstances of their case. It is not at all clear whether the objective system proposed will provide sufficient discretion to provide appropriate legal aid for the circumstances of every case.

The second assumption made by the Courts and Tribunals Service is that defence solicitors in this jurisdiction are better paid than their colleagues in England and Wales and that legal aid cases are more expensive here. An independent review of legal aid schemes across the European Union carried out by the European Commission for the Efficiency of Justice demonstrates that, in fact,

on a case-by-case basis, legal-aided cases are less expensive in this jurisdiction.

The report showed that the average amount of legal aid allocated per criminal case in England and Wales was €1,931, whereas, in Northern Ireland, it was €1,656. The report also showed that a significantly higher number of cases were granted legal aid per head of population in this jurisdiction than in England and Wales — over 58%. We suggest that that reflects the higher levels of need in this jurisdiction.

However, figures are always open to interpretation. The key message that we wish to send today is that the cumulative impact of the proposals will be a diminution in the quality of defence services before the Crown Court. We say that the 25% reduction in standard fees is a cut too far. Although we understand the budgetary constraints within which the Minister must work, it remains incumbent on the Department to ensure that sufficient provision is in place to guarantee a quality service that will ensure that justice can be done. We suggest that a reduction of 10% would be more sustainable. However, the issue of exceptional cases still requires consideration.

We suggest that, if the Department is unwilling to develop appropriately the current proposal or enhance the payments on the basis of prosecution evidence only, the Committee should obtain an assurance from the Department that it will closely monitor the impact of the new system on those cases that would previously have been categorised as VHCCCs to ensure that the defendant is being given a fair trial.

Finally, I want to express concern at the disproportionate burden that the solicitors' profession is being asked to bear in comparison with colleagues at the Bar. Given the significant overheads involved in running a solicitors' practice in comparison with practice at the Bar, and given the potential for job losses in solicitors' practices, we cannot understand how it can be considered justifiable to reduce fees payable to solicitors by a higher proportion than those payable at the Bar. Thank you very much.

The Chairperson:

Thank you very much for your presentation. I would like to ask you about a couple of things in your paper, and then we will take questions from members. You spoke about very high cost

cases and exceptional cases. Is the term "exceptional cases" just another name for very high cost cases?

Mr Pearse MacDermott (Law Society of Northern Ireland):

The short answer to that question is no, it is not. We have accepted for quite some time that the previous VHCCC scheme was unsustainable. We felt that it was driving costs in criminal legal aid up to a level that was not justified and could not be sustained. At a very early stage, we indicated to the Court Service that we saw the removal of that scheme as an integral part of making the savings that have to be made at this current time. However, we are not referring to a system that is similar to the VHCC system. We are referring to the very rare occurrence of an exceptionally complex case, which will involve a volume of paperwork, effort and time and will require some remuneration. In the proposal before us, that remuneration is absent.

Our concern is that, in the absence of remuneration and the ability to carry out the work that is necessary, there will be an impact on the quality of the defence service provided to clients and, therefore, the quality of the justice system in general. That is our big concern. However, we do not see the cases that we are referring to as complex cases as being directly equivalent to VHCCs. Certainly, they would be encompassed within that to some degree, but it is a very different category altogether.

The Chairperson:

You say in your paper that:

> "The Society wants to work with the Minister to ensure that this does not occur."

I understand that you have been working on that for some considerable time. You make that statement, but is it right that you have been working on that for nearly two years and it has not occurred?

Mr MacDermott:

That is correct. We have been involved in discussions with the Court Service over a protracted period of close to two years. The initial proposal was the wholesale introduction of the English system — the graduated fee scheme (GFS) system. We were opposed to that for a number of reasons, and the Court Service eventually agreed that we were correct.

Our difficulty during these negotiations has been that the Courts and Tribunals Service has kept moving the goalposts. Every time we ask the Courts and Tribunals Service what savings and what budget we need to achieve and ask it to show us the figures that they will be based on, something changes. For example, since the Hillsborough agreement and the letter from Gordon Brown, it had been agreed that £79 million would be ring-fenced for legal aid. We are now told by the Justice Department that, as of 22 December 2010, the figure is £75 million, which is quite a substantial reduction. I say that we were "told", but we were not; we came across it in the budget, but nobody notified us of the change, which is a bit surprising given that we have been involved in discussions with the Courts and Tribunals Service.

We have come to the table with an open mind and have attempted to move the matter forward so that we can agree a situation. That is why, in the current economic climate, we have agreed to a 10% reduction in the standard fee and the removal of the VHCC regime. Our figures, which have been approved by the accountancy firm Harbinson Mulholland, show that our proposal will come within the £79 million budget. That is the important factor. We cannot understand why our proposal has been rejected by the Courts and Tribunals Service, because it is sustainable and will maintain confidence in the administration of justice.

The Chairperson:

You mentioned the change from £79 million to £75 million, which is something that led to some discussion in the Committee. You said that the Courts and Tribunals Service keeps moving the goalposts and cited an example, and an important one, too. Can you cite any other examples?

Mr MacDermott:

You will see that the Courts and Tribunals Service now accepts that the saving to be made by the removal of the VHCC regime is £16·16 million. That is the first time that the Courts and Tribunals Service has acknowledged that. Initially, it said that the impact of the removal of the VHCC regime would be minimal. It then came up with the figure of £5 million. At all stages, we said that the service was not reading the figures right and that the savings generated by the removal of the VHCC regime would be substantial. It is only now, at this late stage, that it has agreed that the figure is £16 million.

Another area in which the Courts and Tribunals Service has moved the goalposts involves the decision on how much the cut in the standard fee should be. Initially, the proposal was 30%. We had discussions that we thought were going some direction towards reducing that, but a figure of 25% came back, which we were not expecting. Generally, it would be fair to characterise our discussions as being such that we were never confident that the figures were cast in stone to allow us to come up with a proposal to meet them. Having said that, we have come up with a proposal that meets the £79 million budget.

The Chairperson:

But you do accept that the present situation cannot continue.

Mr MacDermott:

Totally, and we accepted that from an early stage. We accepted that the VHCC regime could not be sustained, so we proposed to abolish it in the negotiations. We looked at what would be a fair cut to the standard fees that would allow solicitors to work in that area effectively and allow them to provide a proper service to their clients. The figure that meets the budget and provides that reassurance to the Committee on the quality of justice is 10%. A cut of 25% will have a major impact on solicitors' firms and on the quality of justice that is administered in this jurisdiction.

Mr McDevitt:

Ms McCaffrey, you mentioned that there are risks in using a system that is based on the volume of prosecution evidence only. What do you think those risks are?

Ms McCaffrey:

Such a system looks only at the volume of paperwork coming from the prosecution, not at the volume of work that has to be carried out by the defence in preparing a proper case. Research may need to be done, witnesses may need to be interviewed or specialist reports may need to be obtained, and that is not taken into account or may not be related to the sheer volume of paper coming from the prosecution.

Mr MacDermott:

One big issue that has caused difficulty for solicitors' practices in recent times has been

disclosure. Disclosure material is material that the prosecution gives to you after you have made an application to them to get evidence that is relevant. There is a statutory duty on the prosecution to provide material that they are not relying on as evidence but that could be of benefit to the defence. At all times, it is a running battle with the prosecution to get that material. The material can also be quite voluminous, and in the larger, more complex cases, that can lead to a large amount of work being done on behalf of a firm or on behalf of a solicitor in that firm.

A proposal such as this, which does not reflect any remuneration for that work, leaves the solicitors' firm in a difficult situation when it comes to providing an adequate and proper service to a client, challenging all the prosecution evidence and deciding whether that can be done effectively. The disclosure matter is a matter between us and the Public Prosecution Service (PPS), but, very often, the courts are asked to intervene to order disclosure.

Another issue also arises with disclosure. The duty on the prosecution is to provide you with all the adequate disclosure, but, sometimes, because of the volume of paperwork they they have, they will tell you to go and look at it yourself. It is incredibly time-consuming to go through all of that material and to try to distil from it what is relevant to your client's defence.

Mr McDevitt:

Is that the so-called warehouse disclosure?

Mr MacDermott:

That is right; yes.

Mr McDevitt:

Under the current system, how are solicitors able to ensure that, faced with the prospect of six crates full of files, they are able to get the time to go through them to assure themselves that there is nothing in them that is material to their client's defence? How does it work?

Mr MacDermott:

Under the current system, there are two mechanisms. First, if a VHCC certificate is in place, there is a time-recording function, and the solicitor records the time spent doing that work. The

approach that is possibly more appropriate in an ordinary case or a case that does not meet the VHCC criteria is to submit to the Legal Services Commission what is called an application for exceptional payment, which is an application for payment for a set number of hours in which to carry out that work. You work out the number of hours involved and then make an application to the Legal Services Commission for an exceptional payment. It will grant or refuse that, but at least you are being remunerated for work that it is necessary to undertake on behalf of a client. Under the current system, there is no provision whatsoever for that type of work to be done at all.

Let us talk about justice, which is an interesting thing to talk about occasionally. All the miscarriage of justice cases in England were based on lack of disclosure. Cases such as those of the Guildford four and Judith Ward came down to lack of disclosure by the prosecution. Disclosure is a key issue in a defence case, and it is very important that that work is undertaken by a solicitor.

Mr McNarry:

You are very welcome. I really appreciate your attention to detail in what you have furnished to us. I find it very useful, even though I am still wrestling with the idea of solicitors and barristers and the competition that there seems to be around remuneration. However, we are obviously looking for value for money and best service to the public. Will you briefly outline what impact you think the proposals will have on your profession's ability to maintain its standard of service to the public?

Ms McCaffrey:

The big difference between solicitors and barristers is that we have to maintain offices and we have overheads to pay. We have probably a greater number of support staff than our barrister colleagues do.

Mr McNarry:

Do they not have staff?

Mr Peter O'Brien (Law Society of Northern Ireland):

They rarely do; possibly a secretary.

Ms McCaffrey:

Quite often, you find that barristers may have a secretary or may share a secretary. Because a lot of their time is spent in court, they may not necessarily have a full-time secretary. You find, therefore, that solicitors' practices have much higher overheads than barristers. That is why we are at a loss to understand why there should be a suggestion that we take a higher cut in fees than barristers. We think that the aim of both branches of the profession is the same. We want to achieve a quality service for our clients, and if we are not able to do that—

Mr McNarry:

Sorry for interrupting. I understand that you do not like what is being proposed, but how would it impact on the standard of service that you give? Would it be reduced? Would it be worse? If so, tell us. Tell us what the consequences will be.

Mr MacDermott:

Two issues that flow from the current proposal would impact on the quality of service. The first impact would be on access to justice. It is important that all people have access to a proper justice system. The proposed system would have an impact on firms in certain local jurisdictions, which may decide that it is not economically viable for them to undertake this type of Crown Court work. The situation would then be one of legal wastelands, as in England, whereby people would not be able to get a criminal defence solicitor to appear for them in their local area and would have to move to a bigger area — Belfast, Omagh or wherever — to get that provision. Therefore, there would be an impact on access to justice.

Secondly, a very important impact would be on the quality of justice and confidence in that quality of justice. In the current situation, twelve months into the devolution of justice in this jurisdiction, it is very important that the public have, hopefully, complete confidence in the system of justice that is available. We feel that the impact of cuts to remuneration for Crown Court cases would mean that solicitors are unable to provide a service.

You are asking what that will mean. In a case where a large amount of work has to be undertaken, solicitors' firms, like every other business, have to decide what they can and cannot

do. They have to allocate resources and decide what is economically viable. In some larger, more complex cases, a solicitors' firm will say that it is just not possible to do a case given the economic return. That could lead to the situation whereby some defendants, particularly those in complex and high-profile cases, end up being unrepresented. That, in turn, would lead to delay and backlog in the court system and to judges being left in the very difficult situation of having defendants before them who are unrepresented. Therefore, there would be a major impact on the justice system because of delays. As we all know, any justice delayed is justice denied.

Further to that, the proposal would impact on defendants' human rights as it is not human rights-compliant. The proposal takes away the equality of arms that is essential to any justice system. The prosecution would have whatever funds are available to it through the PPS, the Police Service and the forensic science agency, but the defence would be substantially underfunded. That means that defendants would not have the right to a fair trial, which is not compliant with the human rights obligations of this jurisdiction.

Mr McNarry:

That is excellent. I can follow all that.

A key thing that you said was "like every other business". You are a business and must function as a business. In meetings of some of the other Committees that I am on, I hear from businessmen, but I do not hear too many of them making representations to those Committees that they are in business and that business is tough out there. I wonder why you think that there are special circumstances for your business to be in that position. I accept what you said, and you indicated the potential for the downsizing of solicitors' interest in giving that commercial service. I want to try to absorb that. If it is a purely commercial decision, that is what it is; it is nothing to do with me. If any of your offices or companies make up their minds not to do this, that is nothing to do with me. However, if you are being press-ganged into that, I am interested. Perhaps you can address that.

Finally, I am particularly interested in the overall impact that there may be on attempts to attract new recruits into your profession, particularly given the pressures on the universities. I am keen to see that your profession survives, but I am also keen to see that there are routes for our

young people to access. However, I do not want the society to spend a lot of money on that. If you are going to close your offices or downsize, there will be no employment for those young people.

Mr MacDermott:

You raise two key issues, and I am grateful to you for doing so. I did refer to us as a business, and we are a business. However, you have to understand the function of a solicitors' firm or practice in the justice system. We are not like other businesses, such as shops. We are not like Tesco or an accountancy firm.

Mr McNarry:

I might argue with that, because you now have shop windows, and you advertise. You may not sell sweeties, but you certainly do not give anything away.

Mr MacDermott:

Under the proposed legislation, we would be a lot cheaper than Tesco. *[Laughter.]*

Mr McNarry:

Are you going into the insurance business now?

Mr A Maginness:

You are a sort of Lidl.

Mr McNarry:

Is that your experience? *[Laughter.]*

The Chairperson:

He must be allowed to reply.

Mr MacDermott:

Flippancy aside, the real issue is the importance of solicitors to the criminal justice system. It is not that we are not a business; we are, but we provide a function in society, and the value of

solicitors' work to the criminal justice system is massive. It is a societal question. How does society want its justice system to operate? It can have an underfunded, cheap-rate system of justice, whereby innocent people are convicted and rights are not defended, or it can have a proper and adequately funded and fair system. Although we are a business, we need society to fund the criminal justice system, within which the role of solicitors is paramount. We defend people who are charged with the most serious offences. Society has decided that people are entitled to be defended. There is a presumption of innocence, and we are entitled to challenge prosecution evidence. All those matters are very important, and that is our function. If funding is not there to do that work, people will stop doing it and defendants will no longer have the rights that they presently have. The danger is that, if confidence in the justice system is removed, there will be a hugely detrimental effect on society as a whole.

Ms McCaffrey will deal with the impact on new recruits.

Ms McCaffrey:

Thank you for raising the issue, because, at the moment, it is an issue of real concern to the Law Society. Previously, I sat on the Law Society's education committee, which deals with the training of apprentice solicitors and new solicitors. Currently, I sit on the supervisory committee of the graduate law school at the University of Ulster's Magee campus, which is one of two training centres for young solicitors in Northern Ireland. The other is at the Institute of Professional Legal Studies at Queen's University. This is the first year since both those institutions were set up that they have not been able to fill their quota of places. That is because not only must all potential solicitor trainees pass the required aptitude test and successfully complete a law degree, but they must find a master — a solicitor of at least seven years' standing — who is willing to take them on and train them throughout their apprenticeship.

In the past three or four years since the recession first hit, there have been a substantial number of redundancies, especially, and unfortunately, among younger members of the profession. To many of us, that is a real concern, because we would like to see more young people coming into the profession. They bring new, up-to-date ideas and familiarity with new technology, with which some of us struggle as we get a bit older. It is important for the lifeblood of our profession that young people come into it. Consequently, we are very concerned about the

real impact on recruitment into the profession in the past year or two.

Mr O'Brien:

In addition to the general impact that there may be on recruitment to the profession, there are particular issues with attracting people into legal aid practice. In England and Wales, the National Audit Office has looked at the effect of various policy changes on the criminal legal aid system. That was one of the key reasons why we were very opposed to the introduction of the graduated fees scheme. People there were barely able to make a profit from work that they had undertaken, and, as a result, many of them indicated their intention to close their business within the next five years. They were certainly not prepared to take on extra people to do the work in that particular area. Legal aid practice is the poor relation of general practice, in the sense that the rates paid do not attract people to do such work. Our main concern is that the expertise in legal aid practice in general, and criminal legal aid practice in particular, will be lost.

Mr McNarry:

In effect, you are saying that your proposal is better than what you are being offered and that you would like it to be accepted.

I am just worried about the knock-on effect. Are you saying that, if that does not happen, your profession will go into meltdown?

Mr MacDermott:

That is a possibility. We are saying that, if our proposal is not accepted, and if the current proposal goes forward, it will have a damaging effect on the criminal justice system in the Crown Court. There will be cases that cannot be properly represented. The courts will have to deal with that, which will lead to a backlog of bigger cases and logjam. It will lead to defendants being unrepresented. There is potential for major damage to the criminal justice system.

Mr McNarry:

If Tesco went into the law business, do you not think it could do it?

Mr MacDermott:

If it goes through the number of years that we have had to go through to get qualified and go

through our business, it is very welcome to join us.

Mr McNarry:

You must be careful; it might take up that offer.

Mr McCartney:

I want to go back to Elizabeth's point. Was the number of places at the institute because of the lack of ability to get apprenticeships, or was it a combination of factors?

Ms McCaffrey:

I am going to quote the wrong figures, so I apologise for that. On average, I think the number of people applying to do the aptitude test used to be in excess of 400 or 500 a year. The institute at Queen's has 120 places and Magee has 28. That potentially amounts to 148 people training every year. My understanding is that Magee has 11 trainees this year and the institute has 115 or thereabouts.

Mr O'Brien:

The institute is almost full. Either 124 or 125 places out of 148 were able to be filled. It certainly was not because of a shortage of candidates.

Ms McCaffrey:

One issue that was raised with the education committee in the past was that solicitors pay the trainees when they are in their offices. That was something that was hard-wrought over quite a number of years. In spite of the economic crisis, the education committee felt that it was important that we continue to pay our trainees at the same level. We had a number of students saying that they would work for nothing in order to get qualified, but we felt that it was important that their role and their status as trainees was recognised by being paid. That may well be a factor with the number of solicitors who are taking on trainees at the moment.

Mr McCartney:

We have some information about the percentage gap. In monetary terms, what is the gap between your proposal of a 10% reduction and the suggested 25% reduction?

Mr MacDermott:

It is very small. The interesting thing is that it is only in the past three weeks that the Courts and Tribunals Service has agreed to say that the savings from VHCCs was £16·16 million. That allows us, on the basis of our 10% reductions to standard fees for solicitors and the removal of the VHCC, to come in with about £200,000 less than the budget that the Courts and Tribunals Service is proposing. So, it is a very small differential between the two proposals.

Mr McCartney:

I heard you saying that, throughout the negotiations, you were never told what the savings would be. You had an idea, but it was never confirmed.

Mr MacDermott:

We were told initially that the payment was £104 million and that it would have to go down to £79 million. Therefore, we had to save £25 million. That was based on figures of £104 million, which included VHCC payments over a number of years being paid in one year, effectively, or over one and a half years. We could never get an accurate figure that indicated what an annual payment for VHCCs was, or what an annual payment was for the different areas. That caused difficulty in coming to any proposal ourselves. We thought that the VHCC saving was around £15 million, and we now are pleased that the Courts and Tribunals Service says that it is £16 million. However, within the terms of those figures, our proposed 10% cut in standard fees, with the removal of VHCCs, will come within the budget.

Mr McCartney:

The gap does not seem to be too —

Mr MacDermott:

In real terms, it is very little, given the amount of money that is handled by the Department of Justice. We cannot understand why the Courts and Tribunals Service continues to go down the road of proposing a system that is opposed by both elements of the profession when there is an alternative that would satisfy the solicitors.

Mr McCartney:

The volume of papers generated by exceptional cases was mentioned. The proposal at present is to remunerate yourselves only according to the volume of paper that is presented. No cost is being provided for what you call disclosure.

Mr MacDermott:

That is correct. The current proposals provides for payment only in cases in which there are more than 750 pages in the first place. The average burglary or armed robbery case will not have that amount of prosecution pages. Therefore, 98% of cases are taken out of the equation. However, in cases in which prosecution evidence is more than 750 pages, an additional fee is payable. What we are saying is that that does not reflect the work that is undertaken in those large cases. A large of volume of papers is generated by disclosure applications, which are complex and difficult themselves because you have to convince the court that you need that material and the prosecution has to disclose it to you. The current proposals do not include any payment whatsoever for the work that we undertake that exercise.

Mr McCartney:

You have had discussions with the Courts and Tribunals Service. What is its rationale for not providing remuneration?

Mr MacDermott:

It understood where we were coming from in the sense that it understood that this was work reasonably and properly undertaken by solicitors. The difficulty that the Courts and Tribunals Service had was that, up until now, no one has ever sat down and counted the pages of disclosure given in a case because it was not relevant to any payment. So, it had no statistical basis on which to set projections and has not been able to cost it effectively. What we say in response to that is that it is a very small number of cases. Therefore, let us bring in a system that provides remuneration and have a very speedy review of this aspect of it. Let us look and see how it works in six months' time. There is something wrong if it is costing a lot of money, because it should not cost a lot of money. Let us bring in the system to adequately remunerate solicitors for the reasonable work undertaken. We say that that will fit within the budget. If it does not, let us review it. The difficulty that the Courts and Tribunals Service has always had is that it has not

been able to cost it. However, we say that the fact that it cannot cost it does not mean that it is not necessary. A case requires certain elements to be undertaken by a defence solicitor, and this is one of those elements. The fact that the Courts and Tribunals Service cannot cost it does not mean that it should not be done.

Mr McCartney:

The impact on your work is obvious, and the paper highlights a number of cases of disclosure. What has been the Department's response to people not reviewing disclosure?

Mr MacDermott:

I acknowledge that it recognises that we undertake this work. During the negotiations, it seemed to recognise the importance of work on disclosure. However, because it cannot cost it on a purely mathematical and financial basis, it has chosen to ignore it. In the paper that we submitted last year, we exhibited a number of cases that deal with the disclosure issue. A number of cases have been decided on that basis. A very recent case in which Mr Justice McCloskey gave a very scathing judgement against the PPS regarding disclosure is relevant to our discussions. The Courts and Tribunals Service does not include it because it cannot cost it.

Mr McCartney:

If someone is convicted and says that they do not feel that they have had disclosure, is that the basis for an appeal?

Mr MacDermott:

It certainly is. As I mentioned earlier, all the famous English miscarriage of justice cases dealt with issues of disclosure. Had the prosecution done its job properly or had the defence been able to obtain the disclosure properly — the legislation was brought in because of those cases — those convictions may not have stood in the first place. There would not been the knock-on cost effect of having to take matters to the Court of Appeal or the Criminal Cases Review Commission, and there would not have been those miscarriages of justice. There is a knock-on hidden cost of not doing the job right in the first place. If you do not provide the adequate funding in the initial court trial, it will cost you to fix it in years to come.

Mr McCartney:

What is the estimated average cost of a case that goes to the Court of Appeal? Is there an average cost?

Mr MacDermott:

It is hard to say. There are no averages for such cases.

Mr McCartney:

Your paper says that the 25% figure is inaccurate and that, in real terms, it is 50%. Will you explain that?

Mr MacDermott:

Without getting into the mathematics too much, the 25% is a cut to standard fees. The standard fees in the Crown Court make up a percentage of the cost and then you add the VHCC. The abolition of the VHCC coupled with the 25% cut to the standard fee comes out at about 53%. We had the cost priced by our accountants. The headline figure is 25%, but, in real terms, it is substantially higher. It does not take a genius to work out that a 50% cut to income will have a major impact.

Mr McCartney:

What percentage of most solicitors' work is criminal work?

Mr MacDermott:

It is very hard to say, because practices are so varied and different. In this jurisdiction, there are a fair number of firms that do purely criminal work; that is their sole basis of work. There a number of mixed practices, but there a number that do purely criminal work. The impact of a 53% reduction in that income would be substantial.

Mr McCartney:

A small firm would see that as a good basis for the other services that it provides.

Mr MacDermott:

Yes; that is correct.

Ms McCaffrey:

Coupled with the general downturn in the economy, a practice that may have had a mixture of conveyance and probate work but criminal practice as well is being squeezed from all sides. That is in common with everyone. We are not saying that we are exceptional from the point of view of the downturn in the economy, but that is an added consideration.

Mr O'Brien:

There is a provision under the 2005 rules, which is replicated in the 2011 rules for review, that says:

"The Department shall keep the general operation of these Rules under review to ensure that they are consistent with the requirements of Article 37 of the Order."

There is an express provision that says that that should happen at least every two years, but it is possible for the period to be shorter.

Mr McDevitt:

Mr MacDermott, you mentioned Justice Reid's judgement. Did I hear you right?

Mr MacDermott:

Justice McCloskey.

Mr McDevitt:

You said that there was a relevant issue in that judgement with regard to disclosure. What is the relevant issue?

Mr MacDermott:

I was not involved in that case and can talk about it only from reading the judgement. There is a 77-page judgement that members can read. The gist of it is that the prosecution had not disclosed the material that it should have disclosed under the statutory obligation. The defence had to make

numerous applications to the court to get orders from the court for exposure to be disclosed. It still was not forthcoming. The case had begun, evidence had been heard and witnesses had given evidence. The prosecution then disclosed the material that it was obliged to disclose, and it fundamentally undermined the prosecution's case, which led the judge to stay the prosecution and resulted in an acquittal.

Mr A Maginness:

I know that you were in discussions with the Courts and Tribunals Service about the way in which remuneration could be made in cases of discovery during the course of the trial or even pre-trial discovery. I know that it has no benchmark on which to measure that, which is one of the difficulties. However, did the Courts and Tribunals Service give any commitment for provision to be made for that? It seems to me to be a reasonable position for you to ask it to make provision. Was there any response to that?

Mr MacDermott:

No. That is the short answer. It understood our point, but the proposals came back and there was no provision for it.

Mr A Maginness:

Did it not even say that, in principle, it would take that into consideration?

Mr MacDermott:

It indicated during discussions that it would look at whether it could cost it. When it discovered that it could not cost it, it decided to do nothing about it, and that was the end of the matter as far as we were concerned.

Mr A Maginness:

So, it said that, if that happens to someone during a trial, it is tough and that person has to bear their own cost?

Mr MacDermott:

It put the onus on the solicitor to make a decision on whether that exercise can be funded. That is

the difficulty with this whole area, because it is fundamental to the defence that all the evidence and all the material that is before the prosecution is examined. When no funding is available for it, there is a danger that the exercise will not be undertaken and that it will then lead to miscarriages of justice. That is a big concern.

Mr A Maginness:

The overall budget will be reduced from £79 million to £75 million. When you discovered that, did you have any discussions with the Courts and Tribunals Service about it?

Mr MacDermott:

We first discovered the change from £79 million to £75 million when the Department of Justice published its draft budget on 22 December. We have not had any meetings with it since.

Mr A Maginness:

Did nobody contact you, even informally, to tell you that there had been a change?

Mr O'Brien:

Certainly not. In the discussions prior to that, the indication was that there was a degree of certainty and, certainly hopefulness, that it would be able to secure the £79 million and that the budget would not be reduced beyond that figure because it had been ring-fenced by the Hillsborough agreement.

Mr A Maginness:

So, you were genuinely taken by surprise when you discovered that.

Mr O'Brien:

Indeed.

Mr A Maginness:

It is proposed that payment will be calculated on the basis of pages. That seems to be a very crude basis for remunerating any professional work. Is there any alternative? It seems to me that, in a sense, you have conceded that point. You may well not have conceded that, and your

discussions are probably without prejudice, but is there any alternative method of assessing payment for cases? A case could have a small number of pages, but the actual trial could be quite complex.

Mr MacDermott:

That has been a big concern for the Law Society. We believe that the fairest way to remunerate any professional person is through an hourly rate that is fair for the work that is undertaken and required. However, the Courts and Tribunals Service has made it very clear that it is not interested in anything that provides for an hourly rate. It has indicated that hourly rates are just not acceptable in any circumstances.

On that basis, we tried to come up with a proposal that allowed for some form of subjective and objective test with regard to cases, because, as you rightly said, a case could be small in paperwork terms, but it could be very complex because of the novelty of the point of law, the defendant could be mentally impaired or they might not speak English. All sorts of things can make a case complex. We said that you cannot judge the quality of justice or the provision of justice through a tick-box exercise. Therefore, we said that there had to be some form of subjective testing. The Courts and Tribunals Service objected to that because it would mean that someone would have to look at it, and that did not suit its means because it involved more cost.

Mr A Maginness:

What would happen if, for the sake of argument, a normal fee was paid but the outworkings of a case became complex? Could provision be made for the judge who is hearing the case to consider an application for enhanced fees? Could that be a runner?

Mr MacDermott:

I think that was discussed, and it is the situation in some family cases as the judge certifies the case as being exceptionally complex, which increases the fee. It was not done in the criminal field in the past, and it was not actively pursued. The difficulty with that is that, from a solicitor's point of view, the preparation of the case and the amount of work involved in the preparation is key, and it is difficult for a judge to certify what is involved in the preparation of a case. However, it was not discussed in any great detail. It is something that will be the subject of tests

as to what makes a case exceptional. We feel that the Courts and Tribunals Service is not interested in anything that is subjective. It wants something that is purely objective and can be tick-boxed. That is the problem.

Ms Ní Chuilín:

For the record, as the Chairperson alluded to, the Committee was not amused by the figure of £79 million in respect of legal aid being reduced. Our understanding was that an international agreement was negotiated. Other members can speak for themselves, but my view is that the Courts and Tribunals Service tinkered with that agreement, and it had no business doing so.

This is the first time that I have heard about the figure of £16·16 million. You said that you were in discussions with the Court Service for two years, and I apologise if you already mentioned this, but at what stage in those discussions did you come to the figure of £16·16 million?

Mr MacDermott:

First, thank you for your comments about the £79 million. It was also a surprise to us. We also take the view that there was an agreement between sovereign Governments. It was signed by sovereign Governments and, for the Courts and Tribunals Service to come along and interfere with that, is something that we are very concerned about. None of us had heard of the figure of £16·16 million before 25 January of this year. It is the first time that it has appeared in any document. A letter was sent to us from the Courts and Tribunals Service, which contained its latest proposals for savings, and the £16·16 million appeared in that document.

Figures have been thrown left, right and centre in these negotiations. How you ever get to the point where you understand what figure we are supposed to be dealing with is very difficult, but the £16·16 million was first raised with us in a letter dated 25 January 2011 from the Courts and Tribunals Service. Up until then, there were varying figures of what the VHCC would save. Going back to the start of negotiations, they thought that they would save £5 million, but it is now up to £16·16 million. Given the lateness of the hour and the lateness of the stage of the negotiations, they are standing over that figure. It is on that basis that we put our proposal, which comes within their budget.

Ms Ní Chuilín:

OK, so at least it is something that can be settled on, even if you are not content with it.

Mr MacDermott:

We initially thought that the saving for the VHCC would be around £15 million, so it fits in with our projection, albeit based on figures that the Courts and Tribunals Service has given us in the past. However, it is the first time that it has acknowledged that the saving will be £16·16 million.

Ms Ní Chuilín:

My other questions are about some of the cases that have been listed, particularly around disclosure. I do not know how many cases there have been in recent times in which there have been non-jury trials. I have no idea how many cases there have been in which public interest immunity certificates are issued. I do not know how many cases involve Queen's evidence under the Serious Organised Crime and Police Act 2005. However, it strikes me that, if there is an increase in those cases, and if disclosure is not going to be as full as it should be, it may have an impact and lead to hyperbole and miscarriages of justice.

I also want to add something about non-English speaking defendants. Who pays for translation services?

Mr MacDermott:

The Courts and Tribunals Service.

Ms Ní Chuilín:

So, it pays for all that.

Mr MacDermott:

Not always. There have been documents that have had to be translated for which funding has come from the Legal Services Commission to a solicitors' firm. That came out of the legal aid budget for that.

Mr O'Brien:

I want to follow up on your point and the very fact that there are difficulties with disclosure at present. Under the new rules, there will be absolutely no incentive for the situation to improve, because solicitors will not be able to undertake the penetrative work that is undertaken at present to look at those disclosure issues.

Ms Ní Chuilín:

I just feel sorry for people who may find themselves in court, and we all have to presume that people are innocent until proven otherwise. It may come to the middle of a case, and a solicitor may realise that they are in way over their head and that they cannot afford the case. Basically, that is the decision that will have to be made. In such a case, someone would be left practically defenceless.

Mr MacDermott:

That is the difficulty and the major concern that we have. Most of us who practice criminal legal aid do so not for remuneration value but because we value the work that we do, the role that we play in society and the importance that we have in the criminal justice system. It is not something that we come to lightly. For us to say to a client that we cannot take a case on because we will not be properly remunerated is a very difficult thing to do. However, in reality, it is going to have to happen that way in some of the bigger cases, because there is no provision for any remuneration. A firm that takes on one of those big cases could go under because of that. That is a real concern. We are not making the point willy-nilly. Firms will have to say that they cannot undertake cases because their impact would take up so much time and resources that other business would fall apart because of it. The choice then is not to do the case, which leaves defendants and the justice system in a very sad state.

The Chairperson:

Mr MacDermott, if the new proposals proceed in their current format, you are convinced that an uneven playing field will be created between you and your cousins in the Bar Council, who have minimal costs and nothing like the overheads that solicitors' practices have. You have a real concern about the future delivery of justice.

Mr MacDermott:

I will deal with those points in reverse. Yes, I have real concerns about the delivery of justice if the proposals go ahead. It is not fair to say that there is an uneven playing field between us and the Bar Council in a trial context. However, we are concerned that the Courts and Tribunals Service sees fit to reduce solicitors' standard fees by 25% and barristers' standard fees by 20%. We have deliberately not got involved in negotiations over barristers' fees, because that —

The Chairperson:

Does that disadvantage you?

Mr MacDermott:

It disadvantages us, certainly. You very rightly said that we contribute greatly to the running of Crown Court cases and that solicitors' firms have huge overheads. We have to pay for rent, heat, rates, employment, staff, stationery and everything else. That is a massive outlay.

The Chairperson:

Do they have none of those costs?

Mr MacDermott:

They have limited outlay, which is certainly not anywhere near the outlay that a solicitors' firm has.

The important point about that is that solicitors' firms are part of the community that it is based in. Firms employ and finance people within those communities, who then go to local shops to buy their sandwiches and sweets. That is all part of the local community. If solicitors' firms are taken out of the equation, those communities will suffer.

Lord Browne:

Looking at pages 5 and 6 of your paper, which deal with Crown Court remuneration, I see that the Northern Ireland Courts and Tribunals Service has accepted the arguments that you made based on the figures that you produced. However, it has not reduced the level of cuts. Has it given you any indication as to the rationale behind that? It appears to have accepted your rationale, but

made no suggestion about the cuts.

Mr MacDermott:

That question would probably be better directed at the Courts and Tribunals Service, and I hope it will be. The short answer is that it has always been the case that we were told it has to come within budget. We have now shown that it can come within budget, and we are still left in a situation where we do not understand why the percentage cuts talked about remain the same. We just do not understand it. That is our short answer.

Lord Browne:

Have you had any response from the Department on your recommendations for increasing the rates of additional fees by 100%?

Mr MacDermott:

Yes. That proposal was rejected by the Department. That fitted in with the issue of disclosure, because those applications are necessary in situations where, in a difficult case, you have to make a number of applications to court. We saw that as providing some form of remuneration, but the Courts and Tribunals Service said that it was not feasible.

The Chairperson:

That is it. Folks, thank you very much for your presentation and answering our questions.

We are moving on. At our meeting on 7 December, that we received a briefing from the Department on its proposals to change remuneration for defence counsel. We have with us today representatives of the Bar Council. We welcome Adrian Colton QC, the chairman of the Bar Council; Mark Mulholland, the vice chairman; Tony Nicholl of Goldblatt McGuigan; and Martin O'Rourke, who is the chairman of the criminal Bar. I take it that you will be leading, Mr Colton?

Mr Adrian Colton (Bar Council of Northern Ireland):

Yes, but you will be glad to hear that I will be brief.

The Chairperson:

The floor is yours. There will be questions after you make your presentation.

Mr Colton:

I thank the Committee for the opportunity to speak to it. We appreciate it. Before I pass on to Martin O'Rourke, the chairman of the criminal Bar, and the vice chairman of the Bar Council, who have been involved in our discussions, I want to make some general points. Our case around defence remuneration is a simple one. Over a year ago, we entered into discussions on what I understood were agreed objectives, that is, that we should come up with a scheme for payment in criminal cases that suits the system of the Northern Ireland jurisdiction, but that comes within budget. On that basis, we adopted a collaborative, rather than an adversarial approach. We put forward our proposals and we shared all our accountancy evidence and all our expertise. We drove the discussions forward, and we came to a position where we achieved exactly what we set out to achieve, namely, a bespoke Northern Ireland system that the Bar would support and one that comes within or aligns with the budget. When we achieved that, we were told, "sorry, that is not enough, we want a little bit more." Frankly, we do not think that that is anyway to treat a profession. We are very disappointed that that has been the outcome of those discussions.

I see that Mr Nicholl from Goldblatt McGuigan has arrived. These gentlemen can answer any questions that you have around the detail.

You have had a detailed paper from us since November of last year. The key point about that is that, as I understand it, the Courts and Tribunals Service accept that it does align with the budget.

Let me just pick up on a number of points made by colleagues in the Law Society. The first is the issue of whether the Bar is getting a better deal —

The Chairperson:

Mr Colton, can I just stop you there. The Committee Clerk is circulating papers that we just received from the Bar Council. They came into the office at 1.30 pm or 2.00pm. I just want to explain to members that that is why you have not received them earlier. You are getting the

papers as quickly as we can give them to you.

Mr Colton:

They are essentially supplementary papers that my colleagues will address.

I just want to pick up on a number of points. I can understand why, at a superficial level, the Committee asks why the Bar is proposing a cut in standard fees of 10% for barristers and we are proposing 20% for solicitors. I hope I have answered that question before. I will make it clear: that applies only at the bottom end of the scale. We took a sophisticated approach to this. Rather than having percentage cuts across the board, we decided we should deal with the problem.

The problem is VHCCs, which is where the big money was going out. We suggested concentrating the cuts on those cases and having a graduated system so that younger members and those coming into the profession at the bottom of the scale — the bread and butter of the profession — would be able to make a living and have a career. In our proposals, 65% of the cuts are coming from the Bar and 35% from the solicitors' profession. Therefore, it is not true that we are asking for a greater cut for solicitors, and I want to make that clear.

Furthermore, we must remember that the fees already provide for greater payments to solicitors. That is rightly so, by the way; I do not criticise that. On average, they get 2:1 in any trial, which is right because they have overheads and extra staff. That is already built into the figures, and that should be borne in mind as well.

I agree with nearly everything that my colleagues said, particularly Mr MacDermott and Ms McCaffrey. I support what they say about the importance of having a proper legal system in place to ensure that people are properly represented. It is debatable whether £79·5 million or £75 million is sufficient, but we are prepared to work within that. We have never gone back and said that we want more money; we have never cried about it. We have said, "Right, that is the budget; let us come up with a scheme." We think that our scheme will work, and we think it is fair.

I want to pick up on what the Law Society said about the effects on the profession, and I know that that is of interest to the Committee. Although it is right to say that the Bar does not employ as many people as solicitors employ, we have invested £20 million in a Bar Library, which has to be paid off. We deliberately have a system whereby those who come to the Bar are supported during their first seven years. That is particularly important now as an increasing number of females come to the Bar. We are anxious that they have an opportunity to build a career so that the Bar will survive, so, for that reason, we subsidise them during their first seven years. We also employ many staff in that building, and individual barristers employ secretarial staff and so on of their own.

The effect on the profession will be particularly damaging, especially given that the students who come to the Bar now are frequently in debt. The average debt of someone coming to the Bar is £25,000, and they have no guarantee of income. They are out there trying their best to get work under very difficult circumstances. I also want to make it clear that, throughout its history, the Bar has never refused a master to anybody who comes through the qualification process. We will guarantee that anyone who qualifies as a barrister will be given a master and will be given an opportunity to practise at the Bar. That is unlike the system in England and Wales, where literally hundreds of barristers cannot get into chambers because of the closed system whereby you have to get into chambers before you can practise. We have an open system, and we want to keep it that way. One way of doing that is by ensuring that people who come to the Bar have an opportunity to work and get fair remuneration for that work. That is why we have concentrated our proposals on cutting the top fees and protecting the standard fees at the bottom. That is the approach that we have taken. We do not apologise for that; we think that is a fair way of doing it, even though some of my colleagues may disagree.

That is all I have to say generally. I will have over to Martin O'Rourke. I am conscious that you have had an opportunity to read our paper as you have had it for a number of months. It is a substantial and lengthy paper, but Martin may highlight some of the points.

Mr Martin O'Rourke (Bar Council of Northern Ireland):

The Bar's position is really very simple. Initially, the Courts and Tribunals Service wanted to move to the English and Welsh system of a graduated fees scheme. We suggested an alternative

method, which has been adopted by the Courts and Tribunals Service as a good method because it achieved predictability and is simple. It is really just an extension of the 2005 scheme. It was our idea to move into the new, extended 2005 scheme to begin with.

The difficulty is that, having carefully budgeted our proposals with the assistance of Goldblatt McGuigan so that we would achieve our aim of coming within the £79 million, the Courts and Tribunals Service has, for no apparent reason, taken our carefully budgeted scheme, which it agrees meets the £79 million target, and simply slashed the fees in each area well below what we had initially suggested. That is the first issue that we have; in each box, if you like, it has reduced the fees significantly below those figures that would meet the budget.

Secondly, in his presentation to the Committee on 7 December 2010, Mr Crawford repeatedly referred to guilty pleas 3 and 4 — GP3s and GP4s. However, if you look at the draft document, you can see that those do not, in fact, exist; there are just GP2s. That is significant, because, under the current proposals, a barrister will only get paid the enhanced fee for the complicated, significant cases if a client pleads not guilty on arraignment. However, we all know that, when doing those types of cases, particularly the complex and voluminous ones, a lot of work has to be done to advise the client before getting to the arraignment stage. It may well be that he pleads guilty on counsel's advice, and it seems to us that, under the current proposals, if he pleads guilty, the enhanced fees for the more complicated cases simply do not apply. They are all driven back to the 2005 scheme, which has existed since that date. So, there is a problem around how you get access to those enhanced fees. We have asked the Courts and Tribunals Service to address that issue, but it has not been addressed in the draft document.

The third issue that we identified is how the enhanced fees are triggered. Mr Crawford referred to GP3s and GP4s in his presentation to the Committee, but they are not referred to in the document. As you will have seen from the proposals, those fees are triggered by means of a page count. However, we have analysed the data that we have available from previous cases, and it is our submission that, if one were to apply the current proposals on page counts, few, if any, cases would ever trigger the higher fees for complicated cases. In other words, although, on the face of it, it looks as though there is a scheme to cater for those cases, in fact, people cannot get access to those fees because the page counts are so high that no cases will ever fall within those figures.

When Mr Crawford presented to you on 7 December, he suggested a 20% reduction on the initial draft but, significantly, not in class A cases/offences, namely, murders, or in class G cases, which are complex fraud cases, VAT evasion etc. Those are the two categories of cases that will generally be the complex and significant cases. He is proposing a 20% reduction in the cases that will generally not fall within the complex cases category in any event, so it looks like an attractive compromise by Mr Crawford but, in effect, it will have no real meaning in practice.

We say that the page count — in other words, the way in which one gets access to the extended grid — has to be adjusted. You have already heard from the solicitors, and you will have noted that it is proposed that 750 pages would trigger an enhanced fee for solicitors. It is difficult to see the rationale for solicitors getting an enhanced fee at that page count but representatives at the Bar not getting an enhanced fee at that same rate. There is no logic to that whatsoever.

Those are areas that need to be addressed by the Courts and Tribunals Service. The grid needs to be adjusted in the way that we have proposed, and some of the rules that govern the access to those fees need to be readjusted if there is to be any realistic prospect of getting access to them. Those are matters that we have set out in our paper and which we have asked the Courts and Tribunals Service to address, but, to date, we have had no realistic response from the Courts and Tribunals Service.

We have carefully studied Mr Crawford's submission to the Committee on 7 December, and there are a number of significant matters that we need to address and on which Goldblatt McGuigan have assisted us. It may be better for Tony Nicholl to address those matters.

Mr Tony Nicholl (Goldblatt McGuigan):

We have provided correspondence to the Bar dated 10 February in which we asked for documentation. There are a couple of points worth raising. Robert Crawford advised that a 28% cut was required for counsel fees to bring the standard fees in Northern Ireland in line with the graduated fee scheme in England and Wales. Based on the consultation paper and the figures that we have analysed, the required cut is, in fact, 17·5%, not 28%. Robert Crawford confirmed that

the Bar Council's proposal met the budget, and he provided additional figures, bringing the figures down to £75 million in 2013-14. Our point is that the Bar Council's scheme falls within even that budget, taking into account the administrative savings and the civil legal aid savings. In general, this had been an extremely arduous process of negotiations in which the goalposts have been moved on us constantly.

Mr McCartney:

Is there a case here for a complex case?

Mr Nicholl:

It was the issue of the goalposts constantly moving in the negotiation process.

Mr McCartney:

Is there an enhanced fee here maybe?

Mr Nicholl:

With any luck.

At all times, we have managed to come up with a scheme or a proposal that has met the requirements of the Courts and Tribunals Service, and I do not think that that is in dispute.

On the Law Society's comments on the disparity in savings, the underlying figures behind the proposals were that the graduated fee scheme proposal was looking for a reduction of 34% and the figures being sought were a 58% reduction in solicitors' fees and a 17% reduction in counsel's fees. Therefore, there was always an expectation of disparity in the result, and the proposal addresses that.

Mr Mark Mulholland (Bar Council of Northern Ireland):

I attended the Committee on the previous occasion that the Courts and Tribunals Service appeared, and I listened to the presentation. A number of highly relevant and significant questions were asked, and a number of responses were given. I came away with a deeply felt sense of frustration because, on that day, we were not to present before you. On that occasion, I

noted the points to which I took some exception, and I will deal with those now. The Courts and Tribunals Service will have the opportunity to come back on those.

The Courts and Tribunals Service was asked what qualitative or impact assessment had been conducted prior to the intended implementation of the scheme, and the answer was that there had been none. A degree of confidence was conveyed to the Committee that you were to be assured that, whatever the cuts and whatever the significant extent of those cuts, quality representation would still be given in publicly funded cases. Frankly, I invite the Courts and Tribunals Service to inform you, on an informed basis, how it can assert that, because, in all of the discussions that have been held with the Law Society, the Bar and the Courts and Tribunals Service, the one common theme has been that people in solicitors' firms will be put out of business, barristers will be put out of business and the quality of representation afforded will be diluted.

However, do not take our word for that; look to England and Wales. That was said with a great deal of authority, because we have looked to England and Wales. We visited the Bar in England and Wales, got its data, heard its anecdotal accounts and listened to the Lord Chief Justice and the chairman of the Bar Council there. We also read the Public Accounts Committee report of February 2010, which made express reference to the dilution of the quality of representation.

Leaving all of that aside, at first principles, a Google search would have turned up the Ministry of Justice paper of March 2010 for the Courts Service there, 'Restructuring the delivery of criminal defence services', paragraph 6 of which states:

"However, in our view it would not be sustainable to continue to reduce administratively set fees while maintaining the current supply structure. A number of providers have told us forcefully that we have already reached the point at which criminal legal aid work has become unprofitable for them, and it is no longer viable for them to continue to undertake it."

The reference to "providers" is to barristers and solicitors. That is mirrored and replicated in comments that you will find in our papers from Nick Green QC, who was, at November 2010, the chairman of the English Bar Council. Again, he says:

"It will come as no surprise that a disproportionately high percentage of leavers"

were women and people from ethnic minorities. By reason of what he has described as the significance of the drastic cuts in England and Wales — the very thing that is being proposed here — there has been a marked effect on the quality of representation, to the extent that, by

November 2010, in his paper to the Bar of England and Wales, which comprises some 15,000 members, he said that, invariably and inevitably, it means that the Bar, in most areas, can no longer remain within publicly funded work.

To say that that will not have a gross and severe impact on the quality of representation afforded is wrong. In contrast, the Courts and Tribunals Service has said to the Committee that it is confident that it will find people to do the work. Anecdotally, a person who has done 18 months to two years in chambers in a practice in London may be sent to the Crown Court by those chambers. I have been at the Bar for 19 years and Martin O'Rourke has been at the Bar for more than 20 years. We are still junior barristers, and that is the work that we are doing, after years of experience of conducting cases in courts on a daily basis. To say with confidence that there will be no effect; well, that is the difficulty when no impact assessment or quantitative assessment has been made in advance of making such far-reaching proposals.

When the Committee received that presentation, there was, on the face of it, a concession on the criteria that should be applied in what would be classified as non-standard cases. Again, the irony of ironies is that this was the scheme that the Bar presented to the Courts and Tribunals Service. The Bar proposed to abolish VHCCs and to replace them with fees that would be significantly reduced by up to 68% in a scheme that would be all the things that were required — accountable, predictable and transparent. However, what was omitted in the presentation to the Committee was that, in the two categories of cases that normally give rise to non-standard cases — the biggest cases of murder and fraud, known as category A and G respectively — the page count is to be taken down from 2,500 to 2,000. Well, I say, "Big deal". It will not make a button of difference in those cases.

Those cases need the very thing that Pearse MacDermott mentioned — the inclusion of the disclosure count. I could get a case today with a lever arch file containing 500 pages. I could fill this room with the disclosure in it. The totality and the extent of the work that I, as a barrister, do, sitting nightly until 2.00 am or 3.00 am looking for that key point, is not found in that single file; it is found in the disclosure. However, the criteria to be applied will not afford that case to be paid anything other than a standard fee.

A standard fee still represents a significant amount of money to the man in the street. However, bear this in mind: when you take on a big case that can run for six months, you take off most of your summer to work on it. You work every night into the night, and you do it during trial to the exclusion of other work at court. Unlike a solicitor, you are a one-man band. You are retained as a hired gun to present a case with your skill, your experience of advocacy and your depth of knowledge of the law. However, you can only be in one court at a time when a big case runs like that. It requires 110% commitment.

What has happened to date is this: it was our suggestion to abolish the hourly rates that were being paid. However, the matter had to be looked at in a very pragmatic way, because we still felt that, if you give up your time and your experience — it is the people who have reached the top of their field who take those cases — there still has to be fair, but not excessive, remuneration. I will outline the problem that was arising and that will arise. You get your case with your roomful of disclosure, which is normally read in advance of the trial and is dissected and cross-referenced. It is worked on by the legal team, and you prepare your legal arguments and applications. That is done in order to expedite the court hearing and save court time. The skeleton arguments are now two a penny. You are drafting written submissions and pre-trial applications every night, all with a view to cutting down court time and saving resources. To do all that, and to then sit down and advise your client in advance of the case of the pros and cons, the pitfalls and the whys and wherefores of the case, shall be removed as an incentive. Frankly speaking, you can read your roomful of material, and you may have put 10 weeks' work, or even 20 or 30 weeks' work or two years' work, into those 2,000-plus pages, but, according to the criteria, you will get your bog-standard fee that you would get for a shoplifting case or an assault case.

In an equitable world, that simply cannot be right. We go back to Tesco law. Yes, the Bar should be a business, and if we were businessmen, we would say that we do not want that case because it does not pay enough. We look at it as a vocational profession, and we have a sense of pride in our work. Criminal defence work makes up 95% of my work. I relish it and enjoy it. I do long hours, and it is a commitment. When I take a case on my own, as a barrister with a solicitor instructing me, I head up the team. If there is a QC, he or she heads up that team and takes ultimate responsibility. There comes a point in time when you have to make decisions on

your feet while you are in court on a daily basis and someone's liberty is at stake, particularly now with the new sentencing regime under the 2008 legislation. Through that, there will be an increasing number of indeterminate sentences, life sentences and extended sentences, all of which come into the mix. If Tesco wants to come in and do the hours that we do, by all means —

Mr McNarry:

It opens 24 hours a day seven days a week.

Mr Mulholland:

But you will find that the shop assistant goes home at 5.00 pm. Unfortunately, when we go home, the work continues, as it does with members. The difficulty is that those who would otherwise do that work most efficiently and who would dispense with it in a way that brings experience to bear shall be the very people to say: "I would love to do it, but no, thank you". That has been the experience in England and Wales. Ironically, in England and Wales there is still a VHCC system, there is still an hourly rate, and there are still those who earn over £1 million. That all still exists. We are trying to move away from all that and to bring a scheme with predictability. However, we laid our cards fully on the table from the start, and we said that Goldblatt McGuigan would work with the Courts and Tribunals Service to get a scheme within budget. Well, we all know the end result.

Finally, the fall-out of members is not exclusive to the Law Society. I have had seven pupils at the Bar. Members will recall that Gerarda Campbell came to a previous Committee meeting. She is a young lady at the Bar who is in her mid-20s and who is already more than £25,000 in debt. She spends her six months with me. She then spends time beyond that trying to get work and more time beyond that trying to get paid. In the meantime, she is trying to run her home, her family and everything else. This year, to my great disadvantage, I lost one of the most able junior barristers at the Bar, who has taken up a position in the Attorney General's office. She did that because of the difficulties with getting work and getting paid. That dilution of quality is inevitable if the cuts come in the manner in which the Courts and Tribunals Service intends them to.

That is the far-reaching extent of it, coupled with, as Adrian has said, the fact that we have

overheads. We may not have a multitude of staff in every office, but we have more than 30 staff in the Bar Library, and we have a significant building to pay off. It does not take any more than 60 barristers who do criminal work — that is less than one tenth — to leave the Bar Library and say that, because of hard times, they need to cut back on overheads and will no longer pay Bar Library subs. If that were to happen, the Bar Library would be unsustainable as a building, as an institution and as a bedrock of the justice system in this society. I do not say that emotively; I say that as a matter of fact, and it has been outlined in our paper.

Therefore, the implications are far-reaching. We certainly came at this issue with the perspective of trying to find something that everyone could work and that would bring it within a budget that, as Pearse said, started at £5 million, grew to £8 million and, by our savings alone — as proposed in our scheme — is a saving of £14 million per annum. So, we feel that that we have delivered, and then some, on the brief that we were given.

Mr O'Rourke:

I will make one additional point. It is made in the document that the Committee received from Goldblatt McGuigan, but I will summarise it. When Mr Crawford appeared before the Committee on 17 December, he reluctantly agreed that the Bar's proposal met the £79 million budget but stated that he had reservations about the value for money issue. That seemed to be rooted in the comparison that he drew with England and Wales. He indicated to the Committee that he estimated that we were 9% to 10% more expensive than England and Wales. I note that Mr McCartney asked him whether a per capita examination had been conducted, and he indicated that it had not. That had been our understanding also, because we had repeatedly asked the Courts and Tribunals Service for any data it had on a case-by-case analysis with England in order that we could make comparisons. We were never provided with any data. In fact, my understanding is that there was no data available in order to conduct the analysis.

First, we question severely where the Courts and Tribunals Service gets the figures to show that we are 9% more expensive in this jurisdiction than in England and Wales. Secondly, England and Wales are beset with problems as things stand. If we want to have a system with problems such as England and Wales have, we might achieve it. If we are 9% more expensive, we might achieve it if we reduce fees to the point where it affects quality and so on, as has

happened in England and Wales. Thirdly, the whole purpose of the bespoke system that we have devised is to move away from England and Wales, so we should forget about direct comparison with England and Wales. We have a system that we think will work here. It is a bespoke system that is suitable for Northern Ireland, so comparisons with England and Wales, if they can be made — we say that there is no evidential basis on which to make such a comparison — are inappropriate. I want to emphasise that point to the Committee before we take any questions.

The Chairperson:

Thank you, gentlemen, for your presentation. In your paper, you make your top bid. You say that the Bar's position is that cuts to standard fees are simply not necessary. Is that credible?

Mr Colton:

Yes, it is, because we are being told that a budget of £79 million is available. We, therefore, take it that that represents value for money. On that basis, it is possible to devise a scheme without cutting standard fees, although we have accepted and put forward a cut of 10%. It could be done, but we recognise that people like you will ask that question. We could put forward a scheme that does not involve that but, in the interests of compromise and to indicate to the public that we recognise the feeling out there, we suggest a 10% cut in standard fees.

The Chairperson:

In the next paragraph, your next bid is that you accept that, because of budgetary circumstances, the Bar has proposed a 10% reduction. Do you think that that is an accurate reflection of the circumstances in which we all now find ourselves in the real world?

Mr Colton:

You have to look at it in the round. Not all barristers' work is standard fee work. Some do a combination of standard fee work and the more difficult work. We are trying to achieve a balance. The cut in the higher rate is something like 68%. I am almost afraid to say that because, when this gets back to the Bar Library, my sanity will be questioned. I will be asked: what are you doing here? I was at this Committee last June, and I heard what it said about barristers earning £1·3 million per year. I recognise that that is not acceptable and that we need to put an end to it. That is why we said we should address the problem. So, yes, a 10% cut is proposed for

standard fees, but bear in mind that we are also proposing a 68% cut at the other end. It is the balance that is fair. If you look at that figure in isolation, you might say that it is ridiculous that the Bar is taking only a 10% cut, but we are not — that is only for a certain type of work.

The Chairperson:

However, you say earlier in the document that no cut is necessary at all.

Mr McDevitt:

Good afternoon, gentlemen. Can you confirm that you still stand over the Goldblatt McGuigan report as a scheme that you accept in its totality?

Mr Colton:

Yes.

Mr McDevitt:

So you accept it absolutely, even though there are aspects of the Goldblatt McGuigan report that are clearly unpalatable to you. Proposed savings are built in; for example, the savings around means testing and so on, of which you have not been the greatest advocates. Do you still stand over the report and all the proposed savings that are identified in it?

Mr Colton:

It is not what we want. I have no doubt that the Committee can recognise problems with it, and I am sure that the Law Society could as well, but that is what we have come up with.

Mr McDevitt:

I want to be absolutely clear, because it is an issue that has been raised. You will accept it in its entirety and take the pain and the stuff that may not be entirely in line with your own stated policy?

Mr Colton:

Yes.

Mr O'Rourke:

An important rider to that is how it is triggered, which I was speaking about earlier. That is an important aspect of it. The Goldblatt McGuigan report is based on GP3s and GP4s so that, if you qualify on page count, you qualify for those rates. The first question is: how will the page count be set, if that is the criterion? Secondly, if the Courts and Tribunals Service implemented a procedure in the rules that meant that you could get that only if you pleaded not guilty, it would disqualify a lot of those cases. It has to be based on the triggers.

Mr McDevitt:

That is clear in the report. I just wanted to clarify that. We are probably talking money today rather than moving goalposts. I think we are beyond moving goalposts. The draft Budget is out for consultation. Mr Nicholl, in your letter to Mr Garland, you highlighted the Crown Court remuneration proposed savings, the infamous £16·16 million that your colleagues from the Law Society were talking about earlier, £3 million in standard fees, and a minor consequential, which amounts to a total of £18·77 million in savings. You query that figure in your letter.

Mr Nicholl:

I query the fact that, attached to the back of the submission to the Budget, there were further savings of £2·57 million arising from the administrative savings and the civil legal aid. Those figures are not concluded, so that brings the total saving up to £21·9 million.

Mr McDevitt:

What would you say to an argument from the Courts and Tribunals Service that there are no administrative savings or that you are grossly underestimating them in the VHCCs?

Mr Nicholl:

Those are the Courts and Tribunals Service's figures. We are adding our own figures into those totals.

Mr McDevitt:

If the Courts and Tribunals Service was to come back today and say that no savings can actually be achieved there, what would you say as a professional accountant?

Mr Nicholl:

I do not know how the Courts and Tribunals Service came to its figures in the first place, so I would question why it was changing its own figures.

Mr McDevitt:

I have one last question about the standard fees argument. Chairperson, as we know from your earlier question to Mr Colton, the Bar Council proposed a 10% reduction in standard fees. The Courts and Tribunals Service claimed that that would make the Bar 25% more expensive in our Crown Court remuneration than in England and Wales. It subsequently told the Committee that, like for like and across the board, our fees — Northern Ireland fees, one would presume — for Crown Court remuneration would be providing 9% to 10·5% more remuneration than those in England and Wales. What do you say about that?

Mr Mulholland:

There are a couple of aspects to that. First, the consultation paper for a cut in standard fees to bring us in line with England and Wales proposed a cut of 17·5%. We will, no doubt, go down as the worst negotiators in history, because we have somehow managed to put that up to 20%. That was the starting point, which was aimed at bringing us into line with England and Wales. The reference now to 29% or 20%-plus is based on the expectation that, over the next three years, there will be a 3% per annum cut to standard fee cases in England and Wales. That is if that comes in, has worked and does not have yet another dire effect on representation in England and Wales, which is already grossly apparent.

If we are comparing like for like, those are further percentage cuts intended for England and Wales. They have not been introduced yet, and were raised with us for the first time as part of any discussion only at the very end of our discussions with the Courts and Tribunals Service when we said that there was no justifiable basis. We started off with the consultation paper proposing to cut us by 17·5%; we came up with 10%, and now it is 20%. Although, on the face of it, there may be something more to come in England and Wales, we already know the extension of that in the outworking and the effect that it has had on the quality of representation. It is difficult to compare like with like.

The other aspect is that, two years prior to these discussions and in accordance with the 2005 rules, the Bar was invited to and did prepare a paper that went to the Court Service. That paper was a review of the 2005 rules, which are the present workings. Having canvassed our members, we distilled effectively eight or nine fundamental points of shortcomings in areas where either very little remuneration was being paid or none at all. We highlighted those and asked that they be addressed as they were fundamental shortcomings.

We received a one-sentence response along the lines that we may have a point, but nothing would be done about it. That is why we start from the premise that there is not even the need for a 10% cut per se by reason of the fact that there are all these other aspects. For example, it is only since legislation in 2008 that we now have extended sentencing hearings, which, in effect, means in most cases a half-day set aside in court. There is the potential for expert witnesses being called, but there is no provision in the rules to pay for that, and the barristers and solicitors do it for free. They do it as part of the fee they would otherwise get for a sentencing case.

Yet, here is yet another extension of the work and complexity involved, and we have taken it on the chin. That is just one example. Proceeds of crime is another big one. Those are issues that we pointed out to the Court Service. We said that, instead of cutting our fees, there are all these shortcomings that you failed to address in the past two years in that review, so that has to be thrown into the mix here in looking in any equitable base as to the fee and what it should be cut by.

Mr McDevitt:

I have one very final question. Part of your job is to occasionally engage in plea bargaining and to enter into negotiations on behalf of clients for particular outcomes. You would consider that, professionally, you have some experience of negotiators, is that correct?

Mr Mulholland:

Well, I thought so.

Mr McDevitt:

At the heart of most negotiations is a basic contract of good faith. Looking back on the past year, how would you characterise these negotiations?

Mr O'Rourke:

You have seen the letter that we sent to the Minister. We were very upset by the fact that, having achieved the targets and been acknowledged to have done so by the Courts and Tribunals Service, it seemed to be unacceptable, and further cuts were to be made not having been mentioned to us in during the negotiations. That letter speaks for itself and how we feel about how the negotiations were conducted on what seemed to be the ultimate target of the Courts and Tribunals Service, which had not been conveyed to us in the course of the negotiation. The letter sets out our position.

The Chairperson:

Have you found these negotiations to be a goalpost-moving exercise all the time? I think that is the words that were used.

Mr O'Rourke:

Yes. It was with some difficulty that we were able to identify what the objectives were. When we had those objectives secured in order that we thought we could begin to engage accountants to achieve that purpose, it was somewhat upsetting to find that, having spent a great deal of time, effort and expense, we were wasting our time and that different considerations would be applied. That was disappointing.

Mr Mulholland:

On that point: I asked for Mr Nicholl's permission to quote him, because this typified to me the sense and the mood. At the end of one of our final meetings, he turned to me and said:

"Never in 30 years have I experienced this."

The Chairperson:

When you said that you had trouble in identifying, I thought you were going to say that you had

trouble identifying where the goalposts were by the time you went back.

You mentioned a letter.

Mr O'Rourke:

Yes.

The Chairperson:

Would there be any possibility of you sharing that with us?

Mr O'Rourke:

We did in fact copy the letter to the Committee, but we will make it available again. The Minister responded in due course. It is Mr Colton's letter.

Mr McNarry:

Gentlemen, you are welcome, and I am grateful for the papers that you have produced. I am sure you appreciate that we are meant to read them at the weekend or at night as part of our job. That is part of our discovery, because it is all about understanding. I am not here to deny or decry your particular professional opportunities, but I am here to understand them. That is why this type of meeting is useful. If you stayed static for the next four years, which covers the Budget period, would you be making different arguments?

Mr Colton:

Do you mean if we maintained our current level of income?

Mr McNarry:

Yes.

Mr Colton:

Obviously, if we did so, we would not be facing the challenges of losing members of the Bar. We would not have a concern about maintaining the Bar and ensuring that the profession survives. However, the reality is that we are not standing still. That is not going to happen. It is not just

criminal work that is suffering; civil work is suffering significantly at the Bar. The solicitors' profession is suffering with the drop in conveyancing and so on. Everyone in society is facing difficulties and we have to adapt and adjust. So, no, I do not think I would be making these arguments. However, things are not going to stand still.

Mr McNarry:

You understand why I am making that point. In many other walks of life, professions and jobs, because of the Budget situation, we are asking people to take pay freezes and even pay cuts to protect jobs. I am trying to analyse —

Mr Colton:

So are we. Legal aid is to be cut from £104 million to £79 million and, by the way, all those cuts have to come out of the criminal legal aid budget, not the civil or family budget. If we said that that is far too much and that it should be £90 million, we could have this discussion. However, we have accepted the cuts. It is in excess of 25% as a gross figure. At some levels, it is as high as 68%. So, we are accepting cuts ranging from 10% to 68%. I do not think that we are being unreasonable.

Mr McNarry:

Your argument is well made. I am trying to put it into the context of people outside. You called yourself a hired gun earlier. This might not be the most appropriate place to be saying it, but nevertheless. Your colleagues earn sums that most of the public think is excessive. If you do not mind me saying so, it was a bit like hearing a banker saying:

"I had a bad year; I could afford only one Ferrari this year."

That was said only a few weeks ago. We are trying to put it into perspective, because there is a lot of convincing to be done. That is why I raised that.

In your document, you say that, in almost every tier of the court system, two counsel will be instructed where there are issues with serious or grave consequences and that it would be wholly inconsistent for the criminal justice system to adopt an alternative approach. Will you expand on

that?

Mr Colton:

That deals with the issue of two counsel. I was not sure whether the Committee was dealing with that. We have had no communication from the Courts and Tribunals Service since last June when we raised this issue with the Committee.

The point we were trying to make is that part of the current scheme is to significantly reduce cases in which two counsel are employed. Our point is that the criminal system should not be any different from the civil system. If we have a very difficult personal injury claim where someone suffers severe injuries as a result of an accident and there are complicating issues of medical care and treatment and so on, that person is entitled to two counsel. Equally, in some very complicated family cases, people are entitled to two counsel. So, it should be borne in mind that that is across the board. In other words, it is not just in the criminal law that two counsel are instructed. You to look at the concept of two counsel in all areas of law.

Mr McNarry:

Two counsel to do one job, in effect?

Mr Colton:

No. They do different jobs and they bring different things to the table. I accept that that is appropriate only in the more serious cases.

Mr McNarry:

That is fine. I have never understood this two counsel idea. However, I accept your explanation.

Is it appropriate to ask in this session where we now sit with out-of-court settlements? That seems to be a fair part of your profession. Yet, we are talking about all this money that might be spent in court. It seems to me to be locked up into the system. If you settle something out of court, do your fees change? Do you get less money for settling out of court or for going to court?

Mr Colton:

The earlier a case is settled, the cheaper it is for all involved. That is also reflected in criminal law, which is why there is a scaled system. There is obviously less of a fee for a guilty plea than for a trial that runs for six weeks.

Mr McNarry:

Can I just put a plug in for Asda, because it is in my constituency as well? *[Laughter.]*

Mr Colton:

Can I put a plug in for the MLAs who work 24/7? I am fully aware of that. The next time you want a pay rise, I will support you. *[Laughter.]*

Mr McNarry:

We have been trying for seven years to get a pay rise.

Mr Colton:

I do not mind that being on the record.

The Chairperson:

At least we will know who to take our case to.

Mr Colton:

I have only one vote.

Mr McNarry:

You will be a lot better than the bozos who are meant to be representing us.

Ms Ní Chuilín:

We received this letter today from Goldblatt McGuigan about the reform of legal representatives' fees. I will repeat the point that we made earlier. We asked whether the legal aid budget of £79 million was going to be targeted for further reductions, and we were told that it was not. I want to have that noted. You spoke earlier about the pages and the way the whole construct is going to

work out so that you are not going to have the case. What happens to video evidence, or does that really just affect solicitors? The cases that we looked at as examples were the McCloskey judgement and the Martin, Ward and Donaldson cases. What happens in those cases when you are given disclosure?

Mr O'Rourke:

You mean cases in which videos have to be examined?

Ms Ni Chuilín:

Yes. Is that allowed to happen only when disclosure has been funded?

Mr O'Rourke:

In standard cases, there is a fee per hour given to counsel for viewing video tapes or listening to audio tapes. There is an hourly rate, if you like, for doing that. I am not sure what would happen in a case that fell into the higher-rate category. I assume that similar rates would apply in those cases also. There is an hourly rate, which is not very high, but we are not taking issue with that. It has been in operation since 2005, and has been frozen since then.

Ms Ni Chuilín:

So, it has been frozen then?

Mr O'Rourke:

Someone made the point earlier that a lot of businesses etc have to take cuts at this particular time. We are not complaining about taking the cuts. In fact we have suggested them, as Mr Colton said. However, it should be borne in mind that the fees we are operating under — particularly the standard fees — were set in 2005. Indeed, they were set before the implementation of the 2005 rules, probably in the preceding year, and they have not been increased since 2005. Six years down the line, those are still the same fees that have been operating. We are not complaining about that, but you have to put the current reduction in that context to fully appreciate the impact it may have on the Bar.

Ms Ní Chuilín:

It is not that I do not have concerns about the situation you explained, but my additional concern is that we went through an equality impact assessment on the Justice Bill, albeit in a bitsy way, and the figure of £79 million, which people were content with, would have meant that there was a greater degree of confidence in accessing justice. What I heard today is that, if that figure remains reduced, the access to justice will certainly have an impact on equality for people. It is a huge thing, because one of the things that have been disclosed to us is that young men are more likely to end up in the criminal justice system than others. I am sure you know the statistics as well as anyone else. For example, someone from a socially disadvantaged and deprived area may not have a great degree of understanding and is going to find themselves in a court, where they may have to make a decision that they are not capable of making. I just think it stacks up for a massive inequality. It makes a nonsense out of the equality impact assessment process. As you know, is a section 75statutory duty under. From what we have heard, this will potentially lead to further miscarriages of justice.

Mr O'Rourke:

About two years ago, the Bar changed its code of conduct. It used to be that barristers were obliged to take every case that came their way. The Bar changed that to allow barristers to reject cases if they felt that the remuneration for the case was insufficient. It is up to each individual barrister to choose.

What will happen in reality is that some barristers will choose not to do the difficult cases. It will generally be the busiest, most able and most competent counsel who will have the choice to reject those cases. So, the most difficult, complex, voluminous and time-consuming cases will be dealt with by the less able people at the Bar, if they are dealt with at all. That will impact severely upon the justice system. We have tried to balance the fees that are payable whilst trying to maintain an adequate rate that will entice people to take the cases. If the fees are further cut in line with what the Courts and Tribunals Service has suggested, there will be counsel who will reject the cases and simply not do that type of work. That will be damaging for the system of justice. So, we have grave concerns that reducing the fees will push the criminal work down the food chain in the Bar Library system, and that will ultimately impact upon the consumer.

Mr Mulholland:

The Committee on the Administration of Justice (CAJ) has voiced concern on that very point about the fee cuts around the potential for miscarriages of justice and the lack of an impact assessment conducted on this issue. It is wide-ranging. Besides that, as Martin said, there is the impact on the most able doing those cases and declining to do so. In England and Wales, it has led to a marked impact on females and people from ethnic minorities at the Bar. It comes through to the judicial aspect. The most recent paper is the 'Report of the Advisory Panel on Judicial Diversity 2010', which relates to England and Wales. It refers to the continuation of cuts, publicly funded work, those who are most able not doing that type of work and that it therefore significantly reduces the quality of the pool of those who go on to become judges. So, it impacts at every tier of our system of justice and its administration.

Mr McCartney:

Thank you for your presentation. I meant to put this question to the Law Society. Forgive me for not doing so. I hope you do not think I am asking you something that I would not ask them. Have you had any discussion with the Law Society to come up with a joint plan?

Mr Mulholland:

We liaised with the Law Society throughout this process. If we can find a common way forward with it, we are happy to do so. A difficulty arises, in that there is a diversity of competing interests within the Law Society's membership. Some solicitors do the high cost cases, some do the standard fees and some do both. The society has therefore to take all of that on board. If we can come up with something that still came within the budget of £79 million and that helped everyone, we are happy to do it. That something that we discussed with Goldblatt McGuigan.

Mr McCartney:

I am not sure whether it was in December, but in an earlier presentation, you said that the gap between the Bar Council and the Department was around £900,000. That is my recollection. The Law Society said that the gap in part of its proposal, notwithstanding the important disclosure issue, is around £600,000. So, at one time, we all expressed a degree of optimism. People talk about moving the goalposts and different things, but you said, Mark, that Tony made a comment about 30 years. Was that around procedure or figures?

Mr Nicholl:

It was around the constantly changing figures and what people were being asked to achieve. One of the initial papers put to us had £10·5 million in a budget for high-value cases. When we analysed that, the most that could be justified was around £3 million for such cases. We pointed out immediately that what needed to be saved could be saved — approximately £8 million — very quickly without doing anything, because there was something wrong with the budget that was being put to us. So, we had issues with the papers that were being put to us.

Every time we started to analyse the data and come up with proposals, they kept shifting. In the end, there was a shift that was not actually disclosed. Behind the scenes, they were trying to achieve a 28% reduction, having brought us along the path of trying to achieve 17·5%. In the backs of their minds, they always seemed to have a different target than the one being disclosed to us.

Mr McCartney:

Was that articulated as part of the discussion?

Mr Nicholl:

To be honest, it took a long time to draw it out.

Mr McCartney:

How do you propose to build disclosure into the new system?

Mr Mulholland:

That is very simple: it should be part of the criteria. A page count is a very crude yardstick, and it is one that has been cut and pasted from England and Wales. It is being used here because the Courts and Tribunals Service/Legal Services Commission can use a page count to verify the amount of work, as they see it, in a case. They do it objectively, because they find out from the Public Prosecution Service how many pages and how many exhibits make up the prosecution bundle.

They cannot do that for disclosure; or, at least, it is more difficult to do it. Therefore, they simply ignored it. We have suggested that, if we are going to use the crude instrument of page counting, people cannot close their eyes to disclosure, which has to form part of that.

Irrespective of video viewing forming part of a fee that can be paid, which is all right if it is an exhibit in the case; in larger non-standard cases at the moment, there does not appear to be provision for a case in which someone has to watch 20 hours of video. It is meant to be included in the overarching fee being paid. That is the fundamental problem. Mr Justice McCloskey recently gave judgement in the case of Marvin Canning. I know all about that case because on the days when the court could not sit because of disclosure problems, the same judge started the case of Gary Jones. The same problems arose in that case, which expended six weeks to eight weeks. The delay that arose because of non-disclosure and various things caused the trial judge to voice the same misgivings. At the end of that period, the defendant was also acquitted, albeit on different grounds.

Part and parcel of the reason why I am raising this issue is that disclosure is fundamental to the criminal process; it is vital to any defence practitioner who wishes to prepare a case. Delays that arise in getting disclosure frustrate the whole justice system. To simply ignore disclosure, as the Courts and Tribunals Service does, and say that it is not going to form any part of fee assessment, is like taking the tip of the iceberg and ignoring the rest. Normally, disclosure forms the bulk of the sheer volume of work that has to be carried out.

We suggest that, if we are going to have the criterion of a page count, the disclosure documents should be added to those being counted. It is as simple as that.

Mr McCartney:

This might be a wider issue, but where did responsibility lie for non-disclosure in the two cases you mentioned?

Mr Mulholland:

Ultimately, the responsibility lies with the Public Prosecution Service. However, in that instance, a significant failing lay in the fact that it was a very old case and the procedures were not in place

with the PSNI at that stage as regards documentation and document trails, and so on. So, it also went to the police.

Mr McCartney:

Other people have made points that I will not repeat. Where do we go from here? How will this be resolved?

Mr Mulholland:

That is the million dollar question. Our door is always open, and, as I said already, we have liaised with the Law Society. The common theme and the common view is that the proposals will put people in both branches of the profession out of work and, as things stands presently, those most able will not do this work. The Courts and Tribunals Service knows that — it has known that for several months — and the Minister knows that. We are prepared to sit down and try to hammer this out. That is no problem, and we have always said so. From day one, rather than go on the defensive and be obstructive, we came at the matter wholly transparently in an effort to work, engage and be proactive, and we are still prepared to do that. It is entirely up to the Courts and Tribunals Service and the Minister to decide whether that is something that they still want to consider. We are still completely open to doing that, because we feel that the only way forward is to take a productive approach that will bring consensus.

Mr Colton:

As a prerequisite to that, the proposals from the Courts and Tribunals Service should be rejected.

Mr McCartney:

The proposals as they stand?

Mr Colton:

The draft proposals from the Courts and Tribunals Service.

Mr McCartney:

How do you bridge that gap?

Mr O'Rourke:

There is no gap. Our proposals meet the budget. We might have some issues with the Law Society. The accountants for the Law Society, Harbinson Mulholland, might have to have negotiations with Goldblatt McGuigan to see whether there are any issues between us. However, from the Bar's perspective, our proposals meet the budget. You should also bear in mind that, in meeting a budget of £79 million, that does not apply for the next two years. A two-year review is built into the process, so anything that was implemented on our terms would be subject to review. There would be an ideal opportunity to take stock at the end of that period. Until then, the budget is £85 million, so there is a little bit of surplus to work with in the meantime. You could take stock statistically after those two years to see where we stand, and, if there were any difficulties, they could be ironed out at that stage. There is a way forward if the Courts and Tribunals Service were to —

The Chairperson:

Mr O'Rourke, there is a gap. I have a paper in front of me from the Courts and Tribunals Service that states very clearly:

"The Bar Council's proposal would increase legal aid paid to counsel in 23% of Crown Court cases. The Bar's proposal makes no reduction in the fees paid to barristers in cases lasting up to 25 days that go to trial (23% of cases)."

Mr O'Rourke:

We do not accept that, Mr Chairman. Goldblatt McGuigan —

The Chairperson:

Well then, we do have a gap between opinions on the figures.

Mr O'Rourke:

We have a fundamental gap between our figures and the figures put forward by the Courts and Tribunals Service, and the Goldblatt McGuigan paper that you have just received identifies that. We do not accept what the Courts and Tribunals Service said. The position is this: the Courts and Tribunals Service accepts that, if the Goldblatt McGuigan proposals, which the Bar Council endorses, were implemented, the budget would be met. That is the starting point. There may be an issue of £300,000 —

The Chairperson:

I am sorry for interrupting you. I think that Mr Colton made an honest reply. However, you said that it is the Bar's position that cuts to standard fees are not necessary.

Mr O'Rourke:

If you implement a 10% cut on standard fees, which is what we have proposed, and combine that with the cuts to high cost cases that we have suggested — in other words, implementation of the grid — that would meet the budget, and the Courts and Tribunals Service accepts that that would meet the budget. Mr Crawford accepted that at the Committee meeting on 7 December. However, his issue was value for money. He said that the reason that he had an issue with value for money was that we were 9% to 10·5% more expensive than England, but he has no data to back that up. We say that he is not basing that on a case-by-case analysis, which is the only proper basis on which to make such a comparison. His issue was not with the budget; it was with value for money.

The Chairperson:

With all due respect, he is not saying that. The paper from the Courts and Tribunals Service goes on to state:

"Instead, the Bar Council proposal would increase "refresher" fees, paid to barristers for attending court, in these cases".

It goes on to state:

"The Bar Council proposal savings rely heavily on savings to be made by cutting the Guilty Plea 1 (GP1) fee by 45%. NICTS believes that there is a risk that a reduction on this scale would lead to more cases proceeding to the Guilty Plea 2 (GP2) stage, which would mean that the projected savings would not be made. It is understood that this proposal is opposed by the Law Society."

I can only read what is in front of me.

Mr O'Rourke:

First, quite apart from the right of the client to have independent legal advice before he is arraigned, if the fee were payable irrespective of whether he pleaded on arraignment or after, there would be no issue regarding the date on which he pleads.

Secondly, as far as I am aware, the courts, particularly the Court of Appeal in this jurisdiction,

have indicated that, if an early plea is not entered, the client will be penalised. I am not aware of any lawyers who are forcing cases beyond arraignment with not-guilty pleas simply to get an enhanced fee.

There would be an ideal opportunity in the next two years to monitor the situation. That is why I am suggesting that, if the Bar Council's proposals were implemented, there would be a period of time to reflect on this. Statistics could be compiled and analysed in due course so that we could see where we are going. Such revision as is necessary could be made.

With respect, Mr Crawford's suggestion that he envisaged that there might be a problem is speculation. There is no evidence that there has been a problem to date. Currently, as you will appreciate, there is a greater fee for a guilty plea 2; in other words, for someone who pleads not at the initial arraignment but before trial. For that situation, an enhanced fee is paid.

Mr Crawford has not put forward any evidence, so far as I am aware, to suggest that there is somehow a manipulation of the process to get those greater fees. The reason why the Bar Council put forward a greater cut for GP1s is that those are the cases in which the client says that he is pleading guilty on arraignment or in which he is advised to plead guilty. The barrister has to put less effort into those cases because the client tells him before he goes to arraignment that he is pleading guilty. So, all the disclosure issues that generally arise from arraignment onwards do not arise in those cases. We are saying that it is fair to make the heavy cuts on those cases. It is not because we think that there can be some manipulation of the process.

The fair thing to do would be to cut the cases on which less work is expended and preserve the cases where greater work is put in, such as the guilty pleas at a later stage and, indeed, trials. We say that there should not be any cuts at all for trials because they are not very well paid in the present standard rates. So, we are trying to distribute the cuts. One of the criticisms that we have of the Courts and Tribunals Service is that it has taken a blanket approach to the cuts in standard fees. From a practitioner's point of view, if we redistribute the cuts according to the practitioner's needs, we can meet the end result of 10% in a fairer way than by simply taking a blanket approach. That is where the issue lies. It is about how the cuts are applied rather than the end result, because the end result, according to the Courts and Tribunals Service, is that we meet

the budget.

Mr McCartney:

Take the Department out of it. We are being asked to decide on this issue. Both the Bar Council and the Law Society have come up with proposals that are within budget, but one is at odds with the other. We have to try to present a case to the Department that represents the best way forward. We have two proposals, and at the heart of them is people's interest in serving justice. That is why I asked you about that, and maybe I should have asked the Law Society the same question. To my mind, we would be in a better place if there was a marrying of positions. I do not want to personalise the issue. Whatever we present to the Department, we cannot present both cases.

Mr A Maginness:

Before I ask the witnesses a question, I declare an interest as a member of the Bar.

What you are really saying is that the Bar Council will bear a 10% cut but that you do not think that, in the round, it is absolutely necessary because you believe that you can meet the budgetary targets without doing that. Do you believe that the Courts and Tribunals Service is insisting on further reductions that go well beyond that? Is that really the case that you are making?

In the negotiations, you engaged the services of the forensic accountants Goldblatt McGuigan. It has brought forward figures, and you have shared those figures with the Department. Has the Department brought evidence-based figures to counteract what Goldblatt McGuigan has brought forward?

Mr Nicholl:

As far as we know, the Department has accepted out figures. We have not heard anything to the contrary.

Mr A Maginness:

So, the figures that you have presented have been accepted by the Department, and it has brought

no evidence-based figures to contradict them. The Department is still questioning those figures, but there has been no forensic examination of them by the Department or the Courts and Tribunals Service.

Mr Nicholl:

We are working off the same data.

Mr A Maginness:

As far as the negotiations are concerned, although you have presented the Courts and Tribunals Service with figures that can reach the budget figure, since your last discussions with it, you have discovered that the budget figure is £75 million. Has there been any further discussion between you and the Department with regard to that change in the figure? Has there been any engagement? Has the Department or the Courts and Tribunals Service come back to you and said that there is an explanation for it or that they have changed their target?

Mr Mulholland:

No. It has been some time since there has been any direct engagement with the Courts and Tribunals Service, simply because it reached the end of the line some time ago. Our proposal was there. It seemed that there was an expectation that, save for nominal sums — bearing in mind the overall budget — we were very close to meeting its expectations. That then dissipated, and there has been nothing beyond that; neither an explanation for the new budget nor any effort or view to try to restructure proposals that could work within a scheme other than that which the Courts and Tribunals Service is now keen to move on with.

I have taken on board what Mr McCartney said. There is clearly a degree of urgency to this, because, as I understand it, the Courts and Tribunals Service is keen to push the proposal through. In fact, I think that the intended timetabling for it is within the next number of weeks, or months at the most. From our perspective, we are certainly content to work with the Law Society to see if there can be a unified and joint approach. However, there is clearly a triangulation of interests, and it will take the Courts and Tribunals Service to acknowledge and accept that, subject to coming within budget, that is something that would not only be entertained but, if we achieved that objective, would be agreed to.

Mr O'Rourke:

When Mr Crawford presented evidence to you on 7 December, he was pressed by Mr McDevitt about the Goldblatt McGuigan proposal and was specifically asked if it met the objective of the £79 million. He said that:

"It delivers a solution at or about the £79 million."

However, earlier — this is the real issue, as far as we can see — he said that:

"we made the assumption that we needed to get below budget while, at the same time, we were concerned that, if we did a little bit better, it would be a fair cut to legal aid compared with other areas of public expenditure, without damaging access to justice."

The position seems to be that they got to the budget situation but are trying to do a little better without — he said — damaging access to justice. There are two points. First, we do not need to do any better, because the £79 million was the objective. Secondly, they have misjudged the damage that would be caused to access to justice. On both counts, he is wrong. That is where the issue crystallises between us.

The Chairperson:

Let us suppose that this Committee were to adopt your proposals and go down the road that you want us to. Your position is that you are already opposed to restrictions on assignment of counsel. That represents savings of £1·5 million. You do not support the introduction of criminal legal aid testing, which would amount to annual savings of £0·5 million. Supposing we were to go with your proposal — and I am not saying that we will — would you change your stance on those issues?

Mr Mulholland:

Maybe Mr Nicholl can answer that from an accountancy perspective first.

Mr Nicholl:

Inclusive of those two figures — the £1·5 million and the £0·5 million — and the expenditure forecast of the Legal Services Commission (LSC), based on our figures, including the expected administrative and civil legal aid savings, there is a budget surplus of about £5 million. It can easily absorb the £2 million that you referred to. That is the extent of this.

The Chairperson:

You will forgive me for saying it, but this is like wrestling with smoke. So many figures are being thrown at us from so many angles, and everyone refutes everyone else's figures. Accountants would have a field day in here. To assist the Committee to get a handle on this, can you tell us whether you are now saying that the proposal is not necessary and that you already have that built in?

Mr Nicholl:

I am saying that there is a surplus of £5 million based on the Courts and Tribunals Service's own costings, not ours.

Mr Colton:

The proposition put forward by the Courts and Tribunals Service on the two counsel issue was based on very limited data, for one year only. A lot of information about where that figure came from was missing. We raised that in June 2010 and asked questions about it. It is our clear view that, since the whole debate started, there has been a reduction in senior counsel in any event. I can tell you that, without any change in the rules, there has been a reduction. It will be interesting to see if the Courts and Tribunals Service has the figures for more recent years. There has already been a significant reduction in senior counsel.

Mr Mulholland reminds me of the general point about the two counsel issue. At the last meeting, I raised the issue of whether the Crown Court Rules Committee's views have been taken on board by the Committee for Justice. As I understand it, the Crown Court Rules Committee supported the position that was adopted by the Bar. The Courts and Tribunals Service agreed to take on board the concerns that we and the Crown Court Rules Committee expressed about the two counsel issue. We have heard nothing since. I was not sure, Chairperson, if you wanted to be addressed on the two counsel issue. Maybe you did not, because no one else has mentioned it. I am not sure what the position is in that regard.

Mr A Maginness:

I do not think that the two counsel issue is integral to this aspect of our business.

The Chairperson:

I do not think it is.

Mr Colton:

I am sorry; that is my fault.

The Chairperson:

That is quite all right.

Mr A Maginness:

It is an irrelevance as far as these calculations are concerned.

The Chairperson:

Gentlemen, I intend stopping there. We have been at this for a wee while. I trust that you feel that your case has been fairly heard. It was well put, I might add. Thank you for your presentation and for taking questions here today.

Members, following what you have heard from both delegations, we also have with us Mr Robert Crawford and Mr John Halliday from the Northern Ireland Courts and Tribunals Service. Gentlemen, you are welcome. If members wish to ask these gentlemen for clarification about what they have heard, please do so.

Ms Ní Chuilín:

Please bear with me. I am confused. How much is in the budget? We thought that it was £79 million. We were told that it was reduced to £75 million on 22 December.

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

It was published on the website for consultation on 23 December.

Ms Ní Chuilín:

OK. Well, on 22 December, the Minister still thought that it was £79 million.

Mr Crawford:

That letter was possibly drafted the day before it was submitted to the Minister. I have to admit that, at that point, I did not know that the budget for legal aid was going to be £75 million. Even at that stage, discussions were still going on and the final figures had yet to be confirmed and settled. That is the explanation. It is unfortunate that the letter went out just before the revised figure was published. The difference of £4 million will be met from administrative savings in the Legal Services Commission and civil legal aid. There is no impact at all on these proposals. No additional savings are required from criminal legal aid.

The Chairperson:

You are saying that that sits outside this altogether, Mr Crawford.

Mr Crawford:

It could be viewed that way. Certainly, we were clear that no further savings need to be made from criminal legal aid during the period that we are talking about. If we bring forward proposals, it is not because we need to meet the budget in any other area.

The Chairperson:

People could be forgiven for thinking that that £4 million is not really being accounted for and that someone somewhere has just decided that there will not be any impact at all. Is that honestly credible?

Mr Crawford:

I understand from finance colleagues that the figure of £75 million was arrived at by applying the Barnett consequentials to legal aid in the same way that they are applied to the Department of Justice generally. Within the Courts and Tribunals Service, it was accepted that it would not be possible to achieve further savings in the period from criminal legal aid to meet that budget figure. The only savings are those we found to be made from administrative savings, as with all other areas of the Civil Service, and from civil legal aid. The Legal Services Commission has been asked to come up with proposals for civil legal aid savings. It does have some ideas about that, but, up to now, we have not anticipated the requirement to make those savings within that time period, and there has been some doubt about the timescale for that.

Ms Ní Chuilín:

You are free to correct me if I misinterpret you, but my interpretation of what you are saying is that it was your understanding that there would be £79 million and that the finance department, another arm of the Department of Justice, made a decision on Barnett consequentials and completely ignored the Hillsborough agreement.

Mr Crawford:

The final bit of what you said is not a matter for me. However, throughout the negotiations that we had with the Law Society and the Bar Council, we worked on the expectation that the future budget would be no more than £79 million. We did not forecast any savings into that period. We were aiming for 2013-14, at which point legal aid expenditure had to be got down to £79 million. We all thought that it could be running forward at £79 million but that it certainly would not be any more than that. Therefore, we needed to have an annual spend of £79 million in that year. During the process, we said to both representative organisations that we could not guarantee that other savings would not be required, for example, in civil legal aid. However, that was not part of that negotiation.

Ms Ní Chuilín:

My understanding was that it would not be any less than £79 million. Therefore, your understanding that it would not be "any more than" that amount equally applies to "any less than".

I made a point earlier about the equality impact assessment. If that money is to be taken from another part, where is the process for that? It is almost as though a pot of £4 million is going spare. This is not £40 in the back of somebody's purse. I say that with all due respect. This is big money. If it is going to come out of the legal aid end of the criminal justice system, what is the impact of that? That is a really key question for me. We agree about the reform of fees. I think that everyone agrees that that needed to be reformed and to be made much more understandable. However, will the money come from family courts? What is the impact?

Mr Crawford:

To be absolutely honest, the impact of that is not yet known because the Legal Services Commission has to bring forward proposals. I can reassure you that it would see something similar around priorities and that there are other areas, possibly around the family, that might perhaps be easier to address without having that impact on clients and on access to justice.

Ms Ní Chuilín:

I appreciate that you are not from the finance side of the organisation, but that still does not explain how £4 million can be moved around. Our ability to scrutinise is frustrated.

Mr Crawford:

I accept that point.

The Chairperson:

The Law Society and the Bar Council have both stated that the goalposts continually moved during all of the negotiations. You must have a chance to answer that. How would you deal with that?

Mr Crawford:

I appreciate being given the chance to answer that, Chairperson, because a few things should be set in context around those comments. The negotiations or discussions that we were talking about evolved from a process of attempted reform of legal aid that began with a review in 2007. It took a long time to get anywhere. Proposals were brought forward by the Court Service in 2009, and John Halliday was quite closely involved with that. In August 2009, a consultation paper was issued to introduce the graduated fees scheme, which you will be familiar with and which we have talked about. That had no support from the legal profession; indeed, there was very strong resistance.

Following further changes to VHCCs in September, which, again you will recall from earlier briefings, the Bar declined to take on cases. In December 2009, David Lavery wrote to the chairman of the Bar. I will quote a little from that letter, if I may, to set the context of these discussions and negotiations, because I believe that this is an important point. The letter is dated

21 December 2009. It states:

"I am content to extend the consultation period on the Graduated Fee Scheme, and the certification of counsel in Crown Court cases, so that both consultation exercises will now conclude at the end of February. I shall, however, have to bring forward new arrangements in April to deal with the pressing financial situation I outlined during our meeting."

At that point, the Department's option was the graduated fees scheme, and that was the basis on which negotiations and discussions began.

In the letter of 14 December, which I think members have seen, the Bar referred to a letter written by David Lavery that is dated 14 May. It quotes the paragraph in which he talks about the discussions. Later in that same letter of 14 May, David Lavery says:

"At the outset of the consultative dialogue process I explained that our fall-back position would be the implementation of the further changes which we have published for consultation, including the introduction of the Graduated Fee Scheme."

So, on 14 May, after we had been in discussions for several months and not reached an agreed position, the director of the Court Service, writing to the chairman of the Bar in the same terms as several months previously in December, is still saying that the position of the Court Service, if no agreement is reached, is the graduated fees scheme. I am trying to bring out the fact that the aim of the negotiations and discussions was to achieve an agreed way forward but that the Court Service's fallback position was the graduated fees scheme.

In the event, I think we have got a better way forward. Many of the concerns and issues that were raised in those discussions are met by introducing a Northern Ireland bespoke scheme. It meets a lot of the issues that the Law Society and the Bar Council wanted. They have actually got quite a lot out of the process. It is a Northern Ireland scheme. It is not the graduated fees scheme. It does not have the contracting arrangements that exist in England and Wales and that are responsible for some of the comments that you have heard about wastelands. The wastelands issue is not just about fees; it is about the contracting arrangements that exist over there but which are not in place here and which we are not introducing.

At the end of the letter to the chairman of the Bar Council, David wrote:

"This remains our position, and I believe that it is one which will command the support"

of the Minister. Basically, at that point, 14 May, he says:

"If you consider that it would be helpful to pursue the consultative dialogue for a further short time, I would be willing to accommodate this provided there appears to be some prospect of a positive outcome. It would, however, be necessary that the

consultative dialogue should conclude by the end of this month in order to allow us sufficient time to bring-forward the necessary legislation to give effect to the next stages of our reform programme."

That is the context in which those discussions happened. The Court Service was trying to implement a particular proposal. It met with a lot of resistance. Meetings took place. It was not a completely open discussion in that sense, because you will see nothing in that about saying that we would like to have some meetings to agree proposals to reach the Budget.

What was made clear in the discussions was that anything that was agreed had to meet the budget target of what was then £79 million.

The papers provided by the Bar outline the various proposals that it made during the process. The impression is created that everything that was presented to us was in pursuit of the objective of reaching a budget of £79 million. The first proposal referred to in the Goldblatt McGuigan papers would have increased the hourly rate for VHCCs to £250, with an uplift of 100% to potentially £500 an hour, from the then figure of £154. That would have been completely beyond the budget. The second proposal was for an extended grid system, and we were very grateful for the approach taken. In the end, that became the basis of what we put to you. However, again, the figures for that extended grid system would have taken us well beyond the budget.

It was only after that period when things appeared not to be going too well. It was into May and June when we started getting the proposals coming into line. In fact, the Bar's own proposals, in the form in which you have seen them, were not presented until after the consultation period began. We were advised that it would be prepared to move to a position that would deliver a 10% saving on standard fees, but it was not prepared to table that proposal unless it was certain that I would agree it. There were flaws in its proposal. Maybe I should stop there, because I could go on with that for quite a while.

The Chairperson:

The paper that you made available to the Committee with a covering letter dated 2 February — you have heard us ask the Bar Council about this point, and you heard the reply — states:

"all of the £2.8m in other annual savings proposed by NICTS will be made, yet the Bar Council does not support all of these additional savings."

The Bar Council emphatically stated — I do not think I am overdoing it when I say this — that it was not necessary, because the savings were already there.

Mr Crawford:

I was surprised to hear the representative of Goldblatt McGuigan saying that, because I do not know where the extra £5 million is. If there was another £5 million surplus in the Legal Services Commission budget, I would like to know about it, and I would be grateful if you would tell me where it is. We do not think there is any spare cash of that nature. What we are working on is the budget that we have, and which has, I acknowledge, recently changed. I cannot see how those could be accommodated in some other pot of money.

Essentially, we are looking at savings of about £17 million to come from a forecast figure of £96·5 million to £79 million, or a little bit beyond, if you take our figures. That is then supplemented by a further saving of £4 million from administration and civil legal aid, which takes us to £75 million. I cannot see where the £5 million exists.

The Chairperson:

Thank you, Mr Crawford.

Mr O'Dowd:

The Committee has three proposals before it, all of which, we are told, come in on budget. Do you accept that all three are on budget? You accept that yours is on budget, but are the other two?

Mr Crawford:

I have not seen the detail of the Law Society's most recent suggestion, but if it is moving from a 25% cut to a 10% cut, that amounts to around a £1·5 million additional cost, i.e., savings foregone. That would bring the Law Society back beyond the budget. That is off the top of my head, so there may be some other subtleties in the proposal that I have not seen. It is not a million miles from it, but it is not quite there. The Bar's proposal includes £325,000 in administrative savings. I think I acknowledged in the previous meeting that it was not very far away. It would

leave it £250,000 shy of the budget if those proposals were accepted. However, there are others flaws in the proposals, and I defer to you, Chairman, if you want to ask about those.

Mr O'Dowd:

From my point of view, and that of my party, we want to see effective representation for people in court. That was referred to in the Law Society's presentation. We are concerned about the comments about further cuts to the budget. However, if that has to be done with £75 million or £79 million — whatever the figure is — that is what we are measuring it against. I sense a frustration from you and the other parties about the negotiations. I am not sure whether this process helps those negotiations, because you are able to listen to each other and then drag up the entrails of each other's conversations and beat each other on the head with them. That does not make for useful negotiations.

Mr Crawford:

We try not to do that as much as possible.

Mr O'Dowd:

I understand that. Negotiations are frustrating. I am not just pointing the finger at you; I think it is coming from all sides.

Mr Crawford:

I regret any personalisation of the debate. It seems to be coming in my direction sometimes. We have genuine concerns, and we feel that it is our responsibility to flag them up to the Committee. The question was put to the Bar: has it changed its position on assignment of counsel? That amounts to £1·5 million in savings. If they have not, those options are still up in the air. The Committee had expressed concerns to us, so we felt it right to flag up to the Committee that, in the proposal from the Bar, the assumption is made that those savings will be made in full. Unless it has changed its position, we are not making that assumption, because we have not yet had confirmation of that from the Committee, and the Minister has not taken a final decision.

I reflected to the Committee our concerns about means-testing for criminal legal aid and that we regarded it as possibly the least attractive of the savings proposals because it affects clients'

immediate access to any legal aid, regardless of the fee. If the Bar is saying that that proposal is fully accepted by them in order to make the savings, that is a change in position. We just reflect that to the Committee. We have presented a number of proposals, and we have, perhaps, overshot where we need to be. However, until we have some of them agreed, there needs to be some understanding that, if something is given up in one area, it may have to be agreed in full in another. That is why we would find the Committee's views helpful.

Mr O'Dowd:

All three bodies need to go away and think seriously about where the process is going to end up. I do not wish to lecture anyone, but the guiding principle surely has to be that people have effective representation in court. Three bodies here are telling us that they can produce a budget in line with that, but there seems to be a disagreement about whether that can achieve the principle of effective representation in court. I am not sure which of the advocacy groups made the comment, but it said that it appears that the Department of Justice is saying that people are coming in on target, but that things can be done cheaper because they are 5% to 10% dearer than their counterparts in England. Is that the guiding principle of the Department in negotiations?

Mr Crawford:

We were content to present proposals to the Minister for approval, following the proposals that were the basis for the consultation, around a system that provides more generous fees in Northern Ireland than in England and Wales, which are the most expensive areas or regions that we have identified. We believe that this is a generous outcome. They are about 9% or10% more generous for the Bar and about 33% more generous for solicitors. It is a generous proposition when it comes to fees. There is no argument that the cost control aspect of the VHCC system has failed. Everybody is agreed that those need to change.

Mr O'Dowd:

I think that you should go away, lock the door behind yourselves and have a good yarn about it.

Mr Crawford:

We tried that, but it did not really work.

Mr O'Dowd:

Trust me, it can work eventually.

The Chairperson:

You have been trying that for nearly two years, is that right?

Mr Crawford:

Pretty much. The difficulty is not that the goalposts have moved, but that some of the information has changed. I would admit to the Committee that, at the start of this process, I did not fully understand how awful the position was in very high cost cases. The reason why we are making that level of savings in very high cost cases is that the scale of overpayment is enormous. I use those words advisedly. A value-for-money audit is being carried out at the moment, and, although we have not seen the draft report, the auditor tells that he cannot carry out an audit because the documentation that is supposed to support the payments does not exist.

Mr John Halliday (Northern Ireland Courts and Tribunals Service):

That was part of the difficulty of coming up with assessments of how much we were going to save. We just did not have the information to allow us to assess claims.

The Chairperson:

In that case, gentlemen, you will have some appreciation of the Committee's difficulty. We have heard from both bodies and from you. We are caught in the middle, because it will be much more difficult for us to make an intelligent decision.

I know that the Law Society, the Bar Council and yourselves were all concerned about the administration of justice. We have been told, quite clearly, that there are real concerns around whether justice itself will be impacted on. I have no doubt that that is something that will challenge all of us, if that is the case.

There must be a strong case for further continuation of the dialogue that has been going on. I know it has gone on for nearly two years, and it has not got the result, but something needs to be done to take this matter forward in a constructive way.

Mr McCartney:

John O'Dowd has sort of covered this point. The Law Society has given us figures that show that the gap between your proposal and theirs is £600,000, and the Bar has given us figures that show that the gap between your proposal and theirs is £900,000.

Mr Crawford:

We need to revisit what they are saying. The gap is of that order, but again, I would say we have difficulties. To pick up on a question that was put to the Bar: I do not think that a Justice Minister could accept a situation where, if a journalist were to conduct an examination of Crown Court cases, it would show that 23% of those yielded an increase in fees rather than a cut. The difficulty that we have is because the way the proposals are made up causes problems. It is not just the bottom line.

The Law Society's proposal is easier in that sense because it has simply applied a further percentage reduction, which is the basis of our proposal. There is a proposition from the Law Society that we would accept for very small number of cases in which we acknowledge that there are difficulties with disclosure and so on, and we have not been able to find the solution. One representative said, quite fairly, that we recognised that. We have said that we anticipate running the scheme until we have gathered enough information about cases to allow us to revise it and see whether there is some way of recognising that. To that end, we have a meeting with the Public Prosecution Service on Monday during which we will follow up on that point and others.

One solution is to solve the problem around releasing material rather than paying lawyers to go after it and press for it. People may be cynical about that, but we should try the first solution and then look at the outcome. We simply do not have time to come up with a better solution. The proposition would be to run the proposals and come back, probably in about a year, with enough material to review them and make any necessary changes. That would be our preference and that of the Minister, particularly in areas where there is no disagreement, because the savings on VHCCs, for example, are fairly significant at around £16 million a year. Those savings would happen immediately.

Mr McCartney:

I do not see why it should be viewed as cynical to expect the Public Prosecution Service to disclose all material evidence. I think that is an amazing statement to make.

Mr Crawford:

I am naturally cynical.

Mr McCartney:

For a Department of Justice official to say that he feels that the Public Prosecution Service would wilfully not disclose evidence is —

Mr Crawford:

I do not think I quite said that, Chairman. I would like to be clear on that.

Mr McCartney:

You might not have said it, but that was my interpretation.

Mr Crawford:

Can I then amplify that —

Mr McCartney:

Given the fact we have a long history of the Public Prosecution Service holding back and not disclosing —

Mr Crawford:

Can I amplify the point? There were cases put to us by the Law Society in which there appeared to be a considerable amount of effort on the part of the legal representatives. Whether the disclosure or non-disclosure was right or wrong is not for me to judge, but, we are acknowledging that a lot of work was involved in that, and we want to understand it better to determine whether there is a better way of applying public funds to the process.

Mr McCartney:

Yes, but, that is the point that I am making. You have to build something into the system to enable people to examine evidence, which the Public Prosecution Service has a duty to bring into public light.

Mr Crawford:

There is a fee in legal aid for that.

Mr McCartney:

Apart from the fee, if we are sitting on the theory that defence lawyers have to be paid to bring to a court material that the Public Prosecution Service has, not only is it a waste of money, but it does not say a lot for the justice system.

Mr Crawford:

Again, that is an area that I indicated I want to understand better. That is why we are having dialogue with the PPS, and that will begin on Monday.

Mr McCartney:

OK, we will look forward to having a report back on that.

Mr McDevitt:

I want to come back to the letter that the Minister wrote on 22 December. It has been a while since I have been in a private office, but this would have come up in a draft submission possibly on 21 December or 22 December. Is the Minister pretty fast at turning around?

Mr Crawford:

He is, yes. For clarification: because the letter of 14 December from the chairman of the Bar was considered to be a complaint about the negotiating team, the letter was not drafted by John and me.

Mr McDevitt:

That was my next question. It was obviously drafted by someone in the Courts and Tribunals

Service.

Mr Crawford:

Yes.

Mr McDevitt:

It would have been the corporate view of the Courts and Tribunals Service as of that morning —

Mr Crawford:

It was drafted by the director.

Mr McDevitt:

That is fine. You are working in the Courts and Tribunals Service in good faith on the £79 million. Meanwhile, this is coming to the Minister. The Minister is aware of it from the Department of Finance and Personnel, because he would have been aware of it on the day before the publication of his draft spending plans. He would have been aware of movable feasts. It is extraordinary to put yourself in a situation in which you are signing off on one figure a day before you are about to publish spending plans with a materially different figure. It is quite a serious position for a Minister to put himself in.

Mr Crawford:

Without dodging that question, it is a poor draft of a letter. It overstates what the Minister's position would have been at that point in time.

Mr McDevitt:

It raises the question of a function elsewhere in the Department. However, the other thing that I am interested in is that when your colleagues, the officials from finance branch, attended the Committee a couple of weeks ago, I am pretty certain that they did not say that they arrived at £75·2 million as a result of Barnett consequentials. In fact, from memory, I am as certain as I can possibly be that that was not the origin of that reduction. My recollection is that they said that it was the result of an internal trawl, and I am sure that my colleagues will correct me or the Hansard report will confirm that.

Ms Ní Chuilín:

That is exactly my understanding of it.

Mr McDevitt:

So, that changes things quite materially. If it was not a saving put forward by the Courts and Tribunals Service, which would be the normal way in which such a saving would emerge, where did it come from? I take from what Mr Crawford said that it was not offered by yourselves.

Mr Crawford:

Everybody knew that the administrative saving would come. There was the remaining £2 million in that year and onwards. I was aware of some discussions in the Courts and Tribunals Service about that some weeks before, certainly at the most two months before. Our comment about being responsible for legal aid was that, although we were not resisting savings in civil legal aid, we had concerns about the timescales and we could not stand over figures until the Legal Services Commission produced proposals. What has happened in the end is that that budget has been imposed. I do not think that anybody would disagree with it. It is an imposed budget on legal aid, and we now must work to meet that budget. No specific savings in civil legal aid have been identified to deliver that £2 million.

Mr McDevitt:

When the finance branch from the Department of Justice trawled, as it would have, for savings, it would have hit your division in the Courts and Tribunals Service, and you did not reply at any point offering anything up.

Mr Crawford:

I do not think that every division was asked individually. However, we had our savings programme and the finance people were aware of that. We were not asked to do more on criminal legal aid.

Mr McDevitt:

So, you were still working off £79 million.

Mr Crawford:

We were content that no more than that could be made at that time.

Mr McDevitt:

Given that this figure is at the heart of the current breakdown in negotiations, the Committee may wish to explore that further, possibly at ministerial level. Would that be a matter for the Committee?

The Chairperson:

The Committee will make its decisions after it has heard everything.

Mr McDevitt:

I have two further questions on specific points that were raised. What evidence do you have to say that GP1 cuts would lead to less guilty pleas at that stage?

Mr Crawford:

We flagged that up as a risk, and I want to be clear on that. We have not said that it will definitely happen, any more than any of our predictions will necessarily happen. We identified it as a risk because it had been identified as a risk in other areas. If there is delay in the system, guilty pleas do not happen at the earliest opportunity but at the next stage. The Ministry of Justice in England and Wales has taken part of that idea on board, and it is proposing to have just one fee for a guilty plea, as happens in the Magistrate's Court.

Mr McDevitt:

How did you come to the view that it was a risk?

Mr Crawford:

Simply because, first of all, two guilty pleas at different stages was an area that had been identified as a risk in the past. That is one reason why we have one fee in the Magistrate's Court. Also, our colleagues in England and Wales have done similar work and analysis. Again, we are not saying that there is hard evidence for it; we are simply identifying it as a risk.

Mr McDevitt;

So, there is no evidence for it, but in your opinion, it is a risk.

Mr Crawford:

Yes; until the evidence is shown, for or against.

Mr McDevitt:

Are you taking any steps to correlate evidence?

Mr Crawford:

The risk is identified from past analysis of other situations. At the moment, we have guilty plea 1 and a guilty plea 2. They are not too far apart in amounts. If two fees that are very different are created, our perception is that that risk would certainly exist. We have not attempted to quantify the scale of it, but we flag it as a potential risk. That is why we would not have gone down that road ourselves as a way of making cuts.

Mr McDevitt:

Finally, in your written submission to us, you suggested a potential inconsistency between the figures that Goldblatt McGuigan had allocated for assignment of counsel and means-testing and the fact that the Bar Council and the public record are sceptical about those two provisions. I asked the representatives from the Bar Council twice this afternoon whether they would accept Goldblatt McGuigan in its entirety as an outcome and they said that they would, subject to certain conditions, which were not substantive to those two issues. Did you hear them saying that?

Mr Crawford:

I did, and, I must admit, I am surprised that they have changed their position. I am glad to have that confirmation.

Mr McDevitt:

Do you think you need some mediation here? *[Laughter.]*

The Chairperson:

Are you offering yourself?

Mr McDevitt:

No. I am offering Brendan. *[Laughter.]* It is a deadly serious proposition. You are party to the negotiations. Well, they are not negotiations at the moment, because everyone accepts that they have broken down. Do you think the process requires a degree of arbitration or mediation in order to come to an outcome at this stage?

Mr Crawford:

I am pretty confident that the Minister would agree with me that what we have called negotiations in shorthand are actually discussions. We want to consult and discuss with colleagues and stakeholders in all areas. However, the Minister is very clear that he will dictate the final shape of any proposal. There was a public consultation process, and most of the material you have before you was submitted during that process. I think you heard at a previous meeting that we tried to indicate to the Bar that the Minister would not be minded to accept a very low cut. Those indications were given. I am not sure that a further period of discussion or negotiation would necessarily achieve anything positive in the short term. Again, I draw attention to the savings that would be lost thereby.

Mr Givan:

I think you made an important point when you concluded by saying that, ultimately, the Minister decides. I think some of the criticism of you, Robert, has been unfair, because my experience is that officials do not act without the instruction of their Minister. If you are taking a hard-nosed position, I suspect that that is the position of the Minister and that you are simply doing his bidding. That is appropriate and right, and, ultimately, David Ford can answer for the position that he has taken. You said that the reduction from £79 million to £75 million would be met through savings in administration. So, £75 million can work for the proposal of the Bar Council.

Mr Crawford:

Yes, absolutely. There is no difference. The £79 million was the target we were working to. In a sense, that has not changed by shifting to £75 million, because no additional savings are required

from criminal legal aid. So, whatever proposal worked on £79 million will work on £75 million. However, we still have difficulties with the Bar's proposal. The total saving is not quite there and there are concerns, which we have articulated.

Mr Givan:

Where are you in percentage terms? Are you 90% there or 95%? What is the difference between your position and that of the Bar?

Mr Crawford:

The first fundamental point is that, if we accept that the Bar is now accepting the savings on assignment of counsel and means-testing, that is one concern. We still have a concern and we have not heard from the Committee about that, but if the Bar accepts that, then its proposal comes more into line with ours. The second point is that the Minister would not accept a situation in which cases that go to trial in the Crown Court — all the cases that last for up to 25 days currently — would cost more. No Minister could accept a situation in which he claims to have made a cut in legal aid, but a case comes up in which the barrister who takes the case is being paid more than he would have been paid for a similar case before the changes were made.

Mr Givan:

The accusation is that people have been negotiating in good faith, but that that good faith has been abused. How do you respond to that?

Mr Crawford:

I said at the start that the negotiations came out of a previous set of failed negotiations, if we can call them that, to introduce the graduated fees scheme. There was an attempt to introduce such a scheme five years previously, which also ran into opposition from the legal profession. The context was to see whether we could establish a way forward. As I said, we have got a way forward that meets a lot of what the Bar and the Law Society wanted. It is a Northern Ireland-based extended grid system, which the Bar, we acknowledge, first suggested. The disagreement is primarily about how much goes into individual fees. We believe that a situation that is still considerably more generous than that in England and Wales, which is the next most expensive area, is not a bad outcome. It is better than most other private sector operations that work for

Government funds.

Mr Givan:

In your view, does the £75 million ensure effective representation?

Mr Crawford:

We believe that it does. We believe that the impact on legal services will not be to the extent that is claimed by the legal profession. There may be people who have earned a lot of money in the past who will choose not to take on legal aid work in future. We have had anecdotal evidence of that. To take the Bar as an example: a small number of the Bar gain most of the legal aid funding. You have seen the high earners and the percentages in that. There are many more members of the Bar who could come into that work. I believe that the Committee met one young lady who was not getting that level of work. It is a competitive profession. If the rates go down, there are other barristers, we believe, who will take on that work. Counsel who work as public prosecutors do so at lower rates. After the proposed changes they will still be getting lower rates than defence counsel. As I said in a previous meeting, English counsel have come over here to work at lower rates than they get in England and Wales because our rates are still attractive.

Mr McCartney:

A number of weeks ago, we received a presentation saying that people are entitled to the best representation possible. If you are working from the assumption that the "high earners" will walk away, it means that the best are walking away.

Mr Crawford:

In all areas of public funding there is a balance between the amount of funds available and —

Mr McCartney:

I accept that, but it is a precarious assumption simply to say that the high earners will walk away and you are not losing —

Mr Crawford:

I am saying "may". It is their choice, in the sense that they may no longer wish to do legal aid

cases. Most criminal work is funded by legal aid, so they may not make that choice, but we acknowledge that possibility.

Mr Givan:

Do the Bar's proposals ensure that there will be no more £1 million high earners? At least, that is what was said today.

Mr Crawford:

The likelihood of that will be removed by the removal of VHCCs, which is common to both proposals. I will give an example of the fees. In a 10-day murder trial, for example, the existing fee regime would pay a QC who represented the best counsel the standard fee of £18,400 under the 2005 rules. Under our proposal, that QC would get £14,720 for a 15-day trial. Under the Bar's proposal, that person would get more than the £18,400.

The Chairperson:

Do those rates compare with other regions?

Mr McCartney:

Did you say a 15-day trial? The first one was a 10-day trial.

Mr Crawford:

I am sorry; I was reading from the 15-day trial example. A 10-day trial pays a QC £15,400 at present, but under our proposals, it would pay £12,320. Under the Bar's proposal, that barrister would get more, because there would not be a cut.

Mr McCartney:

Would the barrister get more than the first figure?

Mr Crawford:

The barristers would get more than they get today.

The Chairperson:

Do your proposed rates compare favourably with other regions?

Mr Crawford:

Our rates, for the Bar, would be about 9% to 10% more generous than those paid in England and Wales. The rates for the solicitors would be 33% more generous than their counterparts in England and Wales.

The disparity is justified by the Minister's view that the costs of running offices and paying staff on the solicitors' side are such that the impact justifies not cutting as deeply at present, particularly given the financial circumstances.

Mr A Maginness:

You are saying that these were discussions not negotiations.

Mr Crawford:

I think that that is the word that the Minister prefers, certainly.

Mr A Maginness:

I am very surprised at that, because I thought that these were negotiations that would reach a conclusion where either you agree or disagree or, alternatively, you reach agreement. You are now saying to the Bar Council and the Law Society, "By the way, these were only discussions; they were not negotiations." I find that very difficult to understand, and I think that it is characteristic of the way in which this process has been conducted.

Mr Crawford:

I was going to go back to David Lavery's letter of 14 May.

Mr A Maginness:

Maybe you could look at the letter of 22 December and at what the Minister is saying. Mr Colton made complaints in his letter to the Minister, and, in response, the Minister said:

"I was surprised at the tone of your letter and your assertion that these discussions have not been conducted in good faith by my Department. I regard this assertion as an unwarranted attack on the integrity of my Department and its senior officials."

He goes on to say:

"As you are aware, the financial settlement which preceded the devolution of policing and justice provided that the budget for public funded legal services in Northern Ireland would be reduced to £79m from 2013/14."

That is an unqualified figure. That is not the way that you have presented that figure today. That is what the Minister is saying in an unqualified manner in his letter, and he is your political boss. Yet, sometime after that, the Bar learns that the figure is not, in fact, £79 million, it is actually £75 million. You now say today, "Well, of course, this was not really a negotiation at all; it was simply a discussion." What conclusion can you come to other than that this process was not, in fact, conducted in a proper manner?

Mr Crawford:

First, as regards the discussions — or if you prefer the word "negotiations" — I am making the point that the change in the budget from £79 million to £75 million had no effect on Crown Court remuneration savings. No additional savings are required in that area or in any area of criminal legal aid that we have been discussing with the Bar Council or the Law Society. There is no change. There is no impact. I cannot stress that enough. There is no sense that we are changing what we have said to them about the level of savings required.

Mr A Maginness:

Do you not see how it might cause someone some unhappiness and discomfort to receive the news that the figure is to be £79 million — that is quite explicit and unqualified in the letter — and then receive a figure of £75 million?

Mr Crawford:

I would see more unhappiness and discomfort if we were to say to them that there would be an impact on criminal legal aid, but, in fact —

Mr A Maginness:

But you never said that to them.

Mr Crawford:

The discussions had concluded at that point.

Mr A Maginness:

Well, you had plenty of opportunity to go back and say informally, "By the way, this does not affect you in any way at all." I think that it is characteristic of the way in which these discussions and this process have been conducted. It creates a very unhappy atmosphere between two or three parties when that occurs.

Mr Crawford:

Sorry, I am not sure if —

Mr A Maginness:

Well, you may want to comment on what I have said.

Mr Crawford:

I do not think that there is anything to comment on there, Chairman.

Mr A Maginness:

I am saying that the way in which this process has been conducted has been extremely difficult. It has been an extremely unhappy experience for those with whom you were conducting the process because they did not know where they were in terms of what I would regard as proper negotiations and you regard as discussions. You are constantly changing the goalposts.

The Chairperson:

If I could just intervene to say that I have a copy of the Hansard report of the Justice Committee meeting of 25 January 2011, in which there is mention of discussions. Mr Harbinson said:

"I know that the Minister and Robert Crawford are having ongoing discussions with the Bar Council and the Law Society, but I could not tell you the exact position."

He goes on to say:

"So, we would still have had reductions in those budgets anyway as result of the impact of the negative Barnett consequentials. To maintain the budget at £79 million would have meant taking more money out of somewhere else, if you understand what I am saying."

So, I think that it is quite clear where the cuts are coming from and why they are there. They have been imposed.

Mr A Maginness:

My point, Chairperson, is about the manner in which this process has been conducted. I think that it is quite unfair to say to people, "By the way, this is only a discussion; this is not a negotiation." It is the wrong premise on which to approach a process of this kind.

Furthermore, on foot of the news that there has been a reduction, for whatever reason, from £79 million to £75 million, you did not go back to the party that you had been talking to and say, "By the way, there is nothing to worry about here. This does not affect the basic figures that we have been discussing with you." I think that that is an unreasonable position for the Department and the Courts and Tribunals Service to adopt. It is not fair to the people with whom you have been conducting the process, and it undermines the credibility of the Department.

The Chairperson:

In fairness to you, Mr Maginness, at that same meeting, in response to Mr Harbinson, you said:

"I do not understand that at all."

Mr McCartney:

I would not get hung up on the words; it is about the process. The Bar Council referred to discussions in some of its letter. I think that we all accept that the process has not been what it should have been, whether it involved negotiations or discussions. I think that we all accept that the process has led us to where we are, and there is a still an air of confusion. We are no nearer to resolution, and that is the worrying thing.

Mr Crawford:

The point is that the process has not produced agreement, but, in his letters, David Lavery makes it clear that, if agreement were reached, he would be prepared to put it to the Minister. However, in both letters that I quoted from earlier, the Department's fallback position, if agreement were not reached, was the graduated fees scheme. Chairman, I am referring to letters that David Lavery wrote to the chairman of the Bar Council, which I do not think you have in front of you.

My point is that the discussions or the process delivered for the legal profession a very considerable amount of what it wanted, even though agreement was not reached. It has been put

to us that we would have been 90% successful if we had adopted one or other of the proposals, but I could also say that they have been very significantly successful without getting any agreement in the sense that the position of the Department of Justice and the Courts and Tribunals Service has moved to a Northern Ireland-based position. We are not adopting a graduated fees scheme, and we have accepted a number of the representations that were made during consultation — or rather the Minister has said that he is minded to accept those, pending comments from the Committee.

I would like to refute the idea that we did, in some way, negotiate in bad faith. We have actually taken on board quite a lot of what the profession suggested. Unfortunately, the Minister is not in a position to accept the other proposals that it has put forward.

The Chairperson:

OK, folks, we will stop there. We have probably exhausted this issue and ourselves. Mr Crawford and Mr Halliday, I thank you for your attendance here today.