Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Assignment of Two Counsel:
EQIA and Proposals

3 March 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
Lord Empey
Mr Alban Maginness
Mr Conall McDevitt
Ms Carál Ní Chuilín

Witnesses:
Mr Robert Crawford) Northern Ireland Courts and Tribunals Service
Mr John Halliday)

The Chairperson (Lord Morrow):

We will now have a briefing from the Department on the assignment of two counsel and the equality impact assessment (EQIA) and proposals. I remind members that, at its meeting last week, the Committee considered briefing papers from the Department of Justice on proposals for the assignment of two counsel in the Crown Court and the results of the EQIA. It agreed to schedule an oral briefing for today's meeting. Members have copies of the relevant papers. I also advise that the Bar Council has written to request an opportunity to address the Committee on the matter. The letter, which members should have in front of them, and a written submission were circulated yesterday. Members may wish to discuss the issues raised by the Bar Council

with officials during the briefing session.

We welcome to our meeting Robert Crawford, head of the public legal services division, and John Halliday, criminal legal aid policy adviser. Gentlemen, you are very welcome. I ask you to brief the Committee on the equality impact assessment and to propose a way forward on the assignment of two counsel, highlighting the differences between those proposals and the initial ones, if you please.

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

Thank you, Chairman. We will try to be quite brief. I will ask John to go through the detail of the changes that we have made. I want to say at the outset that we have tried to capture the key issues that were raised by the Committee at its meeting on 17 June 2010 and those that have been put to us by branches of the legal profession. Our overriding objective is to cut cost, and I draw attention again to the differential that we pointed out previously, which is that there are two counsel in 58% of indictable cases in the Crown Court in Northern Ireland compared with 5% in England and Wales. The current, updated figure for here is about 51%. We do not intend to get down to the England and Wales figure. We think that getting below 25% would be quite good. I will leave it to John to explain where we have gone with the proposals since we met some time ago on 17 June.

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

I refer members to annex A of the explanatory memorandum, which sets out the initial position that we consulted on and the position that we arrived at following public and statutory consultation. We started the consultation back in September 2009, and we carried through until February 2010. In April, we issued the post-consultation report, which contained one significant change to what we had consulted on. One of our criteria had stated that the case could not be adequately presented without Queen's Counsel, and we then had further criteria. The Bar pointed out to us that, if it could not be adequately presented and the other criteria could not be met, you would be in a situation in which it could not be adequately presented. So, we changed that position and brought proposals to the Justice Committee on 17 June. We heard your views, following which we also went to the Crown Court Rules Committee, which is a statutory committee with which we have to consult. We took on board its views and then went out to

consultation on the EQIA.

The criteria on which we consulted are set out in paragraph 4 of annex A to the explanatory memorandum. Members will see from that that we have moved considerably. We have taken away things such as stating that the case is exceptional compared with the generality of cases involving similar offences, because the Crown Court Rules Committee said that that would be too limiting. We largely toned it down, and we also got rid of the fixed criteria of 1,000 pages of evidence and 80 prosecution witnesses, because the Crown Court Rules Committee said that we do not have cases that size, so those criteria would never be met.

I shall pass over to Robert, who will run through the criteria.

Mr Crawford:

Based on the evidence presented to us and the concerns raised by the Committee and the County and Crown Court rules committees, which are composed of judges and representatives from the profession, we removed the various objective tests that apply in England and Wales that we had planned to introduce here. As John said, we did that to avoid having criteria that do not actually achieve very much. We have gone back to discretionary-type criteria.

There is one area on which we would welcome the Committee's view. At the meeting on 17 June, it was put to us that there were significant concerns about defendants' human rights being put at risk if they were not provided with two counsel in some cases or with senior counsel in others. We looked at incorporating a regulation that would allow senior counsel or two counsel to be awarded by a judge in cases in which a defendant's human rights were at risk. However, our legal advisers informed us that that is not necessary, because the European Convention on Human Rights and the Human Rights Act 1998 apply to all legislation, which must be interpreted in the context of those instruments. Consequently, a judge who feels that a defendant's human rights are at risk will be able to ignore the criteria and to award two counsel or senior counsel. Although we do not need to put that particular expression in to the regulations because it has effect anyway, we would like the Committee's advice on whether it would be helpful to include those expressions in order to make it clear that judges can award senior counsel or two counsel based on those criteria.

We need to draft this properly in the rules, but it might read something like, "Where a judge considers that, in the interests of justice, a certificate for a senior counsel or two counsel must be awarded in order to protect the defendant's human rights under the European Convention on Human Rights or the Human Rights Act, he may award a certificate for senior counsel or two counsel." We think that that very adequately protects all the rights that people raised concerns about during our various consultations and during our previous meeting with the Justice Committee. We would welcome an indication about whether the Committee felt that it would be helpful to include that in the regulations, rather than to rely on a judge's understanding of the human rights legislation, which will apply anyway.

The Chairperson:

Is the Crown Court Rules Committee now content with the proposals?

Mr Crawford:

We consulted the Crown Court Rules Committee, and we believe that it will be content with the rules, as amended. We went back, not to the committee but to a judge who is a member of the committee, and ran the proposed changes past him, including the idea that the human rights protection did exist already. He expressed his view that that would provide judges with what they needed in order to award counsel in the cases in which they believe it is really needed. We would not normally consult twice with the Crown Court Rules Committee; we have taken its views on board in so far as we believe it is necessary to do so.

The Chairperson:

Previously, you indicated that two counsel were assigned in 58% of indictable cases in Northern Ireland, compared with 5%, I think was the figure, elsewhere. Were you comparing like with like, and do you stand over those figures?

Mr Crawford:

Yes, we do. In fact, we updated the figures before coming here. Over the past six months, calculations suggest that the figure is now about 51%. It had been suggested to us that the percentage in Northern Ireland had dropped; it has a little, but not significantly or so much to

make us feel that it is unnecessary to make the changes.

The Chairperson:

What period of time did that cover?

Mr Crawford:

The figure of 58% was calculated just before our attendance at the Committee in June last year. The 51% was calculated a couple of weeks ago when we anticipated attending the Committee on this issue. So, over nine months or a little bit less, there had been a very small drop in the percentage.

The Chairperson:

That time period is relevant. Did you say nine months?

Mr Crawford:

It was thereabouts. It was from June to February. That is eight months, I believe.

Mr A Maginness:

The basic criterion in relation to the granting of a criminal aid certificate for Queen's Counsel with a junior counsel is if and only if:

"(a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact, such that it could not be adequately presented except by a Queen's Counsel assisted by junior counsel".

Does that still remain?

Mr Crawford:

Yes, the proposed test remains.

Mr A Maginness:

So, it is, "if and only if"?

Mr Crawford:

Yes.

Mr A Maginness:

The second criterion is that:

"(b) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact and a Queen's Counsel has been instructed on behalf of the prosecution."

Mr Crawford:

Yes. If senior counsel is instructed on behalf of the prosecution, there is an automatic grant of senior counsel for the defence. That is how that works.

Mr A Maginness:

The basic test is around:

"substantial novel or complex issues of law or fact".

Mr Crawford:

That is correct.

Mr A Maginness:

It seems to me that, if that is the case, there is very little discretion given to a Crown Court judge in granting a criminal aid certificate. It seems to me that it is a fairly inflexible situation. Yet, when we originally discussed this issue, we were talking about the interests of justice and the need to have proper and adequate representation for people accused of serious offences. So, it seems to me that that basic criterion, which has not shifted and remains in place, leaves very little by way of discretion. If I was a Crown Court judge and was presented with this, I could see very little room for manoeuvre with regard to exercising a more general discretion.

Mr Crawford:

We have largely taken on board the views of the Crown Court Rules Committee. The judges on that committee said, for example, that the criteria we had proposed on pages of evidence and the objective tests would be too limiting. I accept that the criteria we had originally proposed were seen as too limiting by the judges, and we have removed those. They did not seriously quarrel with us or say that the words "substantial, novel and complex" were very limiting. They sought to consider whether there should be more situations in which senior counsel were automatically awarded. That is why we went back to one of the senior judges when we looked at the concerns

in relation to someone's right to a fair trial. He was happy that having the additional criterion of interests of justice where somebody's human rights needed to be protected would cover any additional situations not covered by "substantial, novel and complex". We believe that "substantial, novel and complex" will cover most big, complicated cases in which it would be anticipated that there would be senior counsel or two counsel.

Mr A Maginness:

It seems to me to rule out senior counsel in most serious criminal offences, if that is the criterion. It is not that the offence is serious; it is that the offence is serious and involves substantial, novel or complex issues of law or fact. It is such a restrictive criterion that I cannot see very much room for judicial discretion being exercised in the generality of cases.

Mr Halliday:

That was not the view of the judge from the High Court bench that we spoke to. He felt that —

Mr A Maginness:

Who was the judge?

Mr Halliday:

It was Mr Justice Hart.

Mr A Maginness:

Does that reflect the full views of the Crown Court Rules Committee?

Mr Halliday:

When we spoke to the Crown Court Rules Committee, the bit that it felt limited it most was:

"compared with the generality of cases involving similar offences".

The committee asked for that to be removed. We did that, and we went back to Mr Justice Hart, because he had been the most vocal member of the committee.

Mr Crawford:

I am not sure whether it was even a recommendation because it was a verbal discussion with the

committee, but the only area in which we did not follow the members' views very obviously was that they would have been minded to have a number of serious offences automatically attracting senior counsel or two counsel, as appropriate. The offences that they had in mind were those for which a life sentence might apply. We have limited that to murder. That is because there are now so many offences that could attract an indeterminate sentence, and we do not believe that it would be appropriate that an automatic grant of senior counsel would apply for that offence. It should be for the judge to determine what the actual nature of the case required.

Clearly, if a potential life sentence is involved, the judge might decide to engage the human rights clause that we are now suggesting could work in that case, or he could decide, for example, that the issues of law are such as they are quite complex. Following the discussion at the Rules Committee, we discussed among ourselves the example of a case involving serious sexual offences. I do not think that any of us had any difficulty in comprehending that that was likely to be considered a case that involved a complex issue of fact, so we did not see that there was undue restriction. We removed the bits that were seen by the judges as being unduly restrictive, and that is what they told us. We believe that what we now have gives enough discretion to judges to allow them to award senior counsel or two counsel in cases where they believe that that is necessary.

Mr A Maginness:

I was looking at what was suggested by the Bar in its representation to the Committee. I think that it was presented to the Committee at its June meeting. I believe that it was also presented in its written submission. The Bar said that the regulation:

"should be amended to add the following after the reference to 'murder' namely 'attempted murder, aiding and abetting murder, conspiracy to commit murder, manslaughter, rape, attempted rape, possessing explosives to endanger life and conspiracy to possess explosives with intent to endanger life'."

Why is it that you are being so restrictive? It could well be that the criteria "substantial, novel or complex" are used in a case. I do not fully understand — I have made the point before — how a case can be novel without being substantial or can be substantial without being novel. I do not fully understand the meaning of that. However, it seems to me that there should be a reference to those types of crime or offence that should attract representation at a senior counsel level.

Mr Crawford:

We have considered the comments about that, and we do not believe that that case was completely made out. Again, we had the discussion at the Rules Committee, and our view was that the difficulty with specifying specific offences is that some cases involving specific offences can actually be very simple. We felt that there were cases there that did not require the services of senior counsel or two counsel, particularly, for example, if the case involves a guilty plea and there are no issues of law or fact that really need to be argued in court.

Mr A Maginness:

I disagree with that. I think that people are entitled to senior counsel representing them, even if it is a plea. I respectfully disagree with you.

Mr Crawford:

We feel that that should be left to the judge —

Mr A Maginness:

The point is that you are not leaving it to the judge. You are saying to the judge that they have discretion, but that it is very limited. It does not seem to me that there is much flexibility in the criterion that you have laid down, which the judge would have to apply. You are proposing a fail-safe mechanism to the Committee, which I think ought to be put in, but to my mind that is almost the nuclear option that you are writing into the legislation.

Mr Crawford:

It is a safety net, where a judge feels that somebody's human rights could be affected and the criteria do not otherwise allow that judge to award the level of representation that they feel is appropriate for the case. The one area that we totally agree needs to be protected is that of human rights as set out in the European Convention on Human Rights and the Human Rights Act. This will allow the judge to make that call and ensure that those rights are protected by the level of representation he can award. It is a safety net. We felt that the judge has that authority anyway, but we are of the view that we are happy to write it into the regulations if it is helpful to do so.

Mr A Maginness:

It seems to me to be so exceptional that it is very unlikely that judges would rely on that in order to determine cases.

I want to ask you two more questions. When will the certificate be granted? Will it initially be in the Magistrate's Court or is it in the Crown Court?

Mr Crawford:

Our view is that the initial certificate for a single junior counsel will be granted in the Magistrate's Court.

Mr A Maginness:

Or senior counsel?

Mr Crawford:

No. The point is that the Crown Court would take the decision on senior counsel or two counsel. We do not think that there will be great delay in that anyway, but we believed that it would be appropriate that, if there were to be counsel in a case, junior counsel should be awarded at the first possible opportunity in the Magistrate's Court.

Mr A Maginness:

Would that not lead to delay in the system? We have heard a lot in the Committee about delay in the system. A person could get to the Crown Court at the point of arraignment, and then, after several months on remand, an application has to be made for senior counsel; senior counsel is then granted, and there has to be a delay to allow senior counsel to get up to scratch with the case, and so on. That adds to delay in the system.

Mr Crawford:

We did not believe so.

Mr Halliday:

I raised that very point with Mr Justice Hart, and he was of the opinion that any delay that would

occur would be fairly minimal and there would be ways round it.

Mr A Maginness:

My final point is that your approach to this is as a cost-saving exercise; it is nothing to do with the interests of justice.

Mr Crawford:

The reason we are examining it is on the basis that it will save expenditure; yes, that is absolutely right.

Mr Halliday:

We want people to be properly represented by the right level and number of counsel.

Mr A Maginness:

With respect, you are not. The cost factor is more important in this than proper representation for people who are accused of serious offences. That is my interpretation.

Mr Crawford:

I interpret that differently. In a sense, I should like to state that our approach is different. We are driven by the need to examine all areas of legal aid expenditure to drive down costs. That is a financial reality. We have looked at this area, and we have seen a discrepancy between here and England and Wales, our closest jurisdiction for comparison purposes. We believe that it is possible to secure proper representation in the Crown Court and the Magistrate's Court without incurring the same level of cost as has been incurred previously. One way of reducing that is to reduce the number of cases in which two counsel and senior counsel are awarded.

The Chairperson:

I would like to ask further about a word that was used there. We talk about delay. Can you give this Committee a categorical assurance today that, if this is the way forward, it will not in any way delay?

Mr Crawford:

We cannot give the Committee an assurance that any change will not affect delay. What we can do is say that, on the consultations that we have had, and on the examination of the comments that have been made to us, we do not believe that there will be any significant additional delay. Clearly, if a second application has to be made to a Crown Court, that takes a little bit of time. Again, however, from talking to judges and Courts and Tribunals Service operational staff, we do not believe that that delay necessarily has to be significant. The application can be made fairly quickly.

The Chairperson:

You have moved slightly there, from no delay to not being able to give an assurance that there might not be a slight delay.

Mr McCartney:

If there was no need to drive the budget down, would this exercise have been carried out?

Mr Crawford:

It would depend on where the budget was. I suspect that, if there was absolutely no need to look at the budget, we would not have looked at the area. It would not have been among the priorities for the Courts and Tribunals Service to examine in relation to value for money, for example. There are other areas that you have considered that would be higher up that list.

Mr McCartney:

The presentation of this talks, at all times, about staying within budget. I accept the commentary that you have provided today, but the presentation of this is that it is because the budget has to be driven down. It goes without saying that the fear is that, in the interests of justice, two counsel are better than one. Any person going into a court situation will feel that the interests of justice are better served if they are being represented by a Queen's Counsel and a junior counsel.

Mr Crawford:

I am certainly not going to disagree with that. Our contention is that, in terms of value for money and taxpayers' money going into legal aid, we have to look at how that is spent and make sure

that it is actually used in the best way. We are quite open; we are not hiding behind anything. It is about trying to cut costs, but we believe that there is a way of doing it without prejudicing people's rights, in particular their right to a fair trial.

Mr McCartney:

I understand that. Just make the assumption that, all of a sudden, counsel decided that they were going to drop their fees. You are writing criteria that make it impossible for a person to be represented by two counsel, irrespective of the cost. You are nearly making a decision for the court to say that people are not entitled to two counsel, irrespective of the circumstances.

Mr Crawford:

I agree. Again, it is a bit like the discussion that we had on means testing for criminal legal aid. If there is a better way of making the savings than impacting on representation and access to justice, then clearly we will want to consider that first. That has been the way that we have approached all of these issues.

Mr Halliday:

The present test that is applied is actually where the charge is one of murder or the case appears to present exceptional difficulties. "Exceptional difficulties" is probably not too much less of a test than what we are suggesting.

Mr McCartney:

I understand what you are saying, but people in front of the courts — no disrespect to the Minister; on a number of occasions during the Justice Bill debate, he reminded people that this is from England and Wales. He was quite right to do so, in my opinion. However, people here would say that they are better represented in court.

Mr Crawford:

After this, they will still be better represented than in England and Wales.

Mr McCartney:

I accept that. If it was 6%, they would be better represented. If there were two counsel in 6% of

cases, that statement could be better represented. I do not want to bring this down to statistics. In the presentation, after the EQIA, there was a statement that:

"the proposed rules do have a differential effect on young male defendants … there is no way to mitigate the effects of the policy."

I do not think that that is a true statement. There is a way of mitigating it: by ensuring that there are two counsel.

Mr Crawford:

No. The statistics show that a much higher proportion of criminal defendants are young males, and they will show that whatever level of representation we have. The proposals will apply equally whether the defendant is a young male, a young female or an older person. We cannot skew the actual criteria to help with the fact that the proposals affect young males rather more. That is a feature of who ends up in the criminal justice system as a defendant.

Mr McCartney:

"Young" is not defined, but there are more young males in front of the courts, so obviously it is going to have a negative impact on them. However, surely there is a way of mitigating that? It may not be the solution that you want, and that is fair enough. I accept that, but there is a way of mitigating it. The statement that there is no method of mitigation is not a fair reflection of what is in front of us.

Mr Crawford:

I fully understand the point that you are making —

Mr McCartney:

I just want to make this final point. Even in the presentation of it, while many defendants may be innocent in this group, innocence and guilt will only be decided afterwards. This is nearly presented as, "Sure, some of them are going to be guilty, so two counsel was nearly a waste of time."

Mr Crawford:

Not at all. What we are trying to say is that we, as a court service, in this policy, have no control over who ends up in front of the courts. That is for others. We recognise that in many cases it

may be the individual — I think that the phrase there is "self-selecting" — but the point about many being innocent is that it may not be their choice to be in front of the court. The prosecution may be wrong; we acknowledge that, and that is what we are saying there.

In relation to the disproportionate effect, if we gave two counsel to every defendant, the policy would still disproportionately affect young males, because there would be more young males getting two counsel.

Mr McCartney:

I understand that point. The decision that we are making is around the interests of justice and finance. From your point of view, you have been set a task. What we have to avoid, which might be unfair on you, is that you are told that you have £10 million to spend and are asked what the best way of spending it is. You say, "Well, get rid of Queen's Counsel in most cases. That is it nearly done in one fell swoop." We have to protect ourselves against that.

Mr Crawford:

I fully understand the point that you are making.

Mr McDevitt:

I apologise for having to slip out there, gentlemen. I am genuinely sorry about that.

How do the changes that have been made since the EQIA was completed materially affect its findings?

Mr Crawford:

The EQIA did not raise any substantive issues, other than the one about the impact on young males, and that was not raised as a concern by any of the groups. It was pointed out to us as an issue in relation to the effect of the proposal as a fact, not as something that the proposals would do differently. Really, the changes do not have any effect on the EQIA outcome, because they do not actually change anything in that.

Mr McDevitt:

As it stands, the EQIA does find the policy to be directly or indirectly discriminatory.

Mr Crawford:

It points out that the nature of the environment is such that young males represent a higher proportion of those who come before the courts. However, the policy is not discriminatory, and it is not the policy that causes that effect.

Mr McDevitt:

In response to the question, "Is the policy directly or indirectly discriminatory?", the EQIA finds, "Yes, indirectly."

Mr Crawford:

Yes, it is indirectly discriminatory in the sense that it applies differently and affects more people in that group. I take that point, but the objective of the policy is not discriminatory.

Mr McDevitt:

This is what I am still not able to get my head around. The policy failed the EQIA test for all the obvious reasons. I think that we are agreed what they are. You said that it is about narrowing discretion, yet Mr Halliday said that the current criteria deliver a similar outcome, but not as cheaply, and that is the problem. Why would you introduce a policy that is discriminatory when the current criteria deliver satisfactory outcomes?

Mr Crawford:

We are looking at this because we believe that it is an area in which value for money can be improved by reducing representation. We are trying to find a balance in the way that we do that, without impacting significantly on people's right to a fair trial etc.

On the point that John quoted, we are suggesting that there is already a phrase — exceptional difficulties — that requires interpretation by judges. Therefore, we do not believe that we are making anything more difficult. We have stripped out all the objective tests —

Mr McDevitt:

I take the point about value for money, but surely the whole point of someone's becoming a judge is to have judicial discretion. That is one of the basic reasons for having judges; otherwise, we would administer it in some other way.

Mr A Maginness:

Computers.

Mr McDevitt:

Yes, or civil servants. Mr Maginness suggested that, if we did not need the concept of discretion built into the system, we could use computers to administer justice. In deference to computers, I suggested that civil servants may be slightly more reliable. However, we have judges for a very good reason, and that is because we do not have confidence in civil servants, computers or legislators to do a particularly good job of it.

Surely, the best solution to the EQIA outcome would be to work intensively with the judiciary in order to understand and apply its discretion in a much better way, and not to introduce a new rule that will put you on the wrong side of equality law and narrow the opportunity for discretion. We should be celebrated for having a judiciary that is capable of discretion and of applying it in a good way. Surely, the Courts and Tribunals Service should be able to go back to the judiciary and tell it that we have an issue of value for money that it needs to factor in when applying discretion. You do not need to narrow the ambit of the discretion to achieve that.

Mr Crawford:

We believe that we do. If we do not change the test, a judge who, having heard our greatest explanations of what we would like to achieve by way of better value for money, decides not to award counsel will have it put to him by the barrister or solicitor who is applying for legal aid that the case is similar to a case that was heard, say, three weeks ago. It will be put to him that the facts and level of complexity are very similar and that, therefore, it deserves the same standard of representation. If there is no change in the test, the judge will be in the difficult situation of having to give reasons and justification for not awarding counsel.

Mr McDevitt:

Mr Crawford, we pay judges very large sums of money, and they are exceptionally intelligent, able and learned men and women. The point of having a judiciary that is separate is that we let them overcome difficult dilemmas on behalf of society.

Mr Crawford:

We believe that, in changing this, we still give the judge —

Mr McDevitt:

You seem to have little faith in the judiciary.

Mr Crawford:

We have discussed it with the judiciary. We believe that it will be helpful in giving judges the discretion that they need, but not more than the discretion that they need. In other words, if it is put to them that a case requires representation, they will have a set of criteria that will actually work, particularly with the fail-safe that we talked about in relation to human rights. If judges genuinely believe that there is a risk to the defendant's right to a fair trial, they can award counsel of whatever level and number, regardless of the other criteria. We want to put that in to make it clear that that fallback exists.

Mr McDevitt:

It is my observation that, when faced with a choice between introducing regulations that are found to be discriminatory and leaving the regulations as they are and encouraging judges to apply a greater discretion, you are choosing to introduce regulations that are discriminatory. However, we will leave it at that.

I want to ask you about some of the figures in your consultation document. Does the document state that representation by two counsel at the Crown Court in England and Wales is about 5%.

Mr Crawford:

Yes, that was true.

Mr McDevitt:

The Bar Council argues that:

> "the actual number of two counsel certificates in the most serious cases (Offence Group A) is in fact 63.4%."

What do you say to that?

Mr Crawford:

I am sure that that is true, because the most serious category should get two counsel. That category applies to murder cases, so two counsel is automatic under our rule. Therefore, in our case, that figure would be 100%.

Mr McDevitt:

So, do you stick by the absolute assertion that these are comparing apples with apples and oranges with oranges and that it is perfectly legitimate to draw the parallels that you want with England and Wales?

Mr Crawford:

I believe that it is, because we are looking at all indictable offences, and, although there are differences in categories between England and Wales and Northern Ireland, all indictable offences comprise pretty much the same group of cases.

Mr McDevitt:

Are you quite sure that the sample that you took in the North is statistically robust and comparable with the samples that were available in GB?

Mr Crawford:

In the North, we looked at all cases.

Mr McDevitt:

You took a sample of 754 cases.

Mr Crawford:

The most recent figure of 51% is based on all cases. In terms of calculating the costing, that sample is right. In terms of the percentage, we have looked at all cases. I confirm that the figure of 51% is based on all cases here.

Mr McDevitt:

So, that parallel between England and Wales and Northern Ireland is a general one that we can draw?

Mr Crawford:

Yes.

Mr McDevitt:

In all cases?

Mr Crawford:

As regards the percentage of representation where the cases match up, that is correct.

Mr McDevitt:

Does that apply to other aspects of court policy? Are both systems just the same?

Mr Crawford:

I do not think that they are just the same. Both have different ways of doing things, and the jurisdictions are different. I think that we would need to look at it case by case to confirm that; I would not want to say that every instance is the same because I am sure that it is not.

Mr McDevitt:

It is a bit like the publicly funded legal services argument. It suits to make the comparison with England and Wales, does it not?

Mr Crawford:

It does when we see a differential of such a scale. The difference is not 5% and 10%. If it was,

we would probably look to see whether it was worthwhile doing anything at all. However, the difference was 58%, now 51%, compared with 5%. That is quite an enormous difference. I emphasise that we are not seeking to get down to the England and Wales percentage. In fact, we are not likely to get much below 25%, as a very rough guess. Until we see how judges apply the criteria, it is difficult to be certain of that.

Mr McDevitt:

I find it interesting that, since justice powers were devolved to this region, we seem to spend an awful lot of time trying to get ourselves back in line with England and Wales, after having apparently spent the entire period before devolution falling out of line with England and Wales. There is very little incentive for us as devolved legislators to reverse everything that was done by the English and Welsh. However, that seems to be what you are asking us to do nearly every week. I know that there were Scottish Ministers here as well, but, by and large, they were English and Welsh.

Mr Crawford:

The only answer that I can possibly give to that is that the Court Service in Northern Ireland was trying to make changes for quite some time before devolution. It has taken until now to get the changes through. I joined the Court Service in February, and in my view, those changes could have been made much earlier.

Mr McDevitt:

You have to concede that, during all those decades when there were English and Welsh Ministers to convince of the merits of making those changes, they were not made, despite the fact that, following your logic, the gap was growing. However, now that you have Irish or Northern Irish — or whatever we want to call ourselves — legislators and Ministers, you want us to do the stuff that the English and Welsh legislators were not willing to do.

Mr Crawford:

I think that the driver behind that is effectively money. At the end of the day, money saved in legal aid is available for redeployment in other services in Northern Ireland. Perhaps, it was easier to get extra money for some areas before devolution. However, even then, legal aid

expenditure ran well above budget for many years.

Mr McDevitt:

So, are you saying that devolution is bad for justice?

Mr Crawford:

No, I would like to think that devolution is good for justice.

Mr Halliday:

Our criteria changed quite a bit from the criteria in England and Wales as a result of the consultation exercise.

Lord Empey:

We risk going round in circles here. Mr Crawford said in his opening statement that the overriding objective is to reduce costs, which is fine, if that is clear-cut and we know where we are.

Ironically, I do not quite know where some recent rulings on insurance and other things take us with the EQIA, which Conall referred to. One ruling said that people with good driving records, who tend to be women, cannot be discriminated in favour of. Most of the miscreants who have accidents are young men. Therefore, Carál and the Committee Clerk are going to be in serious difficulties with their insurance premiums rising. That is an odd outcome. I do not quite know what the implications of that are, but I think that they will be very far-reaching.

On a matter of process, Chairman, we have had a request from the Bar Council to address the Committee again. I ask you whether it is the intention that that opportunity be taken.

The Chairperson:

We have tried to be as flexible as possible around requests. However, I am sceptical about getting through even the existing workload. If members are of a mind that we should meet more often during the week to do all these things, that is a matter for members to decide. Looking at the workload that the Committee has and the number of days that are left to us to do it, I reckon

that we will be doing well to get through it. As a matter of fact, I suspect that we are not going to make it.

Lord Empey:

I appreciate that there are huge difficulties in scheduling at this late stage. However, are you saying that we will have to rely upon the written submission from the Bar Council, as opposed to a verbal submission?

The Chairperson:

Looking at our forward work programme, I cannot see a verbal submission being possible, much as I would like to have that session. Believe me when I say that, because I would rather this Committee go out with the right taste in its mouth, and leave the right taste in everybody else's mouth, that we were fairly facilitating, as I think that we have been. However, this issue has gone to and fro and backwards and forwards, and it gets to the stage at which I feel that some think that we are in negotiations. I want to kill that thought; we are not in negotiations. Let me make it very clear that these are not negotiations that we are carrying out.

In reply to your question, I honestly think that we have no alternative but to go back in writing in this particular case. We have three meetings left after today and a very heavy workload to get through. There will be four oral briefings in each of those sessions.

Mr A Maginness:

I understand those difficulties and sympathise with you as Chairperson. You have always been very accommodating to different groups and bodies. However, we are talking about a fundamental change in legal representation, not just some sort of minor change that will have no effect. If it goes through, this change will affect very substantially the level of representation that people facing serious criminal offences will have.

I do not want to go through all the arguments again — it would not be proper to do that — but I am not convinced that we have really examined the issue in its fullness. It strikes me that we are being presented with almost a fait accompli. The Department has done all the consultation and said, "There it is, this is what we have done, make your minds up." That is not a proper way

of dealing with something so fundamental, and I would be very unhappy if we dealt with it in that way. We should aim to get it right. I agree: no one should use the Committee as a negotiating table. I do not think that that is the position as far as this issue is concerned. We were near that situation on the issue of legal aid, but, in this instance, I do not think that we are. Let us get this right; that is my abiding concern.

The Chairperson:

Mr Maginness raised a couple of points. I do not think that anyone around the table is under any illusion about the importance of this matter. I take it as a highly important one that will have implications that one might even say are far-reaching. I have said this before, although I will not use the same words that I used then: we have just had a report on prisons, and there will be far-reaching changes and implications for society as a whole as a result of that report.

At times, change has moved this society from standing upright to standing on its head. Those are the sorts of changes that we seem to be going through. I do not think that the changes that we are dealing with have that gravity, although that is not to underestimate them in any way. I understand what is being discussed here and what the outcome will be. However, we have exhausted the issue. You may feel that it did not get the time and the in-depth discussion that it merits. I do not agree.

There has been a great deal of to-ing and fro-ing, and we also know that the lawyers and solicitors have been meeting on and off for 20 months and could not get agreement. We were told that the new proposals were within budget, but then we were told the other side of the story, which was that they were not. There comes a time when we have to call it. It is not a call of hope that we got it right; it has to be one of best judgement, which we have to make from time to time. As a Committee, we sometimes have to stand on that and say how we are calling it. I am making no judgement on how members will call this one.

Mr A Maginness:

I do not dispute what you say. However, this is quite separate, I would have thought, from the overall legal aid budget argument that the Committee has rehearsed ad nauseam. In my view, this is a separate, stand-alone issue of fundamental importance. I will leave the matter there; I have

made my point. You are in a difficult position, Chairperson, as you have to guide and direct the Committee.

Ms Ní Chuilín:

What options are there?

The Chairperson:

I was going to ask Mr Crawford how savings will be effected.

Mr Crawford:

If we had moved to the England and Wales model, the savings would have been £2·25 million; we did that costing with accountants working through cases and groups. That is the sample that was referred to. We thought, however, that we were not going to go down the England and Wales road and that our lesser approach would deliver about £1·5 million in savings.

What we are now doing will result in savings that will amount to something less than £1·5 million, but we do not anticipate that it will be dramatically less than that, unless there is a large number of cases in which judges feel that rights are affected and where they would wish to apply greater discretion in order to allow cases to have a higher level of representation than we anticipate. The average cost of a Crown Court case is £9,000, so the loss of one counsel will amount to £3,000 on average. That is the scale of the difference per case in relation to savings. Even taking 100 cases at £3,000, you need to get quite a lot there before you start mounting up £300,000. One hundred cases would give you that impact. We could find discretion being exercised in quite a number of cases without greatly affecting the figures. That is the best estimate that I can give.

Mr McCartney:

Are the savings only about £1 million?

Mr Crawford:

Savings at the moment are about £1·5 million. If our proposals to drop the objective criterion were to bring another 100 cases into two counsel rather than single counsel, they could create

about £300,000 less savings. However, we are not clear that there would be another such 100 cases because we are trying to meet the comments that were put in during consultation, and we do not have a good feel for what that will do to judicial discretion.

The Chairperson:

You talked earlier about putting this in regulations. Will you take us quickly through that again?

Mr Crawford:

Our legal advice is that under the Human Rights Act 1998, which draws into national domestic law the European Convention on Human Rights, it is not necessary to put those into regulations or primary legislation because they apply anyway. A judge has to have regard to them when taking decisions under any legislation. Judges can use those powers simply to ignore the criteria that we have set and award more than one counsel or senior counsel in a case where he believes that a convention right is affected. One of the key convention rights is of course article 6, which is the right to a fair trial.

Put simply, if a judge feels that the defendant needs two counsel for a fair trial, the judge can award two counsel. In putting it in the regulations, although it is not necessary, we felt that the Committee might find it helpful to make it clear that in legal aid specifically, judges are encouraged to have a very direct and focused consideration of whether that power would be engaged. Judges might say that they knew that and did not need such assistance. Nevertheless, putting it in the regulations would make it clear to those who are applying for legal aid and those who are applying on behalf of clients that that option exists.

The Chairperson:

In the interests of transparency it should be.

Mr Crawford:

I am very happy to take that on board.

The Chairperson:

I would like to know whether other members feel that.

Mr A Maginness:

It should be in the regulations, although it does not deal with my fundamental problem about the criterion that is being used. Judges may take the view that the criterion is there so they have to abide by it and it has to be absolutely exceptional to use this. However, proper legal representation would still be unfairly reduced.

The Chairperson:

If the Department goes ahead with the Crown Court remuneration proposals, does it still need to implement these proposals?

Mr Crawford:

We believe that it is still necessary. I know that we gave the Committee figures that show that implementing all the savings would overshoot the new budget somewhat. However, we also anticipate that there will be an additional cost potentially or savings foregone by the Public Prosecution Service (PPS) in relation to the Crown Court remuneration. It is not yet certain whether money has to come out of the legal aid budget to plug that hole if the PPS goes down that road.

In other areas that we regard as being perhaps lower savings, such as criminal legal aid means testing, we have indicated to the Committee that we are not certain that the full savings will be delivered. Again, we are open to the Committee's views when we bring forward further proposals. Taking all those together could achieve another £1 million short on the savings; therefore we believe that these are necessary and justified in order to get us to where we need to be in the budget.

Lord Empey:

I take it that the Department has the power to implement the regulations and that we are consultees. You make the point that we were not in the negotiation as a Committee, so am I right in saying that the Department is seeking our views but that ultimately, through the Court Service, it can make these regulations irrespective of what we say or do?

Mr Crawford:

The first comment that I would make is in response to Mr McDevitt. The regulations could have been made before devolution, because, at that stage, they had gone through consultation. However, given the nature of the recommendations, the Minister felt that it would be appropriate to bring them to the Committee. *[Laughter.]* I knew that that would make him happy.

Lord Empey:

With respect to the Chairperson, that was not the question that I asked.

Mr Crawford:

The Minister wanted the Committee's views, and he took on board some of the points about dropping criteria that were too objective and about carrying out an EQIA. The Minister had the Committee's views in mind. He now wants to go ahead with regulations as soon as possible, taking account of any further comments from the Committee. In order that things can move ahead, he is minded to lay regulations before the Assembly dissolves, and, of course, we will monitor the impact.

The Chairperson:

Will they be through subordinate legislation?

Mr Crawford:

Yes. We sent the Committee the SL5, although, technically, that should not have been sent until the regulations were laid. However, in order to explain the position today, we felt that that was the best document to put before the Committee. The next stage will be for the Minister to consider any further comments from the Committee, after which he will lay the regulations. The Committee will then consider the SL5 along with the draft regulations.

The Chairperson:

Will that be through negative resolution?

Mr Crawford:

Yes.

Mr McDevitt:

The Committee could pray against the regulation, in which case there would be a vote on the Floor of the Assembly.

Ms Ní Chuilín:

Any one of us could pray against the regulations.

Mr A Maginness:

What would the effect of that be?

Mr McDevitt:

We could trigger a vote in the Assembly.

The Committee Clerk:

If the Committee wished to pray against the negative resolution, it would have to put down a motion to pray against the statutory rule, which would be debated on the Floor of the Assembly. The Assembly would then take the decision. Likewise, an individual MLA can put down such a motion, and the vote would go through on the Floor of the Assembly. However, with negative resolution rules you cannot put down a motion to amend. You pray against the entire rule, so you put the whole thing out.

Mr McDevitt:

Can we do that only when we have a draft regulation before us?

The Committee Clerk:

Yes.

Mr McCartney:

On a wider point, this is supposed to be about driving down the Budget, yet we are told that it is about saving £1·5 million. Earlier, the Committee heard evidence from Anne Owers and her team that there is a practice in the Prison Service of calculating annual leave that exists neither in

the Civil Service nor anywhere else in the system, and it costs the public purse £2·5 million a year. There is an inability to do anything about it, yet we are being asked to make a big decision in the interests of justice over £1·5 million. I find it hard to square that circle. Everybody accepts that leave should not be calculated in that way, yet it costs £2·5 million.

We are also told that, every day, a reserve half hour is built in; every day, people get half an hour's pay for not working. Over a year, that amounts to no mean sum. We are told that budgets have to be driven down, yet some budgets are left because we are told that that is just how the system is. I find it hard to square that circle, particularly given that justice is supposed to be at the heart of all this. I understand where you are coming from, because that is your job. However, that is the type of circle that we have to square.

Mr Crawford:

Unfortunately, we are in a particularly bad situation because changes that might have been made some years ago were not made. Therefore the gap that we have to close is large.

The Chairperson:

We talk continually about criminal legal aid savings. What about civil legal aid savings?

Mr Crawford:

Policy responsibility for civil legal aid and its reform rests with the Legal Services Commission, which appeared before the Committee last year to give examples of its reform programmes. As the sponsor division in the Courts and Tribunals Service, we asked the Legal Services Commission to identify savings in civil legal aid. The reason that we are not proceeding with civil legal aid savings in tandem with this is because it is a more complex area; it takes longer to identify savings.

The Legal Services Commission is an advisory NDPB, so the Department does not have quite the same control of its priorities. We anticipate that a programme on civil legal aid savings will come before the Committee in due course. There are some already. The issue of a statutory charge has come to the Committee to make savings in that area, and there are enabling powers in the Justice Bill to introduce a contingent legal aid fund, which will save £600,000. Some of them

have come through as specific proposals, and, in due course, there will be a wider programme. The proposals for savings on criminal legal aid had already been in train for some time, so this is the completion of a lengthy process of delivering those savings. Civil legal aid is further back in the process.

The Chairperson:

The administrative costs of the Legal Services Commission are extremely high, and that is putting it mildly. Can no money be found there?

Mr Crawford:

Money is being found there. In fact, the Legal Services Commission is being subjected to the same regime as the rest of the Civil Service in making 5% year-on-year administrative savings in the coming financial year. That will lead to savings of almost £500,000 each year cumulatively, which means that there will be savings of £500,000, then £1 million and then £1·5 million. Those have been built into the most recent savings forecasts that we put before the Committee. That is not to say that further administrative savings cannot be made, but that is the requirement that applies as of today.

The Chairperson:

What percentage does that represent?

Mr Crawford:

That is 5% of the commission's budget, and it rises to 10% and 15%.

The Chairperson:

Is achieving that a big stress? It does not sound like it.

Mr Crawford:

We are in productive discussions with our colleagues in the Legal Services Commission on that. We are determined to ensure that those savings are made, because we believe that they are deliverable.

Ms Ní Chuilín:

We are waiting for the SL5 to come before the Committee before we take a position.

Mr Crawford:

That is correct. We will adjust the proposal and the regulations to take account of that.

Ms Ní Chuilín:

What would happen if we were to vote against it?

Mr Crawford:

If the Assembly were to vote against it under negative resolution, the regulations would be lost and could not be brought back until the next mandate.

The Chairperson:

Thank you for coming, Mr Crawford and Mr Halliday.

Mr Crawford:

If this is our last appearance before the Assembly dissolves, I thank you all. *[Laughter.]*

Lord Empey:

We might be back sooner than you think.

The Chairperson:

You might find some of these boys on your doorstep.

Ms Ní Chuilín:

We will get him back next week to discuss funding.

Mr McDevitt:

Fair play to him, Mr Chairman.

The Chairperson:

I hope that he is not being presumptuous.