Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Recovery of Defence Costs Orders

26 January 2012

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Seán Lynch
Mr Alban Maginness
Ms Jennifer McCann
Mr Basil McCrea
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr Robert Crawford	Northern Ireland Courts and Tribunals Service
Mr John Halliday	Northern Ireland Courts and Tribunals Service

The Chairperson: You are welcome, even if you did keep us back. *[Laughter.]* Members wanted to know whether we could recover the costs of delay. The earlier briefing went through a little bit quicker than anticipated.

I formally welcome to the meeting Robert Crawford, the deputy director of the public legal services division of the Northern Ireland Courts and Tribunals Service, and his colleague, John Halliday. The session will be recorded by Hansard. I will hand over to you, Robert, and I am sure that members will then want to pose some questions.

Mr Robert Crawford (Northern Ireland Courts and Tribunals Service): Thank you, Chairman. First, I formally apologise for not being here at the time at which the Committee was ready to see us. We will try to ensure that we arrive earlier in future.

The Chairperson: Thank you.

Mr Crawford: As is customary, I will make a short introductory statement and then invite questions from members. We are here today to seek the Committee's approval to enter into public consultation on proposals to create rules that will allow the Legal Services Commission to seek recovery of defence costs orders (RDCOs). The new power to do that is contained in section 81 of the Justice Act 2011, and it gives the Legal Services Commission the power to recover the cost of legal aid from defendants who are convicted in a Crown Court. The Committee was made aware of that power in an informal briefing on 1 February 2011, and, at that time, there were no comments from members.

The proposal was considered by the access to justice review team. In its final report, it recommended that:

“regulations are made as soon as possible to enable recovery of defence costs orders to be made and establish procedures for identifying defendants who have enough funds to be made subject to orders upon convictions.”

The team further recommended that consideration be given to whether there might be scope to use assets frozen under proceeds of crime legislation to defray legal aid costs and for the legal aid fund to have the first charge on any assets that have been confiscated.

Clearly, we have taken on board the first recommendation that we should proceed with the proposal for the recovery of defence costs orders. We are also pursuing the second recommendation of the access to justice review team.

The Committee may be interested to know that we have received just two responses to the access to justice review that commented on the proposal. The Law Society responded:

"The proposed Recovery of Convicted Defendants Costs Orders should allow recovery of a defendant's legal aid costs if he or she were convicted and found to have substantial assets. This would also cover situations where a wealthy defendant managed to secure legal aid but is subsequently adjudicated not to have been an appropriate recipient."

The Bar Council responded:

"We have no specific reservations in relation to the recovery of defence costs orders or an offender levy. However, the Bar would have some concerns in terms of the practical operation and any potential interference with the running of a trial. Consideration would have to be given to the recovery of costs from the public purse in unsuccessful aspects of a prosecution, for example, successful applications for disclosure strongly resisted by the prosecution could be financially punitive."

We do not disagree with the Bar’s caveat. We believe that judges will have sufficient flexibility to apply that, and we can go into more detail on that if the Committee wishes.

The access to justice review has endorsed the objective. The Law Society and the Bar have not opposed the proposal, although the Bar recorded a caveat in its response to the access to justice review. We now want to go to public consultation to get more views on, and input into, how the proposal should operate in practice.

Our objective is the same as when we briefed the Committee on the Justice Bill: we want to give the Legal Services Commission the power to recover costs in a very small number of cases in which convicted defendants clearly have adequate means to pay for their defence costs. Members will be aware of public criticism of some cases in the past year in which it appeared that convicted defendants would have been well able to pay their defence costs. Had a recovery of defence costs order power been available, it might have been exercised in those cases. In addition, we have looked at a number of cases in which the motive for the crime was to acquire significant amounts of money or benefits — I am thinking about the more serious end of, for example, drug-dealing offences. In those cases in particular, a recovery of defence costs order would allow the Legal Services Commission to recoup the cost of the defence of a defendant who had amassed some wealth as a result of his or her crime. We believe that the number of cases will be very small. I explained some of the principles that underlie what we propose. We want the consultation process to tell us what safeguards should be put in place and to give us some guidance on what the views are about the possible impacts and concerns.

We briefed the Committee on the specific principles during the passage of the Justice Bill. The power can be used to recover costs from convicted defendants only; it is not a means test by the back door. Only for cases in which someone has actually been convicted that a recovery of defence costs order may be made. The power will apply only in more expensive cases and its use limited to cases in the Crown Court; it will not be extended to the Magistrates’ Court. The proposal and draft rules that we

attached for circulation as part of public consultation apply only to the Crown Court. So we seek to introduce the order for only the more serious and more expensive cases.

As we advised the Committee, the costing of the saving, which we have included in the public consultation paper, is based on there being fewer than 10 orders a year. That is the kind of scale and usage that we anticipate, because we are aiming for the most serious examples in which somebody clearly has more than adequate means to pay for his or her defence and should, therefore, be asked to reimburse the cost. It will be for the Legal Services Commission to decide whether to seek an RDCO in the first instance. So the commission will not look at marginal cases, and it will not seek an order in every case in which a defendant is convicted. Rather, it will look at cases in which it appears that a person may have significant means. It will then carry out an investigation into that person's financial circumstances and may seek an order for recovery. The proposed rules will include the power for information to be required by the commission and will require that information to be provided by the person on whom information is being sought. It will be for a judge in the Crown Court to determine whether an order should be granted. It will not be for the commission to issue an order in its name. The judge will decide and can determine, with complete freedom and flexibility, how much or how little is to be paid back.

Specifically in the draft rules, we have shown some illustrative figures, and so on. However, we want the consultation to tell us what safeguards might be put in place to make sure that hardship is avoided. We propose, for example, that nobody in receipt of income-related benefit can be the subject of an RDCO, so the poorest in society will not be affected. We also propose that an RDCO cannot be made if the person's income is below approximately £22,000 per annum. Similarly, an order cannot be made if a person's assets are less than £3,000 per annum. Those are indicative thresholds at the moment; they are certainly not our final view. However, they are intended to show that there are cases, certainly at the bottom end of people's income, in which an order should not and will not be made. An RDCO will not, of course, be made for anybody under the age of 18, so young defendants will not be subject to paying their defence costs. We have specified and will specify that the order will not apply to anyone aged under 18. There will be a right to apply to the Court of Appeal for leave to appeal against an RDCO. That will, of course, provide a further safeguard and check. In addition, we propose that the legislation include specific powers for the judge to decline to make any order in a case in which there appears to be hardship, and we will specify that.

The draft rules also state that a principal residence should not be regarded as an asset unless there is more than £100,000 of equity. In other words, if I have paid off £50,000 of my £100,000 mortgage, the £50,000 of equity cannot be counted as part of my assets. However, I may have a lot of cash that would count. That means that a family home or principal residence will not automatically count; it depends on the amount of equity. Cases in which a mortgage has been completely paid off are rather different from ones in which a mortgage exists on most of the value.

In the consultation paper, we do not ask for specific answers on what the levels and limits should be. Instead, we ask people to tell us in what circumstances should an RDCO not be made. That is a much wider question. We thought about the financial limits, but there may be other cases in which an RDCO should not be made, and the public consultation may throw those up. We will revise the rules accordingly, dependent on what we get back from the public consultation. Today, we seek the Committee' s approval to go to consultation. As part of the process with which members will be familiar, we will come back with revised proposals following consultation, and we will, of course, revise the rules subsequent to that. Today marks the start of that process. I have probably said enough for the moment and will take members' questions.

The Chairperson: OK. I want to pick up on one point. People will be able to appeal the decision in the Court of Appeal. Will that be funded by legal aid? If the appeal is lost, will that cost be recoverable?

Mr Crawford: The legal aid certificate will apply throughout the process. The recovery of defence costs orders, as with all such things, will be covered in the Crown Court rules. The appeal mechanism is also covered in the Crown Court rules, and our idea is that everything within that mechanism will be subject to the same regime: legal aid will cover anything within that, and we can make sure that that is included in the regulations.

The Chairperson: Is the £250,000 anticipated saving the worst-case scenario? Is there potential for the saving to be a lot higher?

Mr Crawford: There is potential for it to be higher, but the average cost of a Crown Court case is £10,000. We looked at the cases about which there had been concern. In some drugs and fraud cases, the legal costs were much higher; fraud cases in particular can be very expensive. In those cases, we looked at defendants who had significant assets but were paying nothing for legal aid. If we had one or two of those cases in a particular year, the saving could be much higher. In one case that we examined, the legal aid cost was over £1 million. If that were to be the subject of a recovery of defence costs order and the person could pay — that is the single biggest point — the potential saving could be higher. Our work on means testing found that about 95% of people would still qualify for legal aid even if we brought in a fixed means test. So the vast majority of people will never be subject to a recovery of defence costs order, because their income and assets will be well below the threshold.

The Chairperson: Are there any examples of high-profile cases in which, if the recovery scheme had been in place, you could have got the money back? The Howell case is an example of a very high legal aid bill. If the scheme had been in place, is that a case from which you could have recovered the fees, which, I think, amounted to tens of thousands?

Mr Crawford: Had the Legal Services Commission chosen to apply an RDCO procedure in that case and had the judge granted the order, the recovery would have been of around £65,000 or £70,000 if I remember correctly. There are other cases from which the recovery could have been higher. The cases that we looked at are not quite so well known, but I think that there are much better examples in the area of financial crime.

The Chairperson: Given how much is spent on legal aid, when I initially saw the figure of £250,000, I thought that it was pretty conservative.

Mr Crawford: When we looked at the number of high-profile cases in the past year, taking into account Assembly questions, and so on, only about six featured on the radar, as it were. Of those, not all would necessarily have been subject to an RDCO because of the person's means. The cost was high, but the person' s ability to pay was low. I think that our estimate is not necessarily conservative because, in any one year, there might not be more than one or two cases, in which case you might struggle to meet the £200,000 estimate. However, in another year, if there was a case that cost £250,000 in fees — a big financial investigation into fraud could easily amount to that — the recovery could be well up. We sought to give an average. We got the figure of £200,000 by referencing the percentage of cases in which RDCOs in England and Wales ended up in recovery. We then applied to the Northern Ireland expenditure the percentage recovered against the total criminal legal aid bill in Crown Court cases , and it came out at £225,000. We netted off a bit for administration costs, hence the round figure of £200,000. We assume that our Crown Court judges will be as strict or as generous as those in England and Wales. In England and Wales, we found that Crown Court judges tended either not to impose the full penalty or, in many cases, imposed a penalty of zero if they felt that a defendant's personal circumstances deserved it. So we are trying to feed into that calculation what Crown Court judges might actually do when a recovery of defence costs order is sought. That is another reason why the Legal Service Commission will not go after cases in which somebody is marginally within the threshold for recovery.

The Chairperson: There is a public outcry when legal aid, which is funded by the taxpayer, goes to someone found to have assets way in excess of the legal aid bill. Despite that person being found guilty, there is no means to recover the money.

Mr Crawford: Absolutely.

The Chairperson: How will the judiciary make a judgement? Do they have guidelines stating that 100% or 50% of the cost should be recovered? Do you issue guidance to them on the framework within which they have to operate?

Mr Crawford: Any guidance that we issue will be in the rules. As we suggested, there will be the facility for a judge to consider whether particular circumstances might lead to a different amount, or indeed

nothing, being recovered. Hardship is a specific criterion. We have to look at the family assets to prevent people from dispersing their assets into another name. So, for example, it could be that a defendant is apparently able to pay appears in court but is going to prison. In that case, the income earner will not be available, so the family will have no income. Although the person's assets at the time might be enough to trigger an RDCO, the judge will take into account, should take into account and will, I am sure, be asked to take into account by the defendant, the impact of an order on his or her family.

We suggest a provision for not calculating all of the family assets, for example, something in a defendant's wife or husband's name when there is a contrary interest. Should there be a family dispute in which one party suffers grievous bodily harm and has assets clearly in his or her name, the judge would make a judgement on how much should be considered for a recovery of defence costs order. That is important, because it would be inappropriate for the victim's assets to fund the cost of the defence team.

Such factors are largely why we have not put detailed criteria into the rules: every individual case will be different, which is how the system operated in England. England and Wales moved away from this system but only because they introduced fixed means tests for criminal legal aid. As we told the Committee last year, we felt that there were more difficulties with fixed means tests than with RDCOs. We are going after the cases in which money clearly should be paid back, rather than those in which it might just be possible for it to be paid back. With the introduction of universal credit in 2013, fixed means tests will become much more complicated and a lot more administratively expensive. RDCOs will be in place to cover cases about which people are really concerned.

Mr Weir: Thank you, Robert, for a very informative presentation. I am keen that your paper at least goes out to consultation. It will be interesting to see whether changes will be required when the consultation responses have been received. You said that RDCOs would apply to recovery in Crown Court cases but not Magistrates' Courts . Will you clarify the reasoning behind that? Is that down to a cost-benefit analysis that, from an administrative point of view, you would be chasing up relatively small amounts of money on the Magistrates' Court side, which would not be of benefit? Is there a public policy element to that? From a purely justice point of view, I can appreciate that, in the more high-profile Crown Court cases, some annoyance will be caused when someone who receives legal aid secretly has a lot of money stashed away. From the point of view of fairness, the public may still be somewhat annoyed by such cases in a Magistrates' Court, although those will involve much less cost to the public purse. Is the reason for concentrating recovery orders on Crown Courts essentially one of cost and administration?

Mr Crawford: That is precisely it. The average cost in a Magistrates' Court case is just below £1,000 compared with the £10,000 average in a Crown Court case. So it simply comes down to the scale of expenditure needed: the cost of an order in a Crown Court case would be the same as that in a Magistrates' Court case. The level of expenditure and the administrative expense of chasing those cases meant that it did not make sense to recover small sums of money in individual cases.

Mr Weir: The other practical issue that I wanted to check was this: the hurdles to be overcome are conviction and sufficient means, but at what point are "sufficient means" determined? Obviously, the application or investigation starts at a particular point, but is that at the point of conviction or when legal aid is granted? Let me give you an example: you mentioned family assets, and I know of a case in Bangor in which someone, who did not have a very strong case and looked as though he had no money at all, was being bankrolled by a member of his family. Subsequently, that family member died, and the person came into a lot of money. What is the trigger point for sufficient means for recovery?

Mr Crawford: The recovery cannot be triggered until conviction, because the order cannot be made unless the person is convicted. We want the commission to have the power to begin a financial investigation prior to that. That is because, in some cases that we identified, assets can be moved if there is any expectation of conviction and having to pay.

Mr Weir: What about the assessment of sufficient means? Is that made at the time of conviction or the granting of legal aid? Let me give you an extreme example of have someone who does not have a great deal of money, genuinely qualifies for legal aid, but is clearly guilty of a criminal offence. Let us

say that, between getting legal aid and the day of his conviction, his lottery numbers come up, and, potentially, he has £10 million in the bank. However, because legal aid has been granted, that may or may not become publicly apparent at the time of his conviction.

Mr Crawford: For the RDCO, it is at the point of conviction. However, if that happened, even without an RDCO in place, in theory, the Legal Services Commission has the power now to recalculate the financial means of the defendant. If that happened, the defendant should be subject to financial calculation, and he would perhaps be asked pay for his own legal aid. In practice, it has not operated that way.

Mr Weir: It is all about where the line falls. Take that example of someone who has been convicted but then wins the lottery. If lucky enough to win the lottery the week after his or her conviction, presumably he is beyond the scope of the commission?

Mr Crawford: It will depend on when the decision is taken. The commission will decide very quickly after a conviction whether to bring an RDCO. I am confident that we will ensure that the commission will not have to reopen a file just because someone comes into a lot of money six months later.

Mr Weir: There has been a change in circumstances in that case.

Mr Crawford: That is a good point. We will ensure that there is a time limit from conviction for proceedings to begin for an RDCO. That might be a way of approaching it.

Mr Weir: As I said, I am more concerned about a situation in which someone's circumstances change for the better after receiving legal aid. That person is able to escape with legal aid when there is no reason for him or her to get it. However, if the process is to be refined into an administrative process, we need absolute clarity on that. Apart from anything else, it may prevent a situation arising in which an application for an order is made but the judge rules that such and such cannot be done because of the timescale.

Mr Crawford: Essentially, the facts at the point at which the judge takes the decision are what matter, because that is when the judge must inform himself and decide whether to grant the order. That is the absolute point at which the decision is taken.

Mr Wells: I am a bit surprised that you would recoup only £10,000 in a case such as that of Colin Howell. Surely that cost an awful lot more?

Mr Crawford: That is what we paid, or estimated, to date. I am not convinced that we have all the bills in yet. Those figures are for what we could have done today.

Mr Wells: I must be employing the wrong barristers. I paid just under half of that for one road traffic offence. *[Laughter.]*

Mr B McCrea: The Committee is basing this on your criminal career, Jim. *[Laughter.]*

Mr Wells: The Howell case was a high-profile case that went on for weeks and weeks. How can it possibly be the case that the defence cost only £10,000?

Mr Crawford: I did not say that it did. In that case, I think that we said that it was £65,000 or £70,000.

Mr Wells: I cannot even believe that to be right.

Mr Crawford: My colleague has just reminded me that it involved a guilty plea; there was not a contest.

Mr Wells: Therefore, the cost was only £65,000?

Mr Crawford: Yes.

Mr Wells: Even though it went on and on?

Mr Crawford: Following a guilty plea, there are sentencing meetings, and so on, to be paid for.

Mr John Halliday (Northern Ireland Courts and Tribunals Service): You are maybe thinking of the Hazel Stewart case.

Mr Weir: Yes; it was her case, rather than that of Colin Howell, that went on and on.

Mr Crawford: Not all of the bills for that case are in yet.

Mr Wells: You have been quite defensive. With a projected saving of £250,000, it is hardly worth the effort. That is absolute peanuts compared with the overall bill; it is a tiny proportion of what you pay out.

Mr Crawford: There are several points. It is worth it because the cost of £50,000 and the estimated recovery of £250,000 show a net gain — that has to be worth it. Given that we are in deficit, anything that produces savings has to be worth the effort. Also, the principle behind the measure is to try to get closer to the principle that legal aid pays for the defence costs of defendants who cannot afford to pay them. It is not a perfect solution by any means, but it helps us towards that by at least looking at the most expensive cases and most wealthy clients.

Mr Wells: It is not part of the punishment. A judge does not give a defendant six years, a £10,000 fine and then say that the cost will be recouped, so why is the judge required to make the decision? Why is a table not drawn up so that folk in the Courts and Tribunals Service can say that Mr Smith has assets of £500,000, which triggers a figure of such-and-such to be recouped and it just goes ahead? Why is the judge being asked to intervene at all?

Mr Crawford: Getting access to somebody's property requires a court order to trigger enforcement action to seize that property, if required, or to access a bank account, and so on. That is where that comes in. If we did it the other way, it would be through a means test that would simply require the person to pay the money based on their means as the case proceeded. As the Committee will know, we are looking at that, but we are less in favour of that than the RDCO proposal.

Mr Wells: The judge should be required to give the order to seize the property, but the actual assessment of what should be seized should be left up to the Courts and Tribunals Service. Why should the judge, after a long case in which he has perhaps given a ruling of many pages, have to work out what should be seized?

Mr Crawford: The details of the cost of the case will be provided by the commission. It will detail the claim and the legal aid bill as far as it knows, or it will make an estimate if some claims have not been submitted. The judge will have that information. It is important that the judge has the flexibility to take into account individual circumstances; in particular, perhaps, the needs of a convicted defendant's family. It may be inappropriate to deprive the family of money that they require when the defendant goes to prison, particularly if he or she is the only breadwinner. That kind of judgement should be left to a judge rather than the Legal Services Commission.

Mr Wells: If there is £100,000 equity in the house but another relative, such as a wife or a child, lives in the house, is that the sort of circumstance in which you may deem it inappropriate to include that as part of the assets?

Mr Crawford: I believe that a judge would make the decision that that would be inappropriate. We have to include family property to prevent the very simple avoidance of an RDCO by moving property to another name. At the same time, that is why a judge should consider how much should be paid. If it is a family home, it is quite likely that the judge will decide that nothing be taken from the equity and that only the assets or finance available to the individual should be considered.

Mr Wells: Would a pension fund be part of the assets?

Mr Crawford: Pension funds can be considered to be part of the assets, but there would be a question for the judge about whether he should touch that, again depending on who was likely to benefit from it in the period in which a convicted defendant was in prison.

Mr Wells: Would the normal rule, which is that they would have had to have moved assets to another name for three years before the case, apply?

Mr Crawford: We have not specified that in the draft rules at present, but we are looking at a power of the commission to freeze assets at any point after the case begins. So it is not so much three years but more in the course of the case, when the commission feels that it has cause to carry out an investigation into somebody's means and to prevent assets being shifted, perhaps out of the country.

Mr Wells: If a criminal who believes that the police are on to him and that he is likely to be arrested decides to sign over all his property to his wife or brother, he could get away with that provided that he had not been charged.

Mr Crawford: Again, we need to look into the rules to see what scope and flexibility there is for an extension to cover that situation. We have not included a specific time limit; we have simply given the commission the power to go after the assets.

Mr Wells: In a civil case, if an asset has not been moved within the three years —

Mr Crawford: If, by the time that the commission knows about a legal aid application, the assets are not available to the individual, the commission may have no reason to investigate his financial means anyway because he will not have any.

Mr Wells: Given the track record of some of those individuals, they will arrange their affairs in an appropriate manner to reduce any prospect of their having to pay back their costs. That strikes me as an absolute loophole: if they can do so a week before being charged, they will. Some of those guys will know that the game is up and they will do, or be advised to do, that.

Mr Crawford: We want to discuss such matters with folks in the Serious Organised Crime Agency (SOCA) and the PSNI because they have confiscation powers as well. I would be very happy to pursue that when we talk to them as part of our consultation.

Mr Wells: There was a famous case in north Down of a drug dealer who had four houses in plush north Down, hundreds of thousands of pounds and received weekly incapacity benefit of £80. Technically speaking —

Mr Weir: Did he not end up getting shot dead, though?

Mr Wells: Well, yes, but the court did not know what would happen. The fact was that he did not lose any of those assets.

Mr Weir: That was the least of his problems.

Mr Wells: The problem was that the state, the Court Service, paid out a fortune for his costs.

Mr Crawford: We suggest that any property moved into the name of a partner or family company, firm or organisation — essentially to anywhere that can be traced to that individual and appears to have been moved in expectation of going to court — will be accessible to the commission. What we have not done, perhaps, is deal with the practical difficulty in that the commission may not learn of its being moved until after a case has begun. It may be unreasonable for the commission to go back too far, but we will look at that point.

Mr Wells: If you applied the same rule as in civil cases, namely that it the asset would have had to be moved three years before the event, there would be no grey areas and no doubt.

Mr Crawford: We could certainly look at that.

Mr Wells: It is unlikely that he was aware that he was going to be caught three years before the event. You have to look at that because you deal with guys who are very devious and very intelligent.

Mr Crawford: OK. That is a good point. We did not look at a specific time limit, but we will do so.

Mr B McCrea: I am mindful of the advice that Mr Wells gave to all of us who are in public office at the last meeting.

Mr Wells: Sign it all over to the wife.

Mr B McCrea: Helpfully, he has just repeated that advice. It is not that I am unsympathetic to the issue that you are trying to tackle but the more you say, the more concerned I become. Is there a problem with the financial means test for legal aid?

Mr Crawford: At the moment, the financial means test for legal aid depends on a judge's determining whether the accused has sufficient means to pay for his or her defence. In practice, other than passporting — if somebody is on benefit, that test is automatically assumed to be met — there is no detailed assessment of an individual's circumstances in most cases, unless, as has happened in some cases, the Legal Services Commission or the judge causes that to happen. However, that happens in a minority of cases. There is not a problem with the test in the sense that the judge has the discretion to do that.

Mr B McCrea: After what you just said to me, I think that there is a problem with the test You said that the assessment is hardly ever done and that legal aid is automatically granted only when someone is on benefits.

Mr Crawford: That takes us into a debate on whether there should be a fixed means test. We have taken the power to introduce that through the Justice Act, and perhaps later this year, we may bring forward proposals on that. In previous briefings to the Committee, we pointed out that the associated administration costs could be quite significant, and we questioned whether those made it worthwhile. The introduction of universal credit could make those administration costs even more difficult. However, that is almost a separate discussion because it is about a fixed means test rather than about recovery of defence costs orders.

Mr B McCrea: I noted that your introductory statement referred to issues that you had with fixed means tests. However, as I listened to the potential problems, I was not sure whether it is right, as a matter of justice, to go after the assets of the family, for example, who may or may not be innocent. You gave an example of crimes against a member of the family and said that caveats would have to be inserted. The more you start putting in caveats and rules, the more concerned I become. Bearing in mind that you talking about a figure of only around £250,000, I think that this is starting to look like an awfully complicated solution for a relatively modest benefit.

Mr Crawford: In some ways, it may seem like that, but it may not be so in the majority of cases. The reason that we have to include the consideration of family property is to avoid the evasion of an RDCO by transferring property into another name. Similarly, that is why we brought in the company element. It is not as though we will examine someone's company's assets to decide whether they should be subject to an RDCO, but we will seek to find out whether they have moved property into the company name to avoid having to pay legal aid. The point about the alternative to RDCOs of a fixed means test, and we are considering both, is that it was less attractive when we consulted last year, partly because of the administration costs and partly because of the potential for a larger number of people to be affected.

Mr B McCrea: I am not a lawyer, so it is probably not right for me to comment, but it appears to me that you are engaging certain fundamental rights. Your statement says that you are not impinging on article 6(3)(c) of the schedule to the Human Rights Act 1998. Fundamentally, however, people are entitled to legal aid if they do not have the means to pay. A judge will determine eligibility at the financial means test stage, and then, at some date, somebody else will say retrospectively that that was wrong. However, your argument was that, if that turns out to be wrong, you can claim it back

anyway. My thinking is that we are doing an awful lot of work to do something that we already have the powers to do. I am not quite sure that it is as simple an in-and-out type of operation as you hope for.

Mr Crawford: We have acknowledged that the current means test does not work perfectly; otherwise, we would not have proposals to take the power to change that. Our point is that the RDCO is a way of getting at a small number of cases in which the expense may be considerable and the individual concerned quite wealthy. It is an alternative to introducing a comprehensive means test, which would require the means testing of every single application other than those currently passported for benefits. As I said, the introduction of universal credit in October 2013 will make that passporting option a lot more difficult. Although we are still considering a fixed means test, it looks difficult, whereas the RDCO is certainly achievable.

Our point is that a person's circumstances can change. I will give you an example of a case to which RDCOs would apply, but even a review of the legal aid eligibility would not. An individual might contest ownership, or ever having access to, certain property because such an admission would mean being found guilty of the crime — the point being that he or she acquired the property illegally. If the case against the individual was successful, the circumstances would change significantly. At that point, the only way of getting back the cost when the case was over would be through a recovery of defence costs order, because legal aid will already have been granted and paid.

Mr B McCrea: What happens in such a case when the family, who are innocent and not involved, live in the house and have rights of residence?

Mr Crawford: In such a case, we suggest that the judge is required to be the person who takes the decision on the order and determines how much should be paid. We want to avoid creating hardship for family members, who may, as you point out, be completely innocent of any crime or even any knowledge of a crime and, therefore, should not be punished. We are trying to avoid individuals having hundreds of thousands of pounds under their control moved into a family name just to avoid having to pay their defence costs.

Mr B McCrea: You talk about hundreds of thousands of pounds, but your total estimated recovery is £250,000.

Mr Crawford: We can recover only the cost of the case, and there would be a small number of such cases. We will not take all of the person's assets. An individual with several hundred thousand pounds can be liable only for the total cost of his or her case.

Mr B McCrea: As you said, all you are asking for is to go to consultation. I will be surprised if that process does not highlight more difficulties than those that we anticipate. In your evidence, you said that the order might be appropriate for areas in which people had profited from their crime, such as drugs-related crime. Is that not dealt with through other agencies in other ways? It used to be dealt with by the Assets Recovery Agency. I do not know what that is called these days.

Mr Crawford: It has been absorbed into the Serious Organised Crime Agency. There are two good arguments for having the RDCO power as well, and the two do not conflict with each other. The first argument is that the person may have assets that will not be subject to a confiscation order under the Proceeds of Crime Act 2002. In other words, there would still be honest assets that could pay for their legal aid defence. The point that I read out from the access to justice review is relevant to the second argument. Where assets are thought to be substantially or all from the proceeds of illegality, we would still like to have the power to go in to get the first take on those assets. That is because that money comes back to us in Northern Ireland by way of the legal aid fund, whereas Serious Organised Crime Agency recoveries usually go back to the Treasury, with only a proportion coming back to us. In that circumstance, we would rather have all of the legal aid costs than have another agency give us part of those back. It is better ifor it to be in the Northern Ireland piggy bank, as it were.

Mr McCartney: Where does the focus lie in determining which case should be addressed?

Mr Crawford: In the first instance, it lies with the commission. In the public consultation, we want to hear people's views on the determining criteria, because those can either be statutory or written in the

form of guidance, perhaps issued by the Minister, to the Legal Services Commission on the circumstances in which it would seek to recover. The powers in the rules may be quite flexible, but the guidance can narrow that flexibility and then be updated or adjusted as circumstances change. For example, we will start off with a list of benefits to be used as a reason for not pursuing a recovery of defence costs order. We set those out in the rules, but they will change, for example, with the introduction of universal credit or over time. Without having constant changes to its rules, the guidance can be updated to inform the Legal Services Commission that we have discovered a circumstance in which we do not believe it appropriate to seek a recovery of defence costs order.

We are open to guidance from the Committee and others. We may set a threshold in the rules that specifies £22,000, or whatever, as a threshold of income below which no order should be sought. However, we might, initially, give guidance to the commission that we want the RDCO to bite against people who have more assets than that and set in guidance a different level that could then be varied with experience. That option is open to us and is one that we want to look at.

Mr McCartney: Will that be based on the nature of the case?

Mr Crawford: The nature of the case is not the primary concern. In cases of acquisitive crime — fraud, drug-dealing, and so on — it is more likely that the person will have assets that the commission might be interested in pursuing. Although we have not built it into the proposal as such, our view is that in cases in which there is to be the recovery of illegal assets anyway, recovery of defence costs orders should be sought so that the money comes back into the legal aid fund and helps other people.

Mr McCartney: If it is so obvious, why does the current legislation on asset seizure not kick in?

Mr Crawford: In the present legislation, asset recovery can apply only to assets acquired illegally. The first distinction in the case of RDCOs is that assets acquired honestly can be used to pay for somebody's defence costs. The second distinction is that we would still want to use the recovery of defence costs orders in a case involving illegal assets to ensure that money went back specifically into the legal aid fund, rather than it going to the Treasury and coming back only in part to Northern Ireland.

Mr McCartney: If that were potentially to happen, could someone opt out of the Crown Court, go to a Magistrates' Court and then —

Mr Crawford: That option will exist, but only in certain cases in which people have the option of being tried either way. Certain cases must go to the Crown Court, and that is where they go.

Ms J McCann: You answered some of my question when you replied to Raymond and Basil. I have a concern: did you say that the figures involved are an income of £22,000 and £3,000 of assets?

Mr Crawford: Only above £22,000 could a recovery of defence costs order be sought. That is our illustrative figure in the draft rules.

Ms J McCann: If we exclude people who profit from crime, such as drug dealers and people traffickers, £22,000 is not a huge amount of money to earn in a year, and a threshold of £3,000 in assets is not particularly high. My first concern is for people's access to justice. People who are innocent and just over the threshold might decide not to fight their case because they cannot afford to pay back the legal costs should they be found guilty. They would not have the access to justice that everyone should have. Do you know what I mean?

My second concern has been highlighted. Families who are totally innocent of any crime would be punished because of one member of the family. You talked about equity. If the partner and children of a convicted person are living in a house and have no idea that a member of their family is involved in crime, why should they be punished by having to sell their home to pay the legal costs? You said that the RDCO would affect only a small number of people and that you will specifically target drug dealers, and so on, but I am concerned that it might affect people outside that bracket. How can you safeguard an innocent person who does not want to go down the road of fighting a case because his or her family would be left with no home?

Mr Crawford: I will deal with your second point first. The first fundamental point is that we do not want to impose hardship on anyone other than the person who has to pay the costs of his or her defence. However, to avoid evasion, we have to take into consideration family property . As the draft rules sit, and they are the first draft and subject to consultation, we include a specific power for the judge not to issue an order at all if there is a question of undue hardship. That can apply to the family or to anyone who would thereby suffer. Secondly, a judge can look at the property and assets and make a judgement that the convicted person has his or her own bank account containing, say, £50,000, to which the family never had access and from which nothing was spent on family outgoings. In those circumstances, the judge might say that it is fairer to take the £50,000 because that has never been of any help to the family, is never used for family outgoings, exists offshore, or whatever. The family home should not be counted as part of the calculation. That is why we included the point about home equity. If, for example, a family home's mortgage has not been paid down very much, it will not count at all as part of the asset. We tried to build in those protections to do precisely what you seek. We are a long way from deciding the final levels. Again, it is about not just the levels of incomes and assets, it may be about family circumstances, a point on which we really want guidance from the consultation.

The consultation paper contains rather less by way of detail than normal, because we want to hear from the various groups, organisations, political parties and the third sector. They can tell us about any problems that we have not foreseen, and we can build in those considerations. All I can say is that we understand your point and tried to cover some of it in the draft rules, but we are very aware that we are probably not there yet.

Ms J McCann: What about access to justice? Is there not a presumption of innocence?

Mr Crawford: Yes, there is. The point about legal aid is that there is a means test. Legal aid, in principle, is meant to be available to those who cannot afford to pay for their defence. In practice, it goes to many more people, including people who could afford to pay. We are looking at those who can most afford to pay for their defence, rather than at the argument for a comprehensive fixed means test, which is a separate position.

Ms J McCann: Can you not foresee a scenario in which people who are genuinely innocent decide against getting a barrister because, although they are on the threshold and can get legal aid, if convicted, they would be just above that threshold?

Mr Crawford: That would apply whatever threshold was set. There will always be somebody just outside it. The one protection would be to lift the threshold. For the sake of illustration, we have included the figures that applied previously in England and Wales. We found that only 0·06%, a tiny percentage of legal aid expenditure, was actually recovered. In many cases, judges said that it was right to make a recovery of defence costs order but the figure that the person was required to pay back was zero because of the family's circumstances. We are trying to mirror that protection. We are very open to a debate on what that figure should be and to protections. Really, we have tried to write the family home out of consideration as much as possible while avoiding the facility to transfer funds.

Ms J McCann: I think that it is very important to include one more point. Sometimes, family members might be the victims of the crime, which requires some safeguards to be built in.

Mr Crawford: I am very glad that you mentioned that. One point that I forgot to make in my presentation was that the family assets are not counted in a case in which any member of the family has a contrary interest. If there is an incident of domestic violence and a serious crime arising out of that leads to a Crown Court hearing, the assets of the rest of the family do not count. The RDCO would apply only to the personal assets of the individual charged. That is already in the draft rule, and we are happy to look at strengthening it should we need to.

Mr S Anderson: Most of my points have been touched on, but let me go back to the seizing of assets and property, Robert. What property is considered as part of the recovery of defence costs? I am thinking of a fairly number of high-profile cases in which property was outside the jurisdiction of Northern Ireland. How do you propose to deal with that? It is OK to say that a £100,000 property or a family property should not be touched, but there could be another six properties a few miles up the

road that are outside the jurisdiction. People might be asset rich but, as far as the family home is concerned, they are OK. Is there any way of dealing with that?

Mr Crawford: There is. In fact, at the moment, the only powers available are to ask the police to seek a confiscation order, which is a freezing of assets order to bring those assets back into the jurisdiction or to prevent them from being disposed of. A case of fraud against the Legal Services Commission is running at the moment. The commission requested that the police take that forward. Therefore, the police must do so, but, as yet, have not been successful. Those are the current powers. However, we suggest the inclusion of all property in RDCOs, including property outside the jurisdiction. We would then need to seek appropriate orders to have property repatriated as part of the enforcement of the recovery of defence costs order. The order would sit on all the property, and it would be up to the commission to seek to identify whether certain property needed to be brought back into the jurisdiction. In the case of organised crime, that would almost always be a part of the process, because there would be a search to see what had gone outside the jurisdiction.

Mr S Anderson: I was concerned about the kind of stories that we hear about in the media. People are concerned about the cost of defence when a lot of property and other assets are sitting here, there and everywhere.

Mr Crawford: The cases that we looked at as being the likeliest candidates for recovery of defence costs orders were not the high-profile cases that people are familiar with. They were cases of financial crime because the we want to go after those who have profited. We are looking not for the person who has fallen foul of the law, albeit in a serious offence category, and does not have significant means, but for the people with very significant means.

Mr Dickson: Thank you for your helpful presentation. When it comes to you and SOCA, is there a hierarchy of recovery? In other words, where do you get the right to claim back your money first?

Mr Crawford: This consultation does not cover that. We need to pursue that separately, but I am encouraged by colleagues in the Department who have said that those agencies want to talk to us because they are afraid that they might lose some money through our orders kicking in first. We want to create a situation in which that gets placed on property. The public defence order creates the first charge on the property.

Mr Dickson: That issue is not lost sight of in these papers.

Mr Crawford: It is not in the current draft of the rules attached to this paper, because the consultation is rather more about the impact. However, we want to have that built in.

Mr A Maginness: I agree entirely with the main thrust of the proposition. It is necessary to have a strong protection for families, spouses, partners and children. I understand the issue of avoidance or evasion, but you must have a foolproof system for protecting children in particular. If the only asset is the family home, there must be a presumption that it is protected. If you were to sell the family home, it would cause all sorts of problems for dependants and create a greater injustice than the one that you are trying to remedy.

Mr Crawford: I will take that on board. I want to emphasise that it is not the family home that we are after; it is other properties.

The Chairperson: Thank you very much. The officials have heard the points made by the Committee. Are members content that the matter goes out to consultation and comes back to the Committee in due course?

Members indicated assent.