Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Review of Access to Justice Arrangements: Ministerial Response

21 June 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 Tom Elliott
Mr Seán Lynch
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr David Ford	Minister of Justice
Mr Robert Crawford	Department of Justice
Mr David Lavery	Department of Justice
Mr Mark McGuicken	Department of Justice

The Chairperson: I welcome the Minister of Justice, David Ford; David Lavery, the director of the access to justice directorate; Robert Crawford, deputy director, access to justice directorate; and Mark McGuicken from the public legal services division. The meeting will be recorded by Hansard and published in due course. I hand over to the Minister.

Mr Ford (The Minister of Justice): Thank you very much, Chairperson. I do not need to introduce the team as you have done it so adequately. We have provided the Committee with a paper that sets out my response to each of the recommendations in the access to justice review. That paper also includes a summary of the consultation responses received so that the Committee can see clearly where I have responded to the points made in the consultation. I have also provided the Committee with a copy of my proposed departmental action plan, which sets out a comprehensive programme of reform that we will take forward over the next three years.

My overall objective throughout all these reforms will be to ensure that we have a justice system that works well for everyone, and where those who need help, including financial help, get appropriate assistance. Therefore, I set three strategic objectives for reform: improvements in access to justice where I think that we can do better; bringing legal aid expenditure within budget where we have to make more savings; and improving governance where I want to ensure that we get value for taxpayers' money and that there is proper accountability for how that money is spent.

Since inheriting responsibility for justice functions, I have emphasised the need to devise a justice system that meets the needs of the people of Northern Ireland; no longer will Northern Ireland simply copy and paste what has been introduced in England and Wales without any assessment of its

suitability to this jurisdiction. I am grateful to the Committee for its support for this approach, and I am pleased that the access to justice review made important recommendations that will help my Department to achieve that aim. My reforms are intended to provide the best solutions for Northern Ireland within the constraints of the tight financial situation and the need to deliver value for money. There are 19 projects in the action plan with the objective of promoting access to justice. The Committee might find it helpful if I were to comment on a few of the projects that the Department will prioritise.

One of my top priorities since becoming Justice Minister has been to speed up justice. I have called on senior leaders across the justice sector to work together, supported by the Department, to tackle this long-term problem. The access to justice review is one of several independent reviews that have highlighted the issue of delay in the justice system, and I am happy to take on board its recommendation that we should examine the causes of delay, including whether there are aspects of our legal aid system that are generating perverse incentives and contributing to delay. Once that project is delivered, I will also explore whether there are lessons to be learned for the civil justice system. My officials will brief you later on the detail of our work in that area.

The access to justice review made recommendations for promoting and supporting alternative approaches to the resolution of disputes. As I have said on many occasions, I support strongly the examination of any alternatives that can avoid court proceedings that may be lengthy and costly and, in some cases, even harmful to those involved. However, this is a complex area, and the first project will, therefore, be a comprehensive mapping exercise to establish what is already happening. We will then look at ways in which alternative dispute resolutions may be supported, while ensuring value for money.

Another important project to improve access to justice is the project to research the legal needs of children and young people. Although we already have quite good information regarding the legal needs of adults, I do not think that we have adequate information on the needs of children, which may not be the same as adults. The important research will establish whether there are areas where we can improve access to justice, specifically for our children and young people.

Since devolution, my Department and the Committee have given considerable attention to the role of the legal profession and the level of representation that people receive for proceedings in court. One area that has received less attention is the role played by expert witnesses in all types of court proceedings. I am, therefore, pleased to highlight that the expert witness project in the action plan is one of the top priorities. That project will not simply look at the cost of expert witnesses but will go further and examine issues regarding quality, including how their use might contribute to speeding up the justice programme.

The action plan also includes projects for the development of a mixed model for the delivery of advice and assistance, and to develop partnerships with the advice and voluntary sector. I am pleased to advise the Committee that my Department has already commenced work in that area by entering into a contract with the Housing Rights Service to deliver advice and assistance to people at risk of losing their home. This pilot project will provide valuable lessons about how the Department could work in partnership with the voluntary sector in the provision of advice in specialist areas.

The Committee will note that another priority project will be to consider how a review of the operation of the family justice system could be taken forward. Although there has been a review of family justice in England and Wales, I will not assume that its conclusions and recommendations provide the right solution for this jurisdiction. Once the scoping exercise is complete, I will inform the Committee of its findings.

Members know of the need to tackle the increasing expenditure on legal aid and get it under control. To date, I have introduced changes that will save more than £20 million from criminal legal aid. I am grateful to the Committee for its assistance. The 'Access To Justice Review Northern Ireland' made several recommendations in that area. As set out in the action plan, work has already begun on projects to achieve the necessary savings. Good progress has been made. For example, the Committee recently considered my proposal to introduce a power for the Legal Services Commission to obtain recovery of defence cost orders. I plan to make the necessary rules before recess so that they come into force at the beginning of October.

There is, however, more to do. The action plan sets out what I propose to do over the next three years, including projects intended to deliver almost £8 million in further annual savings from civil legal aid. That will bring total legal aid expenditure within budget, and, in the absence of any unforeseen

delay, this objective will be achieved by March 2015. The projects in the plan include the development of a new remuneration scheme for civil legal aid. There are deficiencies in the current arrangements, including very limited use of standard fees and a lack of proper governance controls. Introducing a new approach to remuneration in civil legal aid and drawing on the experience of the changes that we have already delivered in the criminal legal aid area could deliver annual savings of some £4 million.

I plan to introduce new criteria for the funding of legal representation in legally aided civil cases so that legal aid funding is provided only where such representation is necessary and for the level of representation that is appropriate. Those changes should reduce the number of counsel paid by legal aid in such cases and deliver some £3 million in annual savings.

I am considering changes to the availability of legal aid funding for what are known as money damages cases. Such cases include claims for compensation from Departments, examples of which are tripping claims and medical negligence claims. I believe that we can find a better way of providing legal assistance in many such cases. The Legal Services Commission has consulted the legal profession about an alternative approach. I anticipate that changes in that area should deliver savings of up to £1 million each year. The savings figures that I have just provided are for each individual project. The total savings amount to a further £8 million each year from civil legal aid.

Another key area in which improvement is needed is accountability. Shortcomings in the governance arrangements for legal aid have quite understandably drawn criticism from the Northern Ireland Audit Office, the Public Accounts Committee and, indeed, members of this Committee. New governance arrangements for legal aid were introduced shortly after I took up office. The new rules for legal aid in Crown Court cases introduced in April 2011 made significant improvements in accountability by removing the separate arrangements for very high cost cases (VHCCs). I have also introduced new criteria for funding counsel in Crown Court cases, which will reduce significantly the number of cases in which more than one counsel is funded by legal aid. The Legal Services Commission has significantly tightened its scrutiny of claims by reviewing the very high cost case assessments undertaken by the taxing master; revoking VHCC certificates for non co-operation; imposing sanctions on the late submission of bills; and, most recently, by calling for case papers in respect of a sample of individual claims to support the assessment process.

I intend to improve the governance arrangements for civil legal aid and address the recommendations in the PAC report. My proposed changes to the remuneration arrangements for civil legal aid will, in addition to delivering savings, bring in new and effective accountability arrangements to address similar problems to those that have been addressed already in criminal legal aid. The Legal Services Commission is already working to improve tackling potential fraud, and a number of cases have been referred to the police. The commission implemented new arrangements for sampling claims earlier this month, which should give it a much better understanding of the potential for fraud.

I plan to introduce a compulsory registration scheme for legal representatives who wish to take on work paid through legal aid. That scheme will include new requirements relating to the maintenance and inspection of records. I intend that it should be supported by a new power for the commission to enter premises to inspect solicitors' and barristers' records. The necessary provision for this will be included in the Faster Fairer Justice Bill. I would very much welcome ideas and comments from the Committee as I take the work forward, and I am happy to take any questions that the Committee may have.

The Chairperson: Minister, thank you very much. It is a very detailed document, and we will need time to look at it. Perhaps I did not quite pick it up on the further plans for change with legal aid. It fits in to the issue of delay, which we will touch on with your permanent secretary later. It is to do with the fees structure. We are told that the standard fee that applies in Scotland has resulted in a dramatic increase in the number of early guilty pleas that are lodged. We still have a fees system here that results in a different and higher level of fee being paid to solicitors and barristers once someone contests. Dealing with that would go some way to encouraging earlier guilty pleas. Are there any plans, as part of the legal aid reform, to stop paying for delay?

Mr Ford: The simple answer is yes. Kenny MacAskill, my colleague in Edinburgh, would claim an improvement of about 40% in the numbers of early guilty pleas, so it is an issue that needs to be addressed. One of the 38 projects that is being driven forward as a result of this review, number 11 on the action plan, deals with the issue of reviewing the existing rules and giving consideration to a single fee for contests and guilty pleas. We are looking at doing some early research on that. The project for that is due to be completed next year, and it merits very detailed consideration because it

appears to have solved a significant part of Scotland's problems. We wish to learn from those lessons in Scotland.

The Chairperson: It seems to be an issue that has been raised with your Department for a considerable time now by people who are involved in cases. "Next year" does not express the urgency that may be needed in dealing with that issue.

Mr Ford: It is in the context of a very detailed report on access to justice with 150-odd recommendations, on two thirds of which we have action under way. I accept that we could pick out any of those where we would want action to have happened more quickly. Nothing has been recommended to this Department for more than two years. Issues may have been around in the offing previously, but it is reasonable to claim that we are making significantly more progress, having devoted a great deal of time, with the Committee's assistance, to dealing with the costs of criminal legal aid. The fact that we are now moving on to detailed work from the Crown Court going down to the magistrates' court, largely around early guilty pleas, and also looking at civil legal aid, is an indication that a programme of work started two years ago that is ongoing.

The Chairperson: Recommendation 38 comments that there are benefits in having criminal defence services provided, in the main, by private-sector legal practitioners. Can you elaborate on what exactly is meant there? Obviously, work was not being done during the strike, and, at the time, there was a threat of a public defender system. Does that recommendation hint at some kind of public-defence role being provided rather than by private-sector legal practitioners?

Mr Ford: A number of issues need to be considered both around the practicality of the way that the system works and around issues such as human rights considerations of having independent defence representation. By and large, our service of defence representation by independent legal professionals is probably the best way of ensuring that independence and covering the human rights aspects. Members will be aware that, as we finalised the proposals to deal with the difficulty when the so-called strike was on, there were real issues where we had to give serious consideration either to a contracting model or, potentially, even the employment of public defenders. At this stage, I am not keen to go to that area, but we need to keep options in that area under consideration.

Mr Weir: Thank you, Minister, it was very comprehensive in that regard. I will touch on three areas, starting with the Chair's point on legal aid. I mean, obviously, last year, we got into a degree of dispute over in many ways what I feel slightly the way things worked out an essentially unnecessary level of dispute because I think the gap between the two sides was not that great. You have mentioned obviously about the further changes you envisage, particularly in terms of civil legal aid and indeed other changes. To what extent have you got buy-in from the solicitors and barristers professions? Clearly, if we could get a situation in which the Department and the professions were moving in the same direction on this, it is something which would be helpful in that regard in terms of smoothly implementing.

Mr Ford: I will have to defer to David or Robert on buy-in since I have not been involved in any direct discussions on it. I accept entirely the point you make that there was a relatively modest gap. It did appear to me that, unfortunately, certain of those involved in criminal defence work exacerbated the scale of that gap and then realised it was not as bad as they were suggesting.

Mr Weir: I mean, just to be clear, I am not exonerating the Department on that side of it either completely. I mean, if there is a gap there and there is an agreement, you know, I mean, I am not going to be necessarily attributing where blame lay in relation to that. Objectively, we have got into a situation in which there was a relatively small gap, and the level of acrimony that built up over a period of time should not really have been there. I am wondering about the handling of implementation. Maybe David can explain.

Mr David Lavery (Department of Justice): The responses to the access to justice review from professional bodies and other stakeholders have been qualitatively different. We have tried to capture those for the convenience of the Committee in our ministerial response document. For each recommendation, you will see what the Bar Council has said and what the Law Society has said. The engagement so far has been with the review process rather than with us. This is the first time that we have really set out our programme of reform based on the access to justice review. This is an area where it should be possible to bring forward reform in a more constructive manner than proved possible on legal aid. Both of us remember the Campbell reforms on civil justice, which everybody

agreed with until you tried to implement them. I suppose that it will just take a bit of time. I think this is an area where it is just qualitatively different. The fact that they have already engaged very constructively with the review process is encouraging. They are certainly not manning the barricades, I do not think, this time.

Mr Weir: You mentioned the mapping exercise on alternative dispute resolution. Alternative dispute resolution can take slightly different forms and times. Although I think there is a lot of merit and value in alternative dispute resolution, one slight concern I have is that people sometimes have a slightly unrealistic expectation of what the outcome would be, if only their particular case was dealt with by alternative dispute resolution. After you have done the mapping exercise, is the intention to tailor a very specific programme to be piloted, or is too early a stage to say?

Mr Ford: It really is a bit early to say. There are a number of issues around alternative dispute resolution. Indeed, you will have seen the booklet that we produced last year, which showed a number of different areas of work being carried out in slightly different ways. We need to be clear that alternative dispute resolution is not necessarily going to save us significant sums of money. To me, there are real issues around the kind of relationships that emerge from relatively straightforward family concerns that end up in an adversarial system that can make matters worse. Those are the areas where we need to get better rather than cheaper results.

Mr Weir: The final point I want to touch on is a more general point on the very comprehensive departmental action plan. In the timescales, various milestones have been put in place. Has the Department worked out a benchmarking process to ensure the quality of delivery on particular implementation, and that what is being delivered meets that quality? It cannot just be that this has to happen by such and such a date in 2013. Is it being fully implemented on the quality side of it? What is your thinking around benchmarking?

Mr Ford: We have to acknowledge that, on one or two occasions, matters have slipped beyond an anticipated date to ensure that we got the quality right.

Mr Weir: In many regards, that is crucial. Although nobody wants to see slippage, it is important that the quality of change is there in what we get, rather than muddling through so that we can say we have ticked the box by 1 April in a particular year.

Mr Ford: That is not what I have got from my officials. Perhaps, David, you should talk about how projects are delivered.

Mr Lavery: Robert and Mark are the masters of the project delivery. However, we need to avoid a tick-box approach, because this is the first opportunity in a generation to do something about access to justice. We could tick the box on the scoping exercise for ADR and do things that improve nothing.

Mr Weir: I am talking about the wider context.

Mr Lavery: I understand. Robert might want to say something about how this is structured as a three-year delivery process.

Mr Crawford: First, on programme management, there will be a programme board drawing in officials across the relevant divisions, chaired by David. In addition, we would like to involve the LCJ's office in that, if they want to be involved, and any others who are relevant to particular projects.

Project quality will be largely managed at the project level. The benchmarking will be set of outcomes that can be measured in each project. When they go out to consultation, in addition to the impact assessment, and the equality impact assessment specifically, we will seek to set out those kinds of qualitative indicators as well. For example, it is very hard to say how we would improve access to justice or measure any detriment to access to justice. However, one of the measures being used as an example in many of these cases is monitoring whether the same percentage of people in the population is applying for legal aid and measuring the number of those who are eligible if we are looking at particular ways of changing financial eligibility for example, which is one of the projects.

I draw your attention specifically to the project and research into the legal needs of young people. That is an area where, as the Minister said, we do not believe we have the information to drive the qualitative analysis. In other words, we have no reason to believe that what is in place is wrong for

young people, but when it comes to outcomes we do not have enough information. That is an indicator of the kind of thing that we want to do and, if necessary, carry out more research on.

Mr Weir: Presumably, from what you have said, it will effectively be structured from a monitoring and benchmarking point of view at two levels. At the individual project level, and you mentioned a project team —

Mr Crawford: Programme board.

Mr Weir: That means it would be monitored and benchmarked at more of a holistic level across the board.

Mr Crawford: That is the idea of the programme board structure: to see how the projects join. Some will impact on others.

Mr Wells: Minister, your answer was very interesting — I do not know whether my question was interesting or not — about QCs' and solicitors' remuneration through legal aid. This is a fascinating document, and it is very interesting and helpful; it shows the sheer extent of the largesse under the former administration. Having looked at that, do you agree that you have room to be even more radical than the welcome steps you have taken, which have had popular support? If I was QC 'X' and was scraping by on £800,000 a year now, would I still be able to provide a first-rate service for my clients and give them legal justice if I had to scrape by on £600,000? Would I still be motivated to go out there and achieve the best for my client? I suspect that, on that sort of money, I probably would.

Your recommendations, when you add them all up, represent roughly a 20% saving that you hope to achieve. Is there not further scope to reduce the budget considerably more than even what you are suggesting in the action plan?

Mr Ford: Mr Wells is encouraging me to engage in his personal hobby of kicking QCs. *[Laughter.]* In fairness to those who engage in work that is funded by the legal aid budget, whether civil or criminal, we have to recognise that not all of them are earning £800,000 a year. In the hypothetical example that Jim gives, it might well be that somebody on £800,000 could survive on only £600,000. That could also mean that some people at the bottom end of the earnings ladder would be talking about getting by on £20,000 instead of £24,000 or £18,000 instead of £24,000.

Mr Wells: There were not too many on your list, Minister, who were getting by on £24,000 a year.

Mr Ford: With respect, when we published the list of the top 100, it did not reflect the position for many junior barristers and relatively junior solicitors who work in practices, because the global figures for solicitors' practice are there. Therefore although it is popular — nay, even populist — to kick those at the top of the tree, we need to recognise the reality. However, the direction of the reforms that we seek to implement is very much in line with what is being suggested. Unlike the position in England and Wales, we are not reducing access to justice; we are reducing the remuneration to lawyers. I believe that that is the correct approach. I am very concerned that we should not suggest that some of the changes going through in England and Wales at the moment, which will cut off people's rights to assistance in some areas, are the right way to move forward.

Mr Wells: During the hearing on the Public Accounts Committee's report, one explanation given for some of the stellar earnings was that bills that had stacked up from previous years had rolled into the next year. Your answer indicates that getting £600,000 to £800,000 a year was for some the norm. It was a clear and consistent pattern that could not be explained in that way. I ask again: how is it possible for anyone to earn that type of money under legal aid, given the amount of hours available and the number of days that courts sit?

Mr Ford: Robert will come in on the detail of that in a minute, but it seems to me that, under the arrangements that we have put in place since the devolution of justice, particularly the abolition of very high cost cases and the much closer examination by the taxing master of the bills submitted, make it difficult to see how people can submit that level of bill and have it paid. However, some will clearly earn significant sums because there will still be elements of that, but I do not think that we will be seeing the same levels. It is difficult to allocate earnings per given year, though, particularly when some cases go on for significantly longer than a year.

Mr Crawford: The Northern Ireland Audit Office report records the evidence given by the Court Service to the effect that there was a loophole in the drafting of the 2005 rules; that was partly fixed in 2009 and finally fixed in relation to VHCCs in 2011, with the complete removal of very high cost cases. That is where the problems that you referred to largely occurred; where it was possible to earn very large sums of money when, in fact, the intent behind the drafting of the legislation was that fees should be paid solely on the basis of hours worked and attendance at court. That problem was fixed in 2009, so it cannot recur.

The reduction in fees for very high cost cases was on the scale of 80%. That means that lawyers who earned their living primarily from such cases have seen their earnings reduced by 80% under the new standard fees system. Overall, in the Crown Court rules that came into force in April 2011, the line was drawn and the scale worked in a way that created a greater differential at the bottom between us and England and Wales, in that junior barristers and those at the lower end of cases — perhaps the less experienced lawyers — did rather better here than their counterparts in England and Wales. However, those at the upper end, in what would previously have been the very high cost case bracket, were cut substantially. Indeed, they are now down to, or in some cases just below, earnings in England and Wales.

We are saying that that problem should now have gone away, in the sense that the effect of those changes should be seen from this financial year onwards, and that will be reflected in a very significant fall in earnings for lawyers who previously earned a high proportion of their income from those cases. Those lawyers are, basically, the high earners that you talked about.

Mr Wells: Is this the first in a series of steps to bring the budget down, or is this it? Do you intend to come back with future action plans to bring the legal aid budget down further?

Mr Ford: The expectation is that what is proposed in this paper, alongside changes to civil legal aid and to the magistrates' courts, following on from the County Court changes, will bring us to the budget that was agreed on devolution of justice. However, we all know the pressures that budgets remain under. I am certainly not saying that that is the end of the road. Robert will, perhaps, flesh that out.

Mr Crawford: The problem in civil legal aid was not nearly as great as that which existed in very high cost cases. Some elements that were criticised by the Audit Office and the Public Accounts Committee remain, and we want to fix those. In addition, in some civil legal aid cases we think that representation is at an unnecessary level; in other words, barristers are in cases where they do not need to be, and perhaps there are two barristers in cases where they do not need to be. Just as has been done with criminal legal aid, we are looking at those areas where we think that the system is providing legal aid more generously than the client or defendant requires for their case. Taking those big areas out will, we believe, take out £7 million. A number of other areas that we have listed will take out perhaps another £1 million between them, and that should take us just below the legal aid budget.

The problem with cutting more deeply into the expenditure of legal aid is that the choices start to look more towards taking some types of case out of scope or reducing access —

Mr Wells: Or reducing fees.

Mr Crawford: Reducing fees is effectively part of this exercise. Project 24 looks at remuneration, and our estimate of savings there is £4 million per annum. It is similar to what was done with very high cost cases (VHCCs). It is essentially about replacing the system that allowed high-ish fees, although they are not as bad as VHCCs, with a standard fee-based system if we can achieve that, or at least an hourly rate that is much more sustainable and defensible. We believe that £4 million is a fairly significant saving to be made.

Mr Wells: After all that has been achieved, where will that leave the hourly rate? What will it be?

Mr Crawford: There is no hourly rate in criminal legal aid any more. The rates in civil legal aid are set by the taxing master, so this project will look at whether to have an hourly rate set by the Department or whether we can achieve a standard, fee-based system, although it is a more complex area in family law. I cannot give you the full answer today, because the project is only beginning.

Mr Wells: What is the current hourly rate?

Mr Crawford: On —

Mr Wells: On civil.

Mr Crawford: There is no — I do not know what the taxing master applies. It will be different depending on the type of case and level of barrister or solicitor. We could provide a brief for the Committee on it —

Mr Wells: What is the maximum hourly rate?

Mr Crawford: I simply do not know today, but it is less, I believe, than the hourly rate applied in very high cost cases.

Mr Wells: I think the reason for the reluctance is that the public will be shocked to hear what that is.

Mr Crawford: I think we can provide the information to the Committee; I just do not have that level of detail in front of me today.

Mr Ford: You are not being entirely fair on that point, Jim. A range of rates will be set depending on the qualifications and experience of the barrister and the type of case. They are set by the taxing master, not by the Department. The issue is that we are seeking to ensure that we pull things around. I do not think it is a reluctance on our part; we will happily get you the figures that we can get. The criminal rates are set by the Assembly on the recommendation of this Department with the approval of the Committee.

Mr Wells: I still think that they will be very generous when they are published.

Mr Ford: We are happy to get you those figures and continue to work on them.

Mr Dickson: Thank you, Minister, for what is an amazingly complicated and complex piece of work that has been presented to us today. It is clear evidence of the amazing amount of work that goes on in the Department.

I want to look at the area of alternative dispute resolution (ADR). You rightly said that it is not a solution to everything in that particular area. One area I would like to cover relates to the thrust of the whole project, which is faster justice. A key element to any ADR process being successful is the speed at which the process is started. Parties may become entrenched in their views, whatever those views may be, whether on employment, family or some other civil area, or whether it is disputes with insurance companies over road traffic accidents. The longer that the thing is allowed to fester, the more difficult it is to encourage the parties to sit down and talk about it and resolve the issue. Can we be assured that speed will be an area included in the mapping exercise?

The other issue that I would like you to tease out, although again it may come out in the mapping exercise, is that of qualification and the appropriate qualifications of those who practice ADR. Basically anyone can call themselves an arbitrator or an alternative dispute resolution person or a mediator, without any qualification. We need to look to some form of standardisation of that role in Northern Ireland. I understand that some work has already been done on that across the border in the Republic of Ireland.

Mr Ford: We were involved in a conference last year that looked at some of those issues on a North/South basis. In a number of cases there are those with legal qualifications who have taken it upon themselves to obtain qualifications around ADR and they may well be the best people to carry things through on issues that are matters of law. Speed is part of the issue, which is why we are talking about the Faster, Fairer Justice Bill, and that is an issue that will continue to be ahead of us.

The complexity of representation touches on Jim and Robert's point with regard to amounts of representation. I remember appearing a little over 20 years ago as a senior social worker in a wardship case in which two parents and solicitors sat on one side of a courtroom and I sat on the other because the solicitor from Central Services Agency was a bit late. The master sat on the bench with his clerk. In those sorts of cases you now frequently find representation at barrister level for a number of members of the family, not just the parents. Obviously, the more complex the group who

have to get together, the more difficult it is to get things happening on time. However, that is an example of where it is not just ADR but even those cases that end up in a normal court system seeing an appropriate level of representation that does not necessarily result in matters being put off to get several lawyers in a room when you need only two.

Mr McCartney: Thank you very much for your presentation. Obviously, there is still stuff we will have to come back to you on this because of the detail. You outlined three main strategic objectives: improving access; legal aid, which is nearly a number crunching thing; and improving governance and accountability. What is your monitoring process and measurements for improving access, so that if you are asked in a year or two years' time whether you have improved access, you can say, "Yes, and here is how"?

Mr Ford: You are touching on similar questions that Peter was asking about quality control. That will be the issue up to the programme board looking at the overall way in which reports come back and each individual project team being seen not only to adhere to a timetable but to ensure that matters are dealt with at an appropriate level of quality.

What you said about coming back to us is also part of the issue. The Committee will need to decide how much engagement it wants around the detail of this. I am very happy that we continue to engage with the Committee but there is obviously a level of detail that becomes pointless for the Committee to engage in. Indeed, I do not get into that level of detail most of the time. However, if there are particular projects that the Committee feels are fundamentally important and wants to have updates on, we need to work out between the Department and the Committee the best way to carry that forward. We have a quality control role but there is also an external validation, where I appreciate the support of the Committee in carrying through some of these reforms. That shows it is not just the Department getting on with it but that we have the wider buy-in across the Assembly.

Mr McCartney: I know some of that would be detail, but if a broad question was asked of any of us, "You have set out to improve access to justice. Have you, and how?" How would you intend to frame that answer in a year's time? Without, I understand, the detail, if I am asked that or you are asked that —

Mr Ford: The difficulty with that is that we can only then give you examples of the 19 projects ongoing, many of which address several of the 150-odd recommendations in the report, so it becomes quite a complex picture. We can certainly look at what we think is the best way to produce a report for the Committee. However, you may want to highlight specific thing. I tried to highlight in the opening statement what we saw as key points, but there may be others that the Committee wants us to focus on.

Mr McCartney: We have teased this out with Robert in the past. There were reports around in England and Wales saying that access, rather than improve, had slipped back. That is a broad statement and I accept that and if you went into detail you would get the same answer. However, it is a question of how broadly. I accept that I am not going to be there to, if you like, publicly articulate the detail but certainly you want to be in a position of being able to articulate whether it has improved or not, and whether we have set a target and reached it.

Mr Ford: That is the key point, without wishing too much to join the Jim Wells bash-the-barristers club. We have said that the reforms that we have been making around costs have been around cutting costs, not cutting access to particular areas of work, which is what the picture has been in England and Wales and, I think, is storing up problems.

Mr McCartney: That is what I am saying. How do you put that into three sentences in a year's time? "Here is how we have not done what happened in England".

Mr Ford: OK. The one sentence today is, "This is not what we are aiming to do". If you want me to come back in a year's time and say, "And we did not", I will happily do that.

Mr McCartney: Yes, but I want to be able to do it too, so I need the detail. That is what I am saying.

Mr Ford: Fine. It is a matter of how we report on such a complex work programme.

Mr Crawford: I can give examples.

Mr Ford: Yes. Robert will give you whatever examples you want at whatever time you want them.

Mr Crawford: There will not be a single bottom-line figure to show that access to justice has been improved by x%, because that is not possible. However, there will be a basket of indicators. I will give a few examples, because the Committee will be familiar with some of them.

Clearly, there is a principle that many Committee members have supported: that in principle, a financial eligibility limit is possible, say, for criminal legal aid, where one does not exist at the moment. However, there is concern about the impact that that will have on the number of people who can get legal aid. Perhaps the benchmark for that project, when we set it finally, will be that we do not reduce it but we make the system administratively more simple, we may bring in contributions, and we might look at, for example, having something that fits with universal credit. There may be a single measure of disadvantage that will apply across the board for all types of legal aid. At the moment, there are three and none respectively for civil and criminal. Rationalising the system might be one of those objectives. We could then show at the end how that happens.

Everybody recognises that the current green form system, by which solicitors fill in a form and send in a claim for the first stage of advice that they give to a client, is awful. It does not work well. The profession does not like it because it is administratively time-consuming for them for the amounts that they claim. We believe that there has to be a better way of doing that. For example, we can set objectives in that project to say that we get rid of the perceived problem of the administrative, time-consuming element for the profession, and we get rid of the administrative cost to a large degree, if we can, for the Legal Services Commission. However, we ensure that the service for the customer — the client — is at least as good. We need to find some way of measuring that. That is the kind of metric that we will be looking for to determine whether it is a success.

Some of the other areas are self-explanatory; the advice/voluntary sector, for example. We believe that, particularly in early-stage advice, as the Minister said in his opening statement, there are better ways of solving problems quickly. It is critically important that someone who needs help or advice with a problem gets it, and, if there is a legal element to it, they go to someone who can actually help them. Better signposting might be part of that, along with ensuring that, if there are gaps in the system, they are filled by the Department encouraging that advice to be provided.

An example of that is the Housing Rights Service, which provides emergency help with housing and repossession cases where, as the Minister said, we have already put in place a pilot project to ensure that anybody who has that problem can get advice from a solicitor at the door of the court. Whereas before it operated only in certain areas of Northern Ireland, it has now been rolled out across the whole of Northern Ireland. The measurement for that project will be an expansion of the service. We will conduct regular checks on the pilot project to ensure the number of clients served against the money put in, the outcomes and the satisfaction that comes back from those people, to see whether it is working. I cannot put it in one percentage improvement. If the Committee would find it helpful, we can provide those details as we develop them and share them with the Committee.

Mr S Anderson: Thank you, Minister, and your officials, for coming along. Can I pitch in on the interest in the alternative dispute resolution? I picked up in your responses that you did not expect it to be a money-saver, or something to that extent, in this particular way forward. From reading through point 50, I see that solicitors and other advice providers might be equipped to signpost their clients to that type of resolution. Why would solicitors want to do that if they could tap into a legal aid system? Is there going to be something here that is either/or, so that if you do not buy into the system, you will be penalised in some way and will not be able to apply for legal aid? Can you explain that?

Mr Ford: I do not think I can explain it, but you have put your finger on one of the key issues around it: whether people might be inclined to engage in some form of ADR and then, if they do not like what they get, insist on going through the full current court proceedings anyway. That is the sort of thing that needs to be addressed by the mapping exercise. That is where we need to see how we can ensure that ADR becomes an alternative and not a preliminary, which is the danger of it. If it works well, if both parties are willing and if that is seen as the end of the road, it will have significant benefits in speed and some benefits in saving. If it merely becomes a duplication, it does not do anything either to speed up the process or to save money.

We also need to recognise that we do not expect to make very dramatic savings by the promotion of ADR. If it is done right, it is done not in a cheap and cheerful way but in a way that ensures that the

law is upheld for the benefit of both parties. Therefore, we cannot expect very significant savings, but we are at a relatively early stage of mapping the sorts of services that currently exist, whether at a fairly informal level or at the ombudsman-type level, to see what is there and to learn the lessons from existing practice and build on whatever mechanisms are suitable. ADR will not be an overnight solution to all of our problems, but it has a part to play.

Mr S Anderson: So, ADR will be more about speeding up and not jamming courts than about saving money.

Mr Ford: Anything that can ensure that people go down a slightly less formal route is likely to result in speeding up and some modest savings, but we should recognise that, if we are looking at ADR for serious issues like family legal cases, we need to ensure that we have a system that is robust enough for both parties to buy into and which delivers a result in which people can have confidence and which, therefore, sticks.

Mr S Anderson: Minister, I am sure that you will agree that neighbour disputes and family disputes can be some of the more difficult ones to resolve. I am sure that we have had experience from our representations on different cases that those are difficult issues. They may not be so easily resolved.

Mr Ford: Those are also the kinds of cases where people will frequently complain to me that one party has received legal aid while someone else who is just over the limit cannot get legal aid and can suffer financial detriment if cases go back and forward to court.

Mr Lynch: Thank you, Minister. There is something that you said in terms of speeding up justice. In a perverse way, legal aid can sometimes add to the delay in justice. Secondly, it is unclear who has the formal responsibility for bringing forward the action plan, so can you highlight that as well?

Mr Ford: Ultimately, I am responsible, although I will be looking to David, who pulls the various threads together because it is being delivered across his directorate.

On the potentially perverse issues about the funding of legal aid, there is no doubt that, particularly when you look at the Magistrates' Courts, a very high proportion of those who are charged with offences will, at some point, plead guilty. There is a huge disadvantage to the system if someone only pleads guilty on the day that they stand up in court rather than at an earlier stage. If they plead guilty earlier, it cuts out the work that has to be done by police, the PPS and so on. It is not for me to agree, but it has been suggested that the fact that lawyers currently get paid more if their clients plead guilty later might possibly be a kind of perverse incentive for people not to plead guilty as early as they might. In Scotland, it appears that there are benefits to the system when both the individual gets a reduction in their penalty for a plea of guilty at the earliest possible point and their lawyer is paid a flat fee regardless of what happens. We want to explore that issue to see whether it is applicable to here. Clearly, we do not want to get to the point where people who feel that they are genuinely not guilty do not feel that they can state their case in court, but we know that, particularly in the lower courts, vast numbers of people will plead guilty at some point. There should be an incentive to do that at the earliest possible stage. That may have to apply to lawyers as well as to the defendant.

The Chairperson: It is fair to say that, even though it is known full well that someone is guilty, there is an element of saying, "Let us see if a witness shows up or not or if a file is not put together very well, and you will get off on a technicality." The fee structure in the initial arraignment encourages a better financial reward for the legal team. I am not suggesting that there is a deliberate attempt to advise defendants, "Plead not guilty because I will get paid more". I am sure that that would be contrary to their code —

Mr Weir: Without wishing to interrupt, I will speak as a former member of the profession. To be honest, it does not really work that way in the sense that, with the best will in the world, it is often more financially advantageous for barristers to rack up a lot of very quick pleas, particularly at the lower end of the scale, than to have contests.

Mr Ford: I will leave two Committee members, both of whose surnames begin with W, to debate that point at an appropriate stage. *[Laughter.]* When talking to a group of lay magistrates recently, I was interested to hear of a district judge who responded to solicitors standing up at 10.30 am and asking for an adjournment of a particular case by looking at his watch and saying, "OK. Will 2.15 pm do?" In some of these cases, there are issues around case management as well as preparation by lawyers.

Mr Wells: On that point —

The Chairperson: The taxpayers' friend. *[Laughter.]*

Mr Wells: I just feel that I did the wrong course at university.

Mr Weir: Jim, if you are up on any charges, I suspect that you will have to represent yourself. I do not think that there are too many barristers who would touch you.

Mr Wells: I am aware of a case in Dungannon in which the judge was so exasperated that he called the legal team together and told them that there would be big trouble if they did this again. Time and time again they had strung it out when the judge believed, rightly or wrongly, that the defendants had informed them long before the final day in court that they would plead guilty. They held on and held on as the fees racked up. Surely there has to be some sanction to penalise any solicitor or barrister who allows that situation to arise. The judge in question — I will not name any names, although I have privilege — named a particular firm of solicitors who were responsible for that activity. He was so fed up because he could see what was going to happen. Under your proposals, will that become a thing of the past?

Mr Ford: I will defer to David on the detail of that. *[Laughter.]* There is a serious issue. The regulation of the two professions is, to some extent, a matter of self-regulation and, to another extent, the responsibility of the Department of Finance and Personnel and not the Department of Justice. Some of us might query whether that is an appropriate division of responsibilities, but that is the division of responsibilities that we were left. I do not know whether David wants to say anything about the way in which that would work and the way that a complaint might operate against a firm of solicitors in the hypothetical case that has been outlined.

Mr Lavery: I suppose it gets into the area of professional misconduct. If a case was being strung out solely to increase remuneration, that would clearly be professional misconduct, and the judge would report it. I do not know the facts of the particular case, and maybe it would not be appropriate to go into them. However, it may simply be that, in that case, the lawyers felt that there was a point at which an informed decision could be made about the strength of the prosecution case. However, I am simply speculating about something that is anecdotal. There is a point at which any judge will report to the Law Society or the Bar the type of behaviour that you described. If it was thought that it was being done solely to maximise remuneration, that would be professional misconduct, and it would lead to a disciplinary process within the professional body.

Mr Wells: It would be interesting to do an analysis of which firms of solicitors, on average, were able to string out cases for much longer than others. If a trend emerged that the same company was adopting this procedure time and time again — they cannot all be in the same situation.

Mr Lavery: The thrust of our reform in criminal legal aid, in particular, is standard fees. They really create a discipline that would be lacking otherwise. If you get a standard fee whether a case takes one day or four days, surely that removes the perverse incentive to string things out. That is why we have gone so far towards standard fees. It is why, as the Minister said earlier, we are interested in the information shared by Minister McCaskill in Scotland: a 40% improvement in early guilty pleas. He told us that the only thing that he did wrong was to pay too high a composite fee. We are modelling that at the minute. Standard fees seem to me to be the way to get rid of a perverse incentive. In the County Court, it would have been the case under scale costs that, if you were for a plaintiff, you got the maximum fee if you claimed the maximum amount and won it or lost it outright, but if you recovered less than the amount you claimed, the fee was based on the amount you recovered. Again, that is perverse; surely there must be a risk that you would maximise the claim and if you lost the case you still got the fee if it was legally aided. There are lots of these things that we are looking at that distort the market.

Legal aid is meant to put people broadly in the same position as a person of reasonable means, but, as the Minister said, the postbag is often full of letters from people who are against a legally aided party who has nothing to lose by proceeding to court and keeping the case recurrently going to court. This is a huge project. I think the Chairman and the Deputy Chair met the representatives of the Welsh Assembly this morning, as I did, and they wanted to know the benefits of devolution. It is this sort of thing: we can actually change policy in this area. If we had not got this devolution, we would

be doing what they are doing in England, which is just brutalising the legal aid system and access to justice. The bad decisions being made there are being made to drive down costs quickly.

One of the first decisions we took under the devolution of justice was to do a comprehensive review of access to justice, and that gives us a chance to decouple from really bad decisions that seem to us to be being made in England and Wales and to decide how best to spend roughly £80 million a year that we have at the moment on helping people get access to justice. Part of that is to get away from the model that we have whereby the legal aid system works best by giving you money to spend on court cases. In civil cases, it may be much better to spend money on access to early advice on resolving the dispute, but the system currently has an orientation towards bringing cases to court and paying lawyers' fees to bring cases to court. As I have often said to this Committee, this is the first time in a generation that we have had an opportunity to decide how best to help people get access to justice. It is a really ambitious programme, but all of these things are on the agenda now.

The Chairperson: OK. We will leave it there. Minister, thank you very much for coming along today. It is very much appreciated.

Mr Ford: Thank you very much. I hope you can see that this is part of a comprehensive programme that fits in with some of the other work we are doing around speeding up the courts system as it operates. We will shortly be discussing some of the other issues around legal aid, which fit in with what we are trying to do here.

The Chairperson: We will. Mr Lavery is staying with us, I think.