Committee for Justice

OFFICIAL REPORT
(Hansard)

Publicly Funded Representation in the Civil and Family Courts and Forecasting of Legal Aid Costs: Departmental Briefing

3 October 2013

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 William Humphrey
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Jim Wells

Witnesses:

Mr Robert Crawford	Department of Justice
Ms Kim Elliott	Department of Justice
Mr Mark McGuicken	Department of Justice

The Chairperson: Before we discuss representation in the civil and family courts, there is an opportunity to discuss the legal aid pressures that have been identified in the October monitoring round. They relate to the robustness and accuracy of the forecast that had been provided and the implications for the legal aid reform programme of work, which was based on predicted savings. So, the extract from the October monitoring round is at page 109 of the meeting folder, and papers that have been submitted by the Law Society on the budgetary forecasting issues are in the tabled pack. We will deal with that item first. Then, we will go back to the issue of the family and civil courts.

I formally welcome Robert Crawford, the deputy director, and Mark McGuicken and Kim Elliott from the public legal services division. The session will be recorded by Hansard and published in due course. Robert, perhaps you could talk to us about the October monitoring round and the issues that pertain to it. Then, members will have questions. After that, we will move to the more substantive issue.

Mr Robert Crawford (Department of Justice): Certainly, Chairman. I think that you are all aware that the current pressure on legal aid is now £41·7 million. That is in the October monitoring round figures that you have. The June monitoring round forecast was, however, only £27 million for the current financial year, 2013-14. The problem that has arisen is that there has been an increase in the in-year pressure, which is due, largely, to faster processing of current court cases. That has meant an addition to the in-year pressure of some £14 million. Almost all of the increase in the pressure is due to that.

I will explain how that came about. Due to concern that Crown Court cases were not proceeding quickly enough, the Lord Chief Justice took an initiative last year to allocate an additional judge to Crown Court work. That judge was in place from September 2012 and fairly quickly managed to make a dent in what was almost a bit of a backlog in Crown Court cases. I will give you some idea of the difference in the processing figures. In 2011, the Crown Court dealt with 1,486 cases. In 2012 — these are calendar years — towards the end of which the new judge was in place, that had increased to 1,677. In the first quarter of this year, the additional judge has led to an upturn of 1,163 cases in the first six months. If that were annualised over the entire year, you would be talking about a figure of 2,326 this year. So, you can see that the impact of that additional judge is significant.

What has happened with regard to legal aid is that, of course, with that judge working since last September, the cases that he is working on have started to come into the legal aid payment system from the tail end of the last financial year. That is why the forecast for this year is estimated to be considerably higher, because we anticipate a big increase in the claims that will come in.

The issue that the forecast raises for us is that we did not see that quickly enough, or rather the Legal Services Commission (LSC) did not see it quickly enough. There has been concern about the forecasting model in the Legal Services Commission for many years, since well before devolution. It is one of the concerns that we tried to address after devolution, and a specific project was set up to look at that. Divisions of the Department have been involved in trying to help the commission with that. With the change in the current monitoring round forecasts, which became apparent really at the June monitoring round, we have changed the structure of that, and that work is now being led by the Department. In fact, it is being personally led by me, with the ambition of getting a new forecasting model in place within the next three months so that this kind of late warning in a forecast situation in-year does not happen again. We should be forecasting three years ahead reasonably accurately. There will always be variations in the work and in the costs of the cases that come into the courts, but we should have a better feel for the kinds of major changes that are going to happen, such as this, and that is what that work is aimed at addressing.

The Chairperson: So, it does not call into question the commission's ability to properly forecast? It is solely explainable on the basis of this additional judge?

Mr Crawford: The particularly large increase between the June monitoring round and the October monitoring round appears to be largely due to the increase in Crown Court payments, which the commission had not previously factored into its forecast. The commission spotted, for example, that there was an increase in Crown Court business, so its forecasts for this financial year increased by 12%. So, it had taken that into account. However, it had not realised the effect of the Crown Court's faster processing by the extra judge until it approached the October monitoring round. We started to see this in its figures from July and August.

We had concerns about the overall model for some years and still do, so we are now taking a more proactive approach to fix it. Our concerns were rather more about, for example, the civil legal aid forecast, because most of the criminal legal aid fees are now standardised, so forecasting is considerably easier. We, therefore, had not expected the pressure to pop up in Crown Court work. We had been concerned, for example, that civil legal aid forecasts for future years would be too low because we felt that LSC was predicting a drop, and we could not see any reason why that business would fall off, given that business in civil legal aid cases had actually increased by over 30% since devolution. So, we may have seen something in the previous forecasts that we did not understand. That has now been fixed in the October monitoring round, so there are now higher figures for those future years. That is part of the challenge that goes on normally.

There are two separate points to be made about the forecasting model. First, we are still not happy with it, and a lot more work needs to be done to get it right. Secondly, the large in-year pressure for this year is almost entirely explainable by the addition of an extra Crown Court judge from September last year.

The Lord Chief Justice actually spoke about that in his speech on 5 September at the opening of the new legal year. He explained how the initiative that he had taken had led to faster processing of Crown Court cases, which, of course, is a very good thing as part of the speeding up justice initiative. Although it is a very good thing and we are happy about it, unfortunately, we did not actually know what it was going to cost, and that has created an in-year pressure for us, which the Department is now discussing with the Department of Finance and Personnel (DFP).

The Chairperson: When the Assembly creates a new offence, does the commission look at that and do any kind of analysis to say, "These could be the implications for legal aid"?

Mr Crawford: Yes. If any other Department or, indeed, any division of our Department brings forward a new offence, a Bill or anything like that, and there is any chance of that having any legal aid implications, it should consult us, and if it is in any doubt about that, it should consult us. Our permanent secretary wrote to the other Departments about a year and a half ago to remind them about that, but a legal aid assessment should be done as a matter of course anyway. It may be that it is time for a further reminder. We are not saying that the increase at the moment is coming from that. It should be part of the normal procedure. Certainly, our division does receive queries from other Departments asking whether there is a legal aid impact. Quite often, there is not, but they are checking as they are, quite properly, supposed to do.

Mr McCartney: Thank you very much for your presentation. What sort of accuracy do you think the new forecasting model should have when laying out a budget? The figures for the commission — it is not just this broad stuff — always seem to be well out; it is not even close.

Mr Crawford: When you say "accuracy", a lot depends on the regime that is in place. I would like to think that we are within a couple of per cent accuracy for the 12-year period ahead because we should know what cases have come into the system. I can tell you how many legal aid certificates were issued in each year. In the Crown Court, for example, the average life cycle of that is around a year, but 25% of cases are dealt with in the first quarter and 50% are dealt with within the next quarter. We should have a way of doing it, but we do not yet. That is the point I am making. When we standardise fees, that ought to be quite simple.

Part of the other work that we have in hand is dealing with the Public Prosecution Service which is prepared, we hope, to give us a heads-up on the large cases that it anticipates bringing over the next years. Hopefully, it will do that in a rolling way, so that we can start seeing the cases that will definitely be outside the norm and where an average cost will not fit the bill.

Civil legal aid is more complicated because the understanding at the moment is that the cost there is less developed. That is because we do not have standard fees in place and because the complexity of civil legal aid means that average costs need to be broken down into much greater detail. That work is under way. Indeed, the most recent meeting of that group was yesterday morning, and progress is being made.

To go back to your question, we would not be able to get anywhere close to a 1% or 2% variance in a forecast for civil legal aid at the moment, but we ought to be able to do so once standard fees are introduced.

Mr McCartney: The contention is that, if you project your budget too low and you overspend, it then looks as though legal aid is drawing down unnecessarily. Each year that a budget is struck and your forecasts are wrong, from the day that you conclude your budget forecast, you need to have that amount in your head. How do you protect yourself from that? I am not saying that it is in anybody's interest, but, if you are as accurate as possible, then whatever the demand for legal aid, you are able to stand over those figures more readily.

Mr Crawford: We completely agree. The problem is one that the Department inherited on devolution. The Legal Services Commission had never had an accurate forecast. Part of the difficulty is that its approach is to look at its historic cash payments. Now, that will only tell you what you have paid out; it will not tell you what work is coming in at the front end of the system, which is the way that every other part of government looks at provision. For example, the health service would be trying to calculate what new business will lead to a cost each month in one month from now, six months from now or 12 months from now. The Legal Services Commission is looking at what it paid last year. That does not tell it what came into the system last year; that is just a liability that it has no real handle on. That is what needs to change, and that is what we are trying to fix. We have been asking the commission to fix it since devolution, and the Department is now taking ownership of that. We have had three years of failing to fix the main problem, although, certainly there have been some improvements, but the forecasts are still too far out for us to be able to accept that going into the future.

The timescale for the work to develop the new models is approximately three months. That is my personal estimate. We are meeting every couple of weeks, and there are meetings of working groups

on specific issues in between. We expect that we will be back here in the new calendar year to explain that we have a new model that is now being tested.

Mr McCartney: Is there a tension or stress between the Department and the Legal Services Commission because you are going to take that?

Mr Crawford: I acknowledge that there is some stress because we have taken the responsibility from them. However, for example, at yesterday's meeting, there was enormous enthusiasm among the commission's staff for solving the problem. I think that the commission has had a lot of other problems to solve — you will be aware of the recent issues on pay, for example — but it is very committed to fixing it. I was personally struck by the enthusiasm of many of the staff: they just want to crack on and nail it.

Mr McCartney: In three months' time, when you have finished that work, will the difference in the prediction model be easily seen?

Mr Crawford: You will not see the results after three months, but we will be able to explain how it will be better. Indeed, I could give you examples now of how we are already developing an improved model — from having looked at this over the past six weeks — and the work that is ongoing, but it is probably better that I give you a comprehensive briefing at some point.

Mr A Maginness: I listened very carefully to what you said. There is a consistent pattern of inaccuracy and getting things wrong. Are you, effectively, blaming the Legal Services Commission for that? Are you saying that the Legal Services Commission is not fit for purpose?

Mr Crawford: No; I am simply dealing with the forecasting issue in relation to that question. The forecasting problem has existed since 2003, when the commission was set up. The point that I am making is that the methodology was never right from the start. Unfortunately, it has not been fixed in the intervening period, so it was inherited by the Department on devolution. I absolutely do not say that the Legal Service Commission is not fit for purpose. The work that is now being done to resolve the forecasting issue will deliver results. Most of that work is being done by the commission’s staff and being done very competently. The difficulty in the past has been that not enough priority was given to solving the problem.

Mr A Maginness: You are saying that, throughout its history, or at least since 2003, when it was established, it has not given accurate projections?

Mr Crawford: The Northern Ireland Court Service, which managed the commission at the time, had to approach Treasury every year for extra money, quite often to the value of about £20 million, and that is documented in the Northern Ireland Audit Office report of 2011.

Mr A Maginness: I would have thought that, if an organisation had not been giving accurate projections for 10 years, you would come to the irresistible conclusion that there was something intrinsically wrong with the organisation — at least with its projections — and that that would require more drastic attention. It is not just satisfactory for you to say, "Look, we always got it wrong. We got it wrong this time too, and there you are."

Mr Crawford: I am saying a little more than that. Since devolution, the recognition has been greater because the Department has started to take action. The work on forecasting has continued to be led by the commission, and my division and the financial services division have been heavily involved in that. That kind of approach has not borne fruit yet, and that is why we have taken over the direct leadership of it. However, I want to make a point about the commission's status. It is an Executive non-departmental public body (NDPB), which means that it is quite independent, and that means that the Department does not have many powers to tell it what to do. That has been overcome by the commission agreeing that we will lead this work from here on in. You will be also very well aware that the commission will become an agency next summer, and that will bring it closer to the Department, where there are many more direct interventions that are easier to be made. I accept the point that you make, which is that it has not had a good record. If the point is that perhaps we could have been quicker at solving it, then I am happy to accept that too. However, we are now on the ball.

Mr A Maginness: Is there any merit in putting the proposition that, because of the speed of cases going through over the past year or so, and, as it were, completing, and you are getting the fees in

and, presumably, paying off the house at some stage during the currency of the year — that is not something that I ever experienced — there would be less pressure next year or more pressure?

Mr Crawford: The difficulty runs into next year because we are estimating that there are sufficient cases in the Crown Court system. Let me put it differently. Until the extra judge came into the Crown Court, the rate at which cases were being disposed of was less than the rate at which cases were being received into the Court. In other words, the Crown Court was not quite keeping pace with the rate of work that was being generated. With the new judge, that rate is considerably higher. For example, the number of cases received from January to June this year was 923, but the number that had been cleared by the Crown Court was 1,163. Compare that with 2011 and 2012, where it was a little bit behind — perhaps 100 or so. My point is that backlog will continue until it is all cleared. The judge is in place until June next year. Looking at the rate of disposals, we are confident that that backlog will be cleared by next year. At that point, we will be processing cases out of the Crown Court — disposing of cases at the same rate as they come in.

The effect of that will be that next year the payments will be made a little later than the cases are concluding, and hopefully quicker than experienced. That means that next year's forecast budget is still around £116 million. However, the year after that, the forecast goes down to £95 million.

Mr A Maginness: Yes, and that is because you are effectively in balance.

Mr Crawford: In balance in the Crown Court; and the savings reform proposals that we have in place will kick in fully in that year, as cases work out of the system. At the moment, we have several million pounds of old cases under the 2005-09 rules to be cleared over the next couple of years. They will have gone by then.

Mr Dickson: Most of my questions have been answered. There is just one area: is there any comparison made between the productivity of the additional temporary judge and that of other judges?

Mr Crawford: We have not attempted to make such a comparison.

Mr Dickson: Could such a comparison be made?

Mr Crawford: I doubt that it could easily be made, because it is judicial management and it would be a matter for —

Mr Dickson: How do they pick the cases? How are they allocated? If you get a bunch of easy cases, can they slip through the system quicker, or —

Mr Crawford: No. I think that it works on the basis that whichever judge has capacity will take on the cases as they come in. The one point that I will make about the cases that are being cleared, and one of the reasons why the in-year cost has increased, is that the average cost appears to have gone up. That appears to be partly because more complicated fraud cases have come through in greater numbers. Between April and June this year, the judicial statistics record that 61 fraud and related types of cases were disposed. For the equivalent period last year, there were just 21 cases. So, I am a bit reluctant to talk about judges' case management, but one thing that the extra judge is doing is getting to grips with those longer, more complicated cases that may have been in the system for some time. That is obviously a good effect, because long cases are being run. But I am afraid that we have no management tool for estimating judicial performance.

Mr Dickson: In relation to forecasting the cost to the public purse, of course, it is the Legal Service Commission's job to predict the number of cases of that type in advance.

Mr Crawford: In fact, we will take over the lead on that.

Mr Dickson: You are going to take over that role?

Mr Crawford: Yes. We will make an estimate based on the most recent figures for processing. That is what leads me to say that we are confident that the backlog will be cleared by June 2014. We are also revisiting all of our calculations in forecasts and reform savings to establish whether we need to

do more than we are doing and whether we need to revisit some of those plans in case they are inadequate.

The Chairperson: OK, thank you. There no other questions on that point, so I invite you, Robert, to deal with the other issues, around representation in family and civil courts.

Mr Crawford: We have provided a detailed written response to the issues that were raised by the Bar Association and the Law Society. That also clarified the point about divorces that came up in the Committee session, where we felt that we had been a bit unclear, perhaps, in what we said. I do not propose to go through it in detail, because we think it is a fairly clear and detailed response. But I am happy to take questions on it, obviously, in due course.

I will make a few general points. We are disappointed that, in the evidence given by the legal profession, there did not seem to be any acknowledgement of the substantial changes that had been made following consultation. We felt that we had taken on board many of their comments and many of those from other respondents. We particularly felt that we had responded positively to the idea that the criteria that we had been aiming to apply were too restrictive. So, rather than aiming for a list of specific exceptions, we have broadened that out so that there is a general flexibility in all of the criteria. Thus, if a particular case is more difficult than the norm in terms of its gravity, seriousness or public importance than the usual case type in courts here, then representation can be given. That is quite a flexible restriction on the Legal Services Commission. One of the protections in our proposal is that the commission would make that decision based on written evidence presented by the solicitor — or by junior counsel if junior counsel was already on the case and was seeking senior counsel. We think that that is a good protection, and we think that we have responded quite well to the comments.

I also want to point out that the Law Society acknowledged that it was entirely appropriate to have filtering. It did not object to criteria to determine what the filtering should be, but neither did it give us any alternative proposals on it. The Bar Council also said that it was not arguing that barristers should be involved in every case. I think that both accept that there should be some fitting of representation to the complexity and seriousness of the case. We think that the flexibility in our revised criteria does that much better. If anything, I have a slight nervousness that we have given flexibility to the Legal Services Commission that might lead to more representation than we have estimated, but that is something that we will monitor and check.

The other protection that I want to mention at this point is this: if there is a case in which the Legal Services Commission says no to enhanced representation, it moves on to the appeals procedure if the legal representative, the solicitor, feels that he wants to do that. That appeals procedure for the County Court and High Court — the higher courts — goes to the appeals panel, which is composed of five solicitors in independent practice. We believe that if the commission gets it wrong and misses a case where there is a really serious issue that does not have appropriate representation, the appeals panel will correct that. At the moment, the appeals panel overturns quite a number of LSC decisions, so there is no sense that it would be reluctant to do that.

Section 11 sets out in more detail the points on criteria. Chairman, I do not propose to go through that, unless members want me to return to it. I will make the one other general point that the criteria that we have adopted and the criteria that we are proposing reflect wider child protection issues than abuse, because one of the points made was that we were limiting the exceptions to abuse. Now, it covers such things as neglect and other child protection issues, because we are saying that there is no limitation on the gravity, seriousness or public importance of the subject matter.

I will pick up on a couple of points in relation to the responses from Barnardo's and the Children's Law Centre that we mentioned. I would like to emphasise those because it was suggested that we had not taken on board their responses. We believe that we have. Barnardo's, for example, said that junior counsel should be provided only in those cases concerning particularly serious and complex child protection issues and that senior counsel should not be requested for proceedings in family care centres, County Court or High Court, other than in exceptional circumstances. Barnardo's also said that it had become increasingly concerned about the number of instances where inappropriate use of senior counsel had complicated and protracted cases unnecessarily, often over a period of several years. At this point, Chairman, I should apologise for attributing that view to the judiciary, at the previous evidence session. I have also spoken to Siobhan Keegan and said that I got that wrong. I apologised for that error. That is now correctly attributed to Barnardo's. We believe that we have met everything that Barnardo's asked us to do in its response.

The Children's Law Centre argued that the criteria should be directly linked to the 'Children Order Advisory Committee — Best Practice Guidance'. We believe that we have done that, and we have tried very hard to make sure that we are absolutely consistent with the guidance in so far as any legal aid system can be consistent with a judicial case management approach. As I said earlier, we will review the application of the guidelines to make sure that they are doing what we believe they should be doing. At the moment, we plan to review them monthly, for the first period, to make sure from the earliest stage that they are working correctly.

I would like to make another couple of points very briefly. The Bar Council and the Law Society made the point that there should be a review of family law and justice. That recommendation was made in the access to justice review final report, and our Minister has publicly supported that on several occasions, in particular in his response to the review on 2 July. However, ministerial responsibility for substantive private family law falls to the Minister of Finance, who is not convinced of the need for review at this time. The Department is trying to take forward some work on public family law, in cooperation with the Department of Health, Social Services and Public Safety. We believe that there will be some more work and, perhaps, pilot projects coming out of the Department's scoping review of the operation of public law and the family justice system. So, we are doing what we can within our departmental remit. To do anything wider would require several Departments to cooperate on a fundamental review.

Personal litigants got a mention, and it was suggested that personal litigants were increasing and that that would be exacerbated by our proposals. In fact, personal litigants decreased from 12·4% in 2010-11 to 6·7% in 2012-13, so the actual facts do not quite support that. The Lord Chief Justice talked about the concern over personal litigants in his speech on 5 September, but we understand, having checked with his office, that he was referring to cases coming before him, which is the Court of Appeal. That may well be the case, but, overall, in the justice system, the percentage has decreased considerably from 12·4% to 6·7%, so we were not sure that that was an accurate point that was being made.

The other point is that our proposals will not remove representation from anyone because everyone will still receive advice and representation by a solicitor. If representation is granted on a legal aid certificate, they will get a solicitor at least. We are not taking anything out of the scope here. I think that there may have been some confusion because, at some point, we may have to consider taking areas of legal work out of the scope, but that is not what these proposals do. So, if somebody, under the 1965 regulations, would previously have received representation automatically for a solicitor and barrister, they will still receive representation automatically for a solicitor. They may not receive the barrister funded under legal aid, unless they can satisfy the Legal Services Commission that the case requires that, but they will receive the solicitor. So, nobody will be made a personal litigant by these proposals.

Child protection was also an issue. I would just like to draw out and emphasise the point that the Northern Ireland Guardian Ad Litem Agency (NIGALA) advised us during the consultation that it proposes in the future to operate on the basis of an experienced social worker and a solicitor, with the solicitor drawn from a panel of solicitors experienced in Children Order work. It felt that there is no need for counsel in the Magistrates' Court or for senior counsel in the higher courts. That is very much in line with our proposals, and we found that very persuasive when we were examining consultation responses. Indeed, that came out of the meeting with the Guardian Ad Litem Agency. It is the statutory agency responsible for doing everything that is necessary to protect the safety of a child. If it believes that that safety can be protected in most cases by a solicitor and a social worker, we believe that that is quite a persuasive view. We do not believe that legal aid on the other side of the case should fund greater representation simply to protect a parent's position where the legal issues, as NIGALA sees them, do not warrant the involvement of counsel in most cases. With all the public interest in child protection, if NIGALA is satisfied with that, that is quite an important point to register.

The Bar Council presented a number of case examples, which are detailed in the response paper because we thought that we should set out the background to those cases. We do not think that they are directly relevant because they refer essentially to inquiries and work that happened after the childcare proceedings. I tried to find out what representation was granted in England and Wales on the childcare proceedings in Cleveland, for example, but the case was too old for those records still to be retained. So, we do not see quite how they fit with our proposals.

The Angela Cannings case was a murder trial, so it was criminal legal aid. In a murder trial, two counsel are automatically granted under our Crown Court representation rules. So, we were not quite sure what point was being made. If anything, in the Angela Cannings case, in spite of Michael

Mansfield acting for the defendant, the defendant was still convicted with two counsel, and it was only after a 'Panorama' investigation that the case came back to appeal and was overturned. So, we are not quite sure what point they were making, but we do not think that it had any particular weight because they were not talking about child protection proceedings in the Magistrates' Court, the County Court or even the High Court. All those cases are important, and they were all critical issues, but in relation to the level of representation granted, we could not see the argument that they were making.

It was suggested that our proposals affect adoption. All adoption cases are heard at the County Court or the High Court, so there will always be one counsel; at least one barrister, with the provision for another if the criteria are met. It is not the case that an adoption hearing will be heard without the benefit of counsel being present. There may have been some confusion about our proposals.

I have a simple factual point about comparisons with England and Wales. I want to emphasise that we are not disagreeing with the percentages given in the evidence, but, in England and Wales, private family law has been taken out of the scope of legal aid. In England and Wales, a large proportion of private family law cases, when partners have split up and are fighting over children, start in the County Court or the High Court whereas, here, they will start in the Magistrates' Court. So, yes, more private family law cases get dealt with in a higher level of court in England and Wales, but that is because the parties choose that or because their legal representative advises them to start it in the County Court or High Court for whatever reason. It is not because the legal aid system in England and Wales is different. In fact, the legal aid system in England and Wales provides less representation, and we set that out in the response paper. The family advocacy scheme in England and Wales only funds, in most cases, for either a solicitor or a barrister and does not provide for an enhancement for additional counsel to be granted. So, we are retaining a system that will be more supportive than that in England and Wales. We felt that that point was factually misplaced because it did not compare like with like.

There were comments about Lord Neuberger's comments in England and Wales. Our Minister has made it clear on numerous occasions that we do not want to rush to cut the scope of legal aid. Lord Neuberger was addressing his comments to the impact of the cut in legal aid and the removal of legal aid from a lot of private family cases. The Minister has said that he is alive to the impact that that would have, and he is not keen to remove legal aid in an area without some form of safety net or some form of help remaining; or, at least, certainly not to do it without understanding the impact. That is what Lord Neuberger is talking about. However, there was another sentence at the end, which we put in the response paper. He said:

> *"It is also a mistake to structure legal aid costs so as to reward lawyers for doing long trials: it inevitably means that trials last longer and cost more, and lawyers should be rewarded for cases lasting less time, not more."*

I thought that that might be instructive, particularly in the context of where we are with finance. I want to emphasise again that, in trying to find a better way of allocating representation, while we are concerned about finance, we are also concerned about making sure that adequate representation is applied. We are trying to make sure that we do not fund representation that is not needed in each individual case. In particular, we are removing automatic funding for counsel when counsel might not be needed; that is the key component of this.

I have one final point. Our proposals affect mainly private family cases where two parties are fighting — two estranged partners perhaps — over a child. Public law is not affected nearly as much, and we put figures and examples into the post-consultation report to explain that. At the evidence sessions, the Bar and the Law Society both rather implied that public law cases would be most heavily hit. In fact, the big hit, if you can call it a big hit, is on private family law.

The Chairperson: Thank you for that very comprehensive response. The written paper addressed all the issues that had been raised by the representatives of the legal profession bodies.

Mr A Maginness: I am considering whether there is any point in discussing this, because your paper states:

> *"many of the reforms can be introduced administratively under guidance issued to the Legal Services Commission ... under Article 8 of the Access to Justice (NI) Order 2003."*

You have given the draft guidance, which is very helpful. Is there any point in us discussing it if you can automatically do this in any event?

Mr Crawford: The key legislative change that is very important to us is the removal of the automatic right to funding for counsel under the 1965 regulations, which effectively apply to the higher courts. Yes, we could do it administratively under guidance on the lowest tier, but we would still have consulted publicly on the legislation and would still have come to this Committee. It is critical that it all hangs together so that it is consistent from one court tier to another. We felt that even though we could have done it administratively for part of the system, it was better to consult on all of it, so that people could see what we are doing throughout the system, and to bring it before the Committee.

Mr A Maginness: But am I right in saying that you can just go ahead and ignore what the Committee might suggest to the contrary?

Mr Crawford: That is true of the part where we do not need legislation. However, I think that we have demonstrated that that is not our approach. We have made quite a large set of changes to the proposals as a result of the consultation.

Mr A Maginness: Does it all hinge on the words "automatic representation"?

Mr Crawford: It does as far as the legislative change is concerned. We believe that there is no justification for counsel simply being funded without any justification whatsoever being made to the Legal Services Commission. That is what happens at present.

Mr A Maginness: It seems to me that that is probably the key to the misunderstanding of what you would say are reasonable proposals and to the reaction by the legal profession. You are saying that there should be representation at appropriate levels — you made that plain today, in the papers that you presented and in the guidance that you have highlighted to us. Some would say that that is the Department rowing back a little bit on what was originally proposed, which I thought was near enough to the ending of representation by counsel at certain levels.

Mr Crawford: I think that we would accept that our original proposals were quite restrictive. In those proposals, we set out an approach that was based on identifying very specific exceptions or exceptionality. We anticipated that respondents would give us more examples to add to that list, so that we would be able to construct a scheme that would be based on a very specific list of exceptions, which you could then add to if others came up. In fact, respondents did not give us that kind of answer. In the absence of that kind of information, we felt it appropriate to row back very considerably to a system that will definitely be a lot more flexible and may be looser, from our point of view, with a greater risk of our not getting the outcomes that we hope for. Based on the responses that we got, and given the concerns that were raised, we believe that that is the only way to go.

Mr A Maginness: Perhaps unusually, I am in agreement with you.

Mr Crawford: Thank you.

Mr A Maginness: I want to try and summarise the thing a little bit. What you are saying is that, in the Magistrates' Court, it should be solicitors and, exceptionally, counsel. However, that would have to be exceptional.

Mr Crawford: That would be very limited.

Mr A Maginness: You are saying that, in the County Court, there should be junior counsel plus a solicitor but not senior counsel.

Mr Crawford: Again, there would be the exceptionality opportunity.

Mr A Maginness: Yes. That will apply right across the civil sphere or spectrum. It will apply not just to public law but to private law, and not just to children's cases but to, what I would term, ordinary civil cases, such as those that deal with road traffic accidents and things like that.

Mr Crawford: Absolutely.

Mr A Maginness: We come to the proposals for the High Court, and this is where I disagree with you. You are saying that, in the majority of cases, there should be junior counsel.

Mr Crawford: At the moment, in the majority of cases in the High Court junior counsel are used. Only 44% of cases in that tier have senior counsel.

Mr A Maginness: If I am right, I think that that 44% related primarily to children's cases.

Mr Crawford: Sorry, more generally —

Mr A Maginness: I am thinking of civil cases as a whole. For example, if I was a legal-aided client and was represented by junior counsel in the High Court in a case involving a motor car accident or something of that nature, and I faced an eminent QC like our former colleague Bob McCartney, I would not feel very comfortable given his standing, expertise and considerable experience.

Mr Crawford: Again, the level of representation of the other party is one of the criteria that can be taken into account.

Mr A Maginness: Yes; I note that.

Mr Crawford: We have not expressed that as automatic, because we do not think that it should be automatic. If there is a case, for example, that does not have very difficult legal issues, the fact that a wealthy party is funding a QC privately —

Mr A Maginness: A wealthy party could be an insurance company.

Mr Crawford: It could be, but insurance companies, in our view and from some of the feedback that we had from other areas, do not want to pay QCs if they can avoid it. They would tell us that they place a QC on a case because legal aid is funding counsel —

Mr A Maginness: I will not prolong this, but I will say that I think that there should be greater flexibility for senior counsel in legal-aided cases on the civil side in the High Court. I do not detect that in the present guidance. I understand that you are creating exceptions, but I do not detect that. That will lead to a disparity in how representation is made in certain cases. That could lead to a disadvantage for legal-aided clients.

My final point is about the savings that you are making. I think that it was £4 million in the first option and about £2 million in the second.

Mr Crawford: I think that you are referring to different options —

Mr A Maginness: Yes.

Mr Crawford: We are now estimating about £3·5 million. That, of course, will depend on changes in forecasting, but it is based on the 2011-12 figures. Most of that is made in the private family law side through the removal of the automatic grant of counsel. That is where the biggest savings are.

The Chairperson: Perhaps you could clarify that point for me, because we might not be far away from making some progress. In the civil cases in the High Court in which you are faced with an eminent QC, how will that be determined? You said that the level of legal representation on the other side is part of the criteria. Explain that to me a little.

Mr Crawford: The primary issue for the grant of senior counsel in the High Court is whether the gravity, seriousness and public importance of the case are more difficult than the norm for that court tier. Clearly, that means that not all cases in the High Court are dealt with by senior counsel. If a party has decided to fund senior counsel in a case — an insurance company, to use Mr Maginness's example — it obviously believes that there is a reason for senior counsel being required to win that argument. Exactly the same reasons ought to be made by the other party to the Legal Services Commission. Essentially, we are saying that that argument can be made by the legal-aided legal team; the solicitor and the junior counsel already in the case. That can be by way of legal opinion that the commission can be given on the legal issues that appear in that case. If the insurance company has made a rational decision on proper grounds for putting a senior counsel into a case and is prepared to fund that, exactly the same argument ought to be capable of being made to the Legal Services Commission to show why that case is so serious that it requires that. The point that I made

earlier was that, if the Legal Services Commission says no and the legal team for the legal-aided party still believes that only a QC can handle the issue, it has the ability to appeal to the appeals panel. One of the key protections that really needs to be emphasised is that that panel comprises independent solicitors who are in private practice outside the power of the Legal Services Commission. Currently, in many cases, they overturn Legal Services Commission decisions on legal aid. There should be no reluctance in that regard. If they, as all practising lawyers, believe that a QC should be granted, I am fairly confident, if the arguments merited it, that they would get that right.

The Chairperson: Is your fear that you might be being too generous now with the independent appeal?

Mr Crawford: I would hate to be quoted that I am being too generous. I do not think that it is a question of generosity. We started out wanting a very tight set of rules. Now, we are, effectively, applying quite a lot of discretion. Discretion can be a very good thing when it comes to getting the right level of fit for a particular case. We allow the Legal Services Commission to work through that, receive all the evidence and reach a decision, and then we have an appeal mechanism, which is effective and certainly has been in the past. My slight fear is that that means that the rules are, in necessity, looser and more flexible. I think that that is a good thing, based on the consultation response that we got, but it leaves me with the sense that we are less predictable, whereas before, I think, we would have been more confident in saying that there are, say, six exceptions under which you can get an additional counsel, we know how many of those six exceptions there are, so we know how many cases that will be, and we can do the maths and work out the volume of cases that get extra QCs.

The responses have told us that we are better doing what we are doing, but that means that we are less certain about exactly what types of case will qualify for additional counsel because of the gravity, seriousness or public importance being more difficult than the norm. We have made our estimate on it, and we will continue to monitor that to see whether there is any big difference from what we have predicted. I think that, for the individual, there ought to be greater confidence that their arguments do not have to fit a particular, specified set of exceptions, so they can make the argument on their own individual case. It is better from that point of view. In terms of government forecasting, it is probably not such a good thing, because we will not know until we see how it works exactly what that will give us.

Mr McCartney: Thank you very much. I want to make a couple of broad points. Robert, you mentioned that people are seeking adequate representation, which I think is right, and legal aid is for those who do not have the means. I think that you said that you are trying to avoid a situation in which people have a level of representation that is not actually needed. I think that that is a fair way to go about it. As regards guidelines and regulations, I go back to the previous argument over legal aid in the last mandate, when the issue was around two counsel. It became apparent that if the guidelines had been properly employed, you would have avoided the need, in the main. I think that everybody accepted that. At least one QC said that he was involved in a case at one time that he should not have been involved with, but if you get it, you get it, so to speak. So how do you avoid that situation? We get a presentation from you today, it is rebutted, and you rebut back. Lord Neuberger is quoted in the defence, and then he is also quoted in the knocking back, so you are left in between. We have to try to come up with a better system.

It goes back to the argument that, if someone goes into a courtroom and the other side is represented by a QC and they are not, you can see why they would say that they are not adequately represented. In the court, I assume that there is no power to say to an insurance company — if that is who it is — that they should not employ a QC in that instance because it is over the top and will put the other side at a distinct disadvantage.

Mr Crawford: The point about the insurance company is fair in relation to any big company that can afford to fund counsel and that fights cases as a matter of course. A lot of companies will, of course, settle. Our argument is that, just because the other side has brought in a QC, that does not mean that a very good, competent — as they all are — junior counsel cannot conduct those negotiations. If you recall, our proposals also include the flexibility to bring in a QC for part of a case, perhaps to provide a legal opinion. That may be part of the solution. If the other side has a QC involved, the junior counsel could say that the legal issues in that case may be such that they cannot deal with them, and ask the Legal Services Commission to fund a counsel's opinion so that we can establish whether or not additional representation is required. That flexibility exists in this. What we are trying to avoid is the automatic award of a counsel that is not needed.

The other criticism that we have had — this reflects the position in private family cases — is that one side brings in a QC because they just want to drive the other person off the pitch. It may not be necessary for legal aid to fund two counsel to defend that. The fact that we fund two counsel leads to a kind of habitual pattern and it is seen as the norm that there are two counsel in such cases.

Again, a lot of the criticisms that the Minister has had have been where legal aid has funded two counsel. Perhaps the other party started with two counsel but then cannot afford to continue, but legal aid can. The legal-aided party can carry on to the death and can keep coming back and back. So, we want to keep it at the lowest level possible, because that is not only good for the legal-aided party but for the party that perhaps started being advised by two counsel and then runs out of money while the legal-aided party does not.

Mr McCartney: In a legal-aided case, there is equality of arms.

Mr Crawford: We have now built that into the rules.

Mr McCartney: If a case is privately funded, equality of arms is not guaranteed.

Mr Crawford: We had a bit of this discussion previously in evidence sessions. Equality of arms ought to be equality of arms to deliver the quality and level of service required. If the insurance company or the privately funded party puts a QC on the case and one is not necessary, in that it can be dealt with perfectly well by a junior counsel, equality of arms is there because both of them can deal with the issues. From our point of view, if there is an absolute and proven need to bring in a QC because they have a particular expertise, that will be granted by the Legal Services Commission. We think that the flexibility is sufficient in here, and the appeals mechanism and the power to bring in a senior counsel for a particular part of the case is flexible enough to do that and to allow that to happen in those cases where it is necessary without it being so automatic that we end up spending money that we do not need to.

Mr McCartney: I agree with that. People will accept that there are many capable junior barristers, perhaps more capable than some senior counsel, but when you are trying to explain that and to create a system that is adequate and fair, it is hard to say that you could end up with the best junior barrister against the worst senior counsel for the insurance company. Particularly on divorce, if someone can afford to be privately funded, you have to have some sort of system.

Mr Crawford: Again, divorce needs a bit of unpacking because it is undefended. We are saying that a solicitor only is the requirement. If there are ancillary proceedings about property or children, counsel can come into the case. Indeed, if the legal issues are so significant in those ancillary proceedings, it can be junior counsel and senior counsel. That is in place. What we are trying to say is that where divorces are genuinely uncontested — there is no argument between the parties — and, therefore, there is no legal argument that needs to be fought out in a court, it is much better that the two solicitors represent their clients and resolve it as amicably as possible. Currently, it is automatic that a counsel can be funded in the case. Many solicitors will not do that if it is not necessary, and we accept that. We are saying that legal aid should have a tighter rule for that, but there is still the provision, very carefully in the proposals, that, if ancillary proceedings about property or children require it, counsel can and will be brought in. So, we think that we have got that one right, because undefended divorces cost an enormous amount of money unnecessarily.

The other point is that, if legal aid funds counsel in a divorce case and the other party is not legal-aided, of course, they then are advised by their solicitor to pay for a barrister as well, when there may be no legal argument between them at all. There may be a need to have some sensible, rational support from a solicitor who understands about property to agree what that settlement is, but, if there is no legal argument between them — that is what uncontested means — we do not see why there is a need for a barrister to be involved.

Mr McCartney: Do you have a copy of your briefing paper?

Mr Crawford: Yes.

Mr McCartney: Can you explain the second bullet point in the departmental response to issue 15 in the paper, which is counsel in divorces? Some of it does not read right. Maybe I am picking it up wrongly.

Mr Crawford: The point that we are trying to make there is the point that I have just made. Currently, if the assisted party's solicitor makes a reasonable argument for senior counsel, based on the claim that the other side has engaged senior counsel, the Legal Services Commission does not check what the other side has. So, first, we are saying that there would be a check. We are also saying that we do not want to grant senior counsel because the other side will feel that they are being outmatched. That may not be as clear in the paper as it ought to be. The key point at the end is that both sides' costs can be inflated, and one side's decision to go and get senior counsel is based on a simple statement rather than a fact. One protection that we are putting into this is that the Legal Services Commission will check whether senior counsel has been brought into a case by the other side before it will consider that.

Mr McCartney: It is just my reading of it but should that not be "if the adjudicators do not"?

Mr Crawford: It probably should, I think. That would make more sense — "or/and", or whichever.

Mr McCartney: Just for accuracy, my comment was directed at the Bar Council, not to officials.

Mr Crawford: Ah, right. Sorry, I think that I was mistaken.

Mr McCartney: I am not as eminent as Lord Neuberger but it was to the Bar Council and not the Department.

Mr Crawford: I apologise. We will correct the record.

Mr McCartney: No, that is OK. Thank you.

Mr T Elliott: Thanks for the presentation, folks. I listened to the Bar Council and the Law Society on the system review. There could still be improvements from the Department. You were not overly clear on that, Robert, in the sense that we are looking at a review and any wider review would require a number of Departments.

Mr Crawford: That is right.

Mr T Elliott: I would like to see at least an attempt to progress that because that is important. If we need an overall review, we need an overall review, irrespective of how many Departments that takes in. It would be useful and helpful if some Departments started to cooperate a wee bit, so I would like to see that progressed.

My second query is around the cost of civil legal aid. Is it similar to other aspects of legal aid, in that there are a small number of very high-cost cases, or is it just that there is a volume of cases that require a reasonable amount of money?

Mr Crawford: There would be a very small number of very high-cost cases for the High Court, because there are a small number of cases in the High Court on civil legal aid, some of which could be identified as very high-cost cases. What we do not have, compared with criminal legal aid, is a specific certificate that determines that something is a very high-cost case and therefore gets higher fees.

We have a group of cases that typically have higher costs. For example, we have seen the average cost of Children Order cases go up significantly in the past year or so. A lot of those cases seem to involve partners who have broken up and are of foreign extraction. That leads to greater costs for interpreters and a lengthier time to sort out issues that may have some relationship, such as family members being out of the jurisdiction. That is an example of a case that drives up the cost. There is no specific category in legislation.

Mr T Elliott: Is it possible to give us a breakdown of how many cases cost above a certain level?

Mr Crawford: Yes, we can do that fairly quickly. We have done analysis of that in Children Order cases. I am happy to write to the Committee on that, Chairman.

Mr T Elliott: Sorry, Chair, I should have declared an interest as a member of Adoption UK's Northern Ireland advisory group.

Ms McCorley: You said that there was an automatic right to appeal if it was felt that one side was disadvantaged because the other side could afford senior counsel and it could not. Is that automatic or does it incur costs?

Mr Crawford: The appeal is within the ambit of the Legal Services Commission, so the appeal is an automatic right. It applies to all legal aid and not just to these proposals. I emphasise that simply because it would not have been spelled out in the proposals that that is the normal way in which the appeal mechanism works. I do not think that there is even an administrative fee for appeals. There should no cost. The appeals panel sits every Friday afternoon, so it is a fairly quick process in order to get it on, as far as I am aware.

Ms McCorley: I asked you this before, but how often would that be reviewed and monitored in the new system?

Mr Crawford: We are planning to monitor the effects of it every month, simply to see what cases are going through. We do not want to let it run for some time before we spot a problem. We would probably review it more formally after about six months. We would be happy to provide the Committee with a report on how it is working if you want that level of detail. We generally review everything more formally after two or three years to determine whether we need to make further changes. In that period, there could be changes to legislation or to the way in which health trusts do things, in which case we need to keep pace with that.

The Chairperson: Why does it have to be solicitors who make up the independent appeals panel?

Mr Crawford: Again, I should say that, in the context of the new agency, that may change. A consultation on appeals was done as part of the work carried out for that. Our division did not take that work forward, but that consultation recommended a change be made to the appeals panel, reducing its number to three. The question would then be whether, in the post-agency future, that panel would not comprise only solicitors. However, that is subject to how that work is taken forward. At the moment, there are five members. It is certainly something that the Legal Service Commission itself had been examining, but bringing forward the proposals to make the commission an agency overtook that consultation.

The Chairperson: It could lead to some saying that there is a perceived conflict there. Why would they not —

Mr Crawford: I think that that point was drawn out in the consultation and, indeed, in some of the responses that you considered some months ago.

The Chairperson: OK. No other members need clarity around this, so I thank Robert and his team for coming.