



Northern Ireland  
Assembly

Committee for Justice

# OFFICIAL REPORT (Hansard)

Legal Aid Reform: Financial Eligibility  
(DOJ Briefing)

5 December 2013

# NORTHERN IRELAND ASSEMBLY

## Committee for Justice

Legal Aid Reform: Financial Eligibility (DOJ Briefing)

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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  
Ms Rosaleen McCorley  
Mr Jim Wells

**Witnesses:**

Mr Kevin Carbery	Department of Justice
Mr Robert Crawford	Department of Justice
Mr Mark McGuicken	Department of Justice

**The Chairperson:** I formally welcome Robert Crawford, deputy director of the public legal services division in the Department, and Mark McGuicken and Kevin Carbery, also from that division. Robert, I believe that this is your last meeting with us in your current position.

**Mr Robert Crawford (Department of Justice):** Yes.

**Mr Wells:** You will miss us.

**Mr McCartney:** He is getting out while the going is good.

**The Chairperson:** Before we start, I want to thank you for the time that you have given to the Committee. We have had some very good and interesting exchanges over the time that you have been in your role. I want to put it on the record that I appreciate the time that you have given to the Committee and the way in which you have conducted yourself towards us. That said, I will hand over to you to take us through the report.

**Mr Crawford:** Thank you, Chairman. I thank the Committee for its unfailing courtesy in these interesting times. It has been a lively time to be in charge of legal aid policy.

**Mr Wells:** We have one last opportunity to change that.

**Mr Crawford:** Indeed. *[Laughter.]* I will provide a brief overview of the outcome of the public consultation on our proposals for changes to the financial eligibility arrangements for legal aid. I will then be happy to take any questions.

The public consultation lasted 12 weeks and ended on 21 June. We received a total of 25 responses, 12 of which made substantive representations. The other 13 respondents offered no suggestions for changes.

We made a number of changes to the proposals as a result of the responses received. Overall, however, the impact of our proposals would be to reduce eligibility for civil legal aid from 42.7% of the Northern Ireland population to 34.4%. That remains considerably higher than in England and Wales, where the eligibility level is 28%. That is very much in keeping with what was set out in the original consultation paper. The post-consultation report sets out the comments received and our responses to them. I do not plan to go through all the points in the paper, but I would like to highlight some of the main ones. I will deal with civil legal aid first.

Our proposal to harmonise the means test for two of the civil legal aid schemes — assistance by way of representation and civil legal aid — was generally welcomed by all respondents. We therefore propose to proceed with replacing the existing separate financial limits with one single new upper financial limit of £10,682 per annum and a lower limit that will now be linked to the level of income support. That linkage will, effectively, last for ever. If income support is uprated, the lower limit for legal aid will also be uprated, and the contributions that people will have to pay will be reduced as that lower limit is increased. We think that this should happen automatically in line with increases in income support. If that proposal and the proposals that we are presenting are accepted, it will mean an almost immediate increase in the lower limit of today's level of £3,355 to a new level of £3,702.12. That will be in line with income support and will be uprated in future with any future upratings.

Upper and lower limits are, of course, based on disposable income and take into account individual circumstances and outgoings such as rent and mortgage payments. We have not made any significant changes to the disregards and allowances. However, as outlined in the original proposal paper, we plan to review all those disregards and allowances in due course to make sure that we capture people's real outgoings, so that our assessment of disposable income reflects the real circumstances.

As set out in the consultation paper, we also propose to proceed with the introduction of a gross income cap of £35,000, which means that applicants with gross income above that level will not be eligible for legal aid, regardless of their outgoings. This will help to keep administration costs down. It will mean that the people who are really highly unlikely to qualify for legal aid will not have to be put through the full means assessment process. Only a very tiny percentage of people who would fall at that hurdle would be eligible for legal aid if they were put through the full assessment process.

We also propose to continue with the plan to make contributions over the full period of cases that are funded by legal aid. Although some representations we received were against that, we believe that there is a general principle of targeting legal aid to those most in need of assistance. By corollary, this means that those who can afford to contribute towards their legal aid costs should do so. It is therefore unfair to expect full contributions towards the cost of legal aid from people whose cases are dealt with very quickly in the 12 months, as at present and, perhaps, a much smaller contribution from those whose cases, perhaps through no fault of their own, happen to last very much longer. We believe that, in the interests of fairness and making sure that those who can afford to pay contribute, the payments should reflect the full contribution. That means that the payments should be made over the full life of the case. That measure will deliver £1 million of the savings that we are talking about in this instance simply by requiring those who are eligible to make contributions to make the full contribution required.

When an application is made in the name of a minor — a person under 18 — the resources of their parents or guardians will be taken into account when assessing the financial eligibility of the minor. We received some representations against this general principle and, in a minute, I will say how we dealt with them. The Northern Ireland Commissioner for Children and Young People and the Children's Law Centre, among others, expressed concerns about it, particularly as it could prevent a child obtaining legal support in circumstances in which he or she genuinely needs legal help and assistance.

We feel that parents' finances should be included, because of the general principle of targeting legal aid resources towards those most in need. It means that those who can afford to contribute towards the legal aid costs should do so. That principle exists throughout the UK jurisdictions and in the

Republic of Ireland. At the moment, we are the only jurisdiction that does not apply this principle. It would also provide a safeguard against parents initiating legal proceedings in the name of a child to avoid having to make a contribution. We have some examples in which that has been the case and in which families could have well afforded to pay legal costs, but the case was taken forward in the child's name. I am not saying that it is a very large number of cases, but, in the interests of tightening rules and making sure that those who can pay do pay, we believe that this is an important principle.

However, we accept the arguments made by the Children's Commissioner and the Children's Law Centre that we need to balance this principle against the importance of ensuring that children are not prevented from accessing legal help. We have made some amendments to our proposals to reflect that. In particular, we are planning to include a power to allow the Legal Services Commission to waive the financial means test completely in cases in which it believes that it would otherwise adversely impact on the rights of the child. In particular, that would be where there is a conflict of interest between the parents and the child, or where — and we are picking language from the Scottish test — it would be "unjust and inequitable" to do so. In other words, if the Legal Services Commission, in making the judgement on the individual case, believes that it would be unjust and inequitable to the child for the means test to be applied, it can waive that test. We do not want parents becoming an obstacle to a child getting legal help when the child genuinely needs legal help and the parents may not share the child's interests. This should provide for that case. By way of comparison, the Republic of Ireland has a very similar test. Its wording is "unreasonable in all the circumstances". The tests in the South and Scotland have been in place for some years and seem to work reasonably well. In a sense, we are adopting what appears to be good sound workable practice.

Responses from the Children's Commissioner and the Children's Law Centre also highlighted some more general points. They made some general representations on the rights of the child. That prompted us to consider something else that we will want to take forward outside this particular project: access of the child to legal aid and justice more generally. There is a situation that we are concerned about. Generally, an application for legal aid is made by the parents. The current arrangements do not contain any specific provision for an application to be made by a child or by any organisation on behalf of a child. We want to look at that. As I said, there are some dangers. We want to ensure, if parents' contributions are required, that this will not be a way of avoiding that. However, based on representations made to us by the voluntary sector organisations, we believe that there may be something in our administrative arrangements that requires a little bit of attention. This is not something that other jurisdictions have addressed to date, but we feel that, given the strength of the representations, it is something that we should do. We will take that forward separately when we come to work on the recommendations that are coming out of the work that the Minister commissioned on the legal needs of children and young people. As you may recall, we commissioned research from Queen's University. That report is about ready. We will have it shortly, and the issue will be addressed when we consider the many other issues that will come out of that report that will require us to examine children and young people's access to justice. The representations made in the consultation will feed into some additional work beyond eligibility.

The changes that have greatest effect on reducing overall eligibility highlighted in the post-consultation paper are those relating to the assessment of capital, by which we mean people's savings and property. We followed the recommendations in the access to justice review and the consultation paper, and we propose to proceed with them. Specifically, capital resources will now always be taken into account when assessing eligibility. Our intention is to ensure that an applicant with considerable savings or property should have to contribute towards their legal costs. Again, the general principle is that a person who can pay something should pay something.

We acknowledge the concerns expressed by a number of respondents, particularly Women's Aid, about this aspect of the proposals. However, we believe that we have put in a number of safeguards that should help to prevent any overdue harsh impact on vulnerable groups, particularly older people.

Property being contested as part of a legal dispute, for example in marital breakdown or where partners separate, will not be taken into account. That point was raised when we addressed the Committee in March. It will not be considered at all, because, essentially, neither party has access to the property, so it should not be considered as something that they can draw on. That will protect ex-partners during the period of legal dispute.

Also, a housing equity disregard of £100,000 will be applied. We explained some of that in March. In addition, there will be a mortgage disregard of £100,000. We set out some examples in annex H to the original consultation paper, which I do not propose to go through in detail. The average house price in Northern Ireland has gone down by about 6% since March and is now £130,864. There is a

£100,000 disregard for any property and a further £100,000 in mortgage disregard. For somebody with a £200,000 house and with half their mortgage paid, all that £200,000 would be disregarded. If they had a £130,000 house and half the mortgage was paid off, the £100,000 equity disregard would not apply. Their mortgage would be about £80,000, so that would be disregarded as well. In fact, the owners of average-price houses or those who own houses considerably above that value will not have to have their capital considered. That will be disregarded.

We suggested including an additional pensioner disregard up to £100,000 of property, depending on their disposable income. A pensioner is defined as someone over 60. We are also looking at those with dependents aged over 60 living with them. We would not be disadvantaging somebody who had to look after a dependent relative of that age or where they perhaps moved into the house owned by that relative to look after that person in their declining years.

That would apply in addition to the two disregards that I mentioned. In theory, a pensioner with no income could have up to £300,000 worth of property exempted from consideration. That is an additional protection. Had we not put that in the original consultation, rather than a reduction in eligibility of maybe 6%, 7% or 8% in total, it would have hit pensioners by about 13%. We believe that that is necessary to protect pensioners. That view was confirmed based on representations that we received and we want to proceed with that important protection for those vulnerable people.

We received representations that the capital limit should be the same for applicants in immigration cases as in other cases. We accepted that.

I will go through two other areas in the original consultation papers quickly. The first is means-testing in the Magistrates' Courts. We had a proposal to test the principle of introducing a fixed fee in the Magistrates' Courts. Although in general we received fairly positive representations about that, concerns were expressed about the potential for causing delay in the criminal courts if we proceeded with it. We accept that that could be a problem because simply processing means-tested applications takes some time.

For example, the current standard for processing civil legal aid applications in the Legal Services Commission is 75% in 12 weeks. Anything like that timescale for the Magistrates' Courts will just not work, so we need to find a better way to do that. We say in the post-consultation paper that until we sort out how that can be done quickly, and we mean very quickly — Scotland does it in 1-2 days, which is the order of change that we need — we will not proceed with that element of the proposal. Therefore, we propose coming back to the Committee in the new year when we have a solution and a refined version of that proposal, and confirmed the level at which we propose to set such a means test.

Financial eligibility for criminal legal aid will be subject to affirmative resolution in the first instance because that commitment was given during the passage of the Justice Act 2011. That one will not proceed until we come back to the Committee. Even then, it will be subject to affirmative resolution. Some of those concerns were expressed last time and rather than go into the detail, it is important to reflect that.

We sought ideas on how to proceed with changes to the legal advice and assistance green form scheme, which we, the legal profession and most organisations that deal with it find is not a good system. Unfortunately, we did not get many ideas, so in some ways we are back to the drawing board to bring forward proposals, perhaps in the new year, on how we will take that forward. Again, we do not propose to proceed with anything in that area at present.

Finally, I would like to make a couple of comments on equality, because some of the issues that I have mentioned touch on section 75 groups. We carried out an equality screening exercise before the consultation. It did not cause us to conclude that there was any evidence of adverse impact on section 75 groups. However, as we do with all legal aid proposals, we invited comments from the consultees. As I reflected, there were some representations made, particularly in relation to children and older citizens. We believe that we have addressed those concerns with the protections that we have put into the revised proposals as set out in the post-consultation report in relation to children and pensioners specifically.

The final point is that implementation of the proposals, if they go forward into law, would be kept under review month by month to make sure that they deliver the kind of results that we have predicted for them. As you know, we funded a commission to carry out considerable independent research on that particular proposal to calculate what the impacts would be, so we are fairly confident that our

researchers got it right, but we will monitor it month by month to make sure that that is actually happening. I am happy to take questions.

**Mr Wells:** In paragraph 3.3 of the Department's response to the consultation you say that you intend to reduce eligibility for legal aid from 43.2% to 35%, a decrease of 8.2%. Why is that statistically impossible?

**Mr Crawford:** Why is it statistically impossible?

**Mr Wells:** Yes, why is a decrease from 43.2% to 35% not a decrease of 8.2%?

**Mr Crawford:** I see what you mean. It is an 8.2% decrease if you take it from 100%. It is about —

**Mr Wells:** It is 23%.

**Mr Crawford:** Yes, if you are looking at the number of people eligible.

**Mr Wells:** This happens time and again with high-powered statisticians in all Departments. They do not know the difference between a percentage and a percentage point. That is an 8.2 percentage point decrease, which is a 23% decrease.

**Mr Crawford:** I accept that. It is badly phrased.

**Mr Wells:** Do you accept that this makes the implications of what you are saying much more profound than a single-figure decrease percentage-wise? Hopefully everybody knows what I am talking about here.

**Mr Crawford:** I think I do.

**Mr Wells:** It is a ploy often used by statisticians to reduce the impact in the public perception as to what is going on. One quarter fewer people in Northern Ireland will be entitled to legal aid than are entitled today as a result of your changes.

**Mr Crawford:** The point I will make in response to that is that over one third of people in Northern Ireland would still be eligible compared to just over one quarter in England and Wales.

**Mr Wells:** That is my next question. Why, even with that, are we so far detached from the rest of the United Kingdom?

**Mr Crawford:** The very simple explanation is that, in Northern Ireland, we are obviously setting the financial eligibility test at a fixed level with respect to people's income. That simply reflects the fact that there are more people in Northern Ireland who are earning below that particular level of income. We have more people at the lower end of earnings and more people unemployed at present than England and Wales have. We have tried to set our levels so that we do not risk disadvantaging and preventing people in Northern Ireland getting legal aid who might have been eligible in England and Wales. That is why we set our levels very slightly above England and Wales, but what that produces, even at an absolute level, is more people in Northern Ireland who are eligible, because there are more people earning less than that threshold.

**Mr Wells:** OK, but why would a 23% fall in eligibility for legal aid only lead to a saving of just over £2 million?

**Mr Crawford:** Essentially, it depends on how that falls in relation to the legal aid cost. We have calculated that for the different types of legal aid. Assistance by way of representation, for example, which comprises the largest bulk of legal aid cases involved, is not a particularly expensive form of legal aid. It is not the higher end of cases. Therefore, you can have a reasonably significant number of cases that do not necessarily cost enormous sums of money. We have calculated that through, but, again, we are looking at the overall cost implications at the end of it. When we say that fewer people are eligible, remember that many of the people who would have been eligible — that 20% — would have been paying contributions under the existing scheme, because their income would have been such as to allow that.

**Mr Wells:** Is it really worth it all for such a comparatively minor saving, given the overall legal aid budget? It is obviously causing some concern among the legal profession, and it really does not strike me as a huge saving, given the way that the legal aid budget more generally seems to be running out of control. This does not seem to be stopping the train at all.

**Mr Crawford:** On its own, it would not, but, first of all, £1 million of the savings on civil legal aid comes from ensuring that we collect all contributions due. That has to be the right principle. The other £1.4 million from civil legal aid comes through introducing the capital threshold. We believe that there is a general principle that people who can pay should pay. The project to review financial eligibility did not start with an objective of trying to make as much savings as possible. It was about tightening up the rules, making them fair and targeting resources at the least well-off. We believe that making savings is important, but we are looking at a range of projects to make the savings that we need to make in order to bring legal aid within budget. This happens not to be one of the largest producing savings. Again, I think that we would have been criticised had we brought forward a proposal to reduce eligibility below, say, England and Wales or sought to make significant savings by reducing it by more than we have done.

**Mr Wells:** You made an interesting point. We have been lobbied quite a bit by solicitors who practise in the family courts, dealing with divorce and separations. You said that there is now provision for the rules to be set aside if there is a conflict of interest. Will you take me through the mechanism of how that would happen on the ground? Would the solicitor make the case or would the courts intervene? How does it happen?

**Mr Crawford:** Legal aid applications are made by the solicitor on behalf of the client. The client in this case could be the child or parent. The solicitor would apply, in the child's interest, to the Legal Services Commission. The solicitor would make the argument and say, "Even though the parents' means are such that they would normally have to make a contribution or, indeed, that they would not be eligible for legal aid, we are applying to the commission on the basis that not to grant to legal aid in this case would be unjust or inequitable to the interests of the child".

A very obvious case would be where there is a conflict of interests between the child and the parents. It could be because the child is bringing an action against the parents or because the parents do not want the action to proceed but where the child has some right that the solicitor advises should be contested. So, the parents may not want to proceed, but it may well be in the child's best interests to proceed, and that advice may be given to the child by the solicitor, or indeed, to the child's parents. You can have the situation where the parents say, "We cannot afford to do this without legal aid. Under the legal aid rules, we are not going to be able to get anything, but, in the interests of our child, it can still be waived by the commission", and that is the argument made by the solicitor.

**Mr Wells:** That certainly deals with some of the concerns that we have heard. Have you any idea how much that exemption will cost?

**Mr Crawford:** We did some thinking about that, but we have not put a figure on it, because we found it difficult to see how the discretion would apply in practice. Again, looking at the Scottish legal aid system was not terribly helpful, because it is very different. It has much higher eligibility but a massively higher contribution scale. It is reviewing its system, because it does not think that it works perfectly. So, we did not think that the Scottish figures would be terribly helpful, and we did not collect them, because we felt that the system is failing. So, the answer, I am afraid, is no. However, we envisage that there will be a small number of such cases. We are talking about situations in which the child and the parents have a different set of interests. Most parents will want to make sure that their child's rights are protected. So, it will largely be at the margins where there is a difference.

**Mr McCartney:** Thank you for your last presentation. In the latter part, you mentioned that this would be under review on a month-by-month basis. What will you be looking for? I assume that England and Wales has done something similar with reforms.

**Mr Crawford:** Although we are being more generous with the limits and so on, the position in England and Wales is largely what we are trying to get to. Scotland and the South have similar arrangements for many of those types of cases. For example, amalgamating children's and parents' income is common, as is the use of capital assets in the assessment. They have done that.

We predict that doing this will achieve a reduction of 20% in the number of people who get legal aid. If it turned out to be inching towards 25%, we would be concerned that it was not working as we

anticipated. Equally, if we were looking at the exercise of the discretion by the Legal Services Commission in respect of children and found that the cases that should be given legal aid were not, we would want to issue guidance to the commission. We cannot intervene in individual cases, but we would want to issue guidance to inform that decision-making. We have thought about issuing guidance anyway, but, initially, we might allow the commission to set its own guidance on that.

Those are the kind of things that we would be looking for. We will try to ascertain whether the proposal is working as we anticipated. The nice thing about this is, because it is at the application stage, the information is available very quickly. We do not have to wait until halfway through the case but can see it at the point when applications are granted and can literally do it month by month after the changes are made. We can act quite quickly.

**Mr McCartney:** The principle of legal aid is to give access to justice to those who cannot afford it. If people are excluded from the system, there might be a temptation not to pursue cases. Will that be part of your monitoring?

**Mr Crawford:** Yes. We will be able to see a drop in the application levels. That will also be monitored. We can, again, get that information month by month.

**Mr McCartney:** Will you be able to monitor from statistics that, last year, for example, 300 people went through a particular court and that fewer did this year?

**Mr Crawford:** Yes. In fact, we have all those statistics here anyway.

**Mr McCartney:** It will not necessarily just be applications. Some people might look at the criteria and say to themselves that they do not fit so do not pursue the case.

**Mr Crawford:** We can also monitor the case types. You mean people who are ineligible, do not apply and do not bring the case through their own resources. We can certainly also build that in to it.

**Mr McCartney:** I asked the question because there are cases in which costs are got through the health service. There is no figure for that, though I know that the legal profession put out a figure for it. If you have a reduction in those cases and people do not pursue cases, the costs that the health service would normally have recouped if there had been a case would also be lost. How do you balance that? Your savings are projected at £2.5 million. Some people have said that the health service recoups something like £11 million a year. I am not sure of the veracity of that figure, but it is there. If you have a reduction of one fifth, you could also have a reduction of one fifth of the money recouped by the health service. You would be saving money at one end and losing it at the other.

**Mr Crawford:** That recoupment will be apparent in the figures that are gathered by us or by the health service.

We do not have as flexible a system for children as some of the other jurisdictions. In private family law cases in Scotland, England and Wales, their equivalent of the Northern Ireland Guardian Ad Litem Agency — in England that is the Children and Family Court Advisory and Support Service (CAFCASS) — can provide representation that is directly funded. We do not have that here. I emphasise that we are trying to be very careful not to disturb what we have, which are privately funded arrangements. That recoupment point ties in with that, because the connection with the health service is quite important. By the way, it would be up to the Health Department and DFP to decide whether that would be changed, not the Department of Justice. I take your point: we need to be very careful that we do not inadvertently pull out what we have. It is quite important.

**Mr McCartney:** Jim Wells outlined the percentage involved in the comparison. Wages and the standard of living in England and Wales are higher. We have to be careful that we do not compare the 35% eligibility here with the 28% eligibility in England and say that that is somehow good and better. If we drill down, you might expect it to be higher here because of all the other mitigating factors.

**Mr Crawford:** What I am trying to say is that we are setting the levels so that we are at least as — generous is the wrong word — supportive as England and Wales in that regard. We set our absolute threshold and gross income cap slightly higher than in England and Wales.



One of the areas that we want to look at next year and, perhaps, tinker with, if I can put it that way, is around disregards. Clearly, the jurisdictions are slightly different in what they disregard by way of disposable income. If we have these new schemes in place, we feel that more work could be done to analyse how that works. That is where we need to do the comparison. It is as much about the difference between what people earn as it is about what the different schemes disregard and how that works. We have rates and they have council charges. There are differences like that that we need to take into account rather better. Under this scheme, we need to monitor that to make sure that we are not inadvertently putting some obstacle in people's way that we think is all right as we have borrowed it from somewhere else.

**Mr McCartney:** It is the sort of idea that your comparisons need to be comparisons rather than something slightly higher. You need to be in the position to be able to say that that is what it should be there and that is what it should be here because of people's income or what is available to them as an income.

**Mr Crawford:** I agree. One of the protections for us in that was that we commissioned Tony Dignan to do that independent research and analysis. If we felt that there was any serious divergence that we needed to investigate, we would have perhaps asked for a little bit of consultancy expertise to come in. Although we are used to analysis, that is a very specialised area, and we would want to make sure that we get it right.

**Mr McCartney:** In the paragraph of the report that covers the equality impact assessment, particularly regarding those of pension age, it states:

*"There was however no empirical evidence to suggest that this would lead to a marked reduction in the take up of legal aid amongst ... older people."*

Where would you have found the empirical evidence if it is not in place?

**Mr Crawford:** Exactly. When Tony Dignan ran that through for us to analyse what the outcome would be if we did not have a pensioner disregard in place, he came up with a figure of a 13% reduction. Clearly, that would be very significant. I accept the point that Jim made earlier that that would be a percentage point reduction, but that would have been a very significant difference and would have impacted more on pensioners than on the rest of the eligible population. That is why we put that additional disregard in.

You are right: we could not have got the empirical evidence, but we tried to get whatever evidence we could by hypothesising and calculating from that.

**Mr McCartney:** That is one of the areas that you will have to watch in your review.

**Mr Crawford:** Absolutely. Indeed, all those things can be adjusted fairly quickly if they need to be.

**Mr Lynch:** Robert, regarding the proposed fees made available to solicitors and counsel coming to a new case or who are new to a case, there were only three responses to it: the Bar Council; the Law Society; and the Legal Services Commission, I think.

**Mr Crawford:** I do not think that we got anything from the Bar Council, but you are right: there were three legal profession responses.

**Mr Lynch:** One of the criticisms was that it was totally inadequate, and the question was asked about why two counsel cannot be paid if two counsel were given to the original case.

**Mr Crawford:** I think that you are talking about a different situation in which a new team comes onto a case.

**Mr Lynch:** Yes.

**Mr Crawford:** That is not, strictly speaking, financial eligibility. I am not sure of the precise situation that you are talking about, but, as a rule, if there is a new team, a new circumstance and, particularly, if a new certificate is issued, the Legal Services Commission will want to ensure that the right level of

representation is applied on that new certificate. Normally, if a legal aid certificate is transferred from one team to another, rather than a new certificate being issued, the same level of representation would continue to apply.

Again, I am sorry, but I am not sure about the situation that you are describing.

**Mr Lynch:** It is when the accused loses their legal counsel for whatever reason and has to bring in a new one. The document states:

*"proposed that the fees would be payable to solicitors and counsel if they are coming new to the case".*

**The Chairperson:** This is the —

**Mr Crawford:** Crown Court?

**Mr Lynch:** Yes.

**The Chairperson:** — sentencing.

**Mr Crawford:** Again, it depends. If a legal aid certificate is transferred, generally, the level of representation will continue to be the same. If a new certificate is issued because, for example, there has been a gap between the teams, the Legal Services Commission will assess that afresh. If the case has been largely completed and, for example, the only circumstance remaining, as in the case we are talking about, is sentencing, you would not normally see a need to involve two counsel. However, that assessment would be made by the court in that instance as it is criminal legal aid. Again, we would not assume that that would require funding for two counsel.

**Mr Elliott:** Thanks very much. Robert, wherever you are going, I wish you well. You are maybe not retiring yet.

**Mr Crawford:** No.

**Mr Elliott:** I want to bring you back to the access to justice review of 2011. I am looking at the recommendations. Does this include the children and family issues regarding recommendation 69?

**Mr Crawford:** In respect of?

**Mr Elliott:** That review report. It states:

*"legal aid should continue to be available to children, parents and anyone exercising parental responsibility, without reference to means or merits, in specified public law children cases."*

**Mr Crawford:** In specified public law children cases, absolutely, although it is entirely different for public law children's cases. That is a case where a child is at risk of being taken into care or removed from the parents. In that case, the child is represented by the Northern Ireland Guardian Ad Litem Agency (NIGALA), and that is funded separately via legal aid. That will continue; that will not change. Regarding the child, those arrangements continue untouched in those circumstances.

**Mr Elliott:** OK. Point 71 refers to the Guardian Ad Litem Agency, but point 69 does not. Point 69 refers to:

*"parents and anyone exercising parental responsibility".*

So, I would have assumed there that parents would still be, or indeed, guardians who were not guardian ad litem.

**Mr Crawford:** What we are saying there is that, in those cases, there would be a financial means test, but that is as at present. That will not change. What Jim Daniell was saying in that report was that we should not change the arrangements and that legal aid should continue to be available. The reason why he said that was, in England and Wales, large areas of legal aid have been taken out of scope

and we have no proposal at present to do anything so radical. In response to that report, we believe that we have met that recommendation through what we are proposing.

**Mr Elliott:** OK. Recommendation 40 states:

*"We endorse the approach to prioritisation proposed for the draft Funding Code with its classification of special children order proceedings".*

Again, I assume that that is not —

**Mr Crawford:** Actually, you have put your finger on an interesting point, because we have now decided not to proceed with the funding code as a particular method of delivering legal aid. The reason for that is that it was clear that the Legal Services Commission was not in a position to implement it within a reasonable timescale, and also because we do not believe that that is necessarily any longer the best way forward for Northern Ireland. England and Wales got rid of their funding code approach earlier this year, I think it was, having consulted on it previously. So, what we are now proposing to do is to continue with the same approach to means testing and merits testing as we currently have. The great advantage of that is that changing the arrangements will not mean any extra administrative cost to solicitors and barristers, particularly solicitors who do the administration, because the funding code would have been a very significant change to the whole structure of legal aid in Northern Ireland. We have moved away from that recommendation for the reasons that I mentioned.

**Mr Elliott:** OK. Sorry, just tell me how you decided on that. Was there a consultation?

**Mr Crawford:** No, because the consultation on all that happened in 2003, and that was in the Access to Justice (Northern Ireland) Order 2003. That consultation had been done. So, effectively, what we have decided to do is not to proceed with that. The consultation that might be appropriate to this is the one on the Legal Aid and Coroners' Court Bill, where we will be making some amendments to the 2003 order because we are not now taking forward those proposals. We will need to make some amendments to make things fit, because we want to use some of the powers in the 2003 order, including to give us greater flexibility and financial eligibilities, so that we can waive financial eligibility in certain circumstances. At the moment, we have to do that through ministerial authorisation, which we have done for, for example, domestic violence victims to allow them to get quick access to legal aid for non-molestation orders. In future, we will be able to do it through the legislation, which is the right way. Again, that will be picked up in the Legal Aid and Coroners' Court Bill discussions in Committee.

**Mr Elliott:** OK. My final point is on recommendation 7, and I think that I raised this when you were in front of us in Londonderry. It states:

*"There should be integration of forecasting on, and budgeting for, criminal legal aid spend with a justice-wide model which recognises the close inter-relationship between spend and performance across the system, including the police, PPS, courts and legal aid."*

My question was about why there is not an overall review to see how much more efficiency could be gained in the entire justice system.

**Mr Crawford:** I am happy to report that we are working on that. Our current forecasting group has been pulled together over the past few months to develop a new methodology and includes representation from the PPS. We are involving our colleagues who work with the Causeway system, and that gives us information from the police, the prosecution service and so on, and all of that will be bound together into a new forecasting methodology. We expect to have the draft methodology available in a working format pretesting by the end of this month, and it will then take a couple of months of testing before we are able to operate it live. To amplify your point: we have a lot more work to do on the civil side because we do not have the advantage of the PPS or the Causeway system giving us information before cases come anywhere near the courts. We still have a bit of work to do to see whether we can get an early heads-up, but we very much want to work on the principle that you enunciated, and we are well down the track of achieving it for criminal legal aid.

**Mr Elliott:** Would you not be safer completing that process before looking at the specific legal aid parts?

**Mr Crawford:** No. The things run together in the sense that, on devolution, the forecasting methodology and governance of legal aid generally was poor. So, there are things that we need to fix through reform of legal aid by tightening up rules and creating new standardised fees in criminal legal aid, which we have done, and in civil legal aid, which we hope to do shortly. Those things need to be done to improve governance and to start to get control of the costs, and they needed done quickly or we would lose the savings that we could otherwise make. We have been improving the forecasting model, and it is certainly better than it was three and a half years ago, but there are more fundamental improvements to be made, and that will happen over the next few months. We expect to have the new model operating by the end of this financial year. So, we are almost there with that. The forecasts that we get are occasionally not great and could be improved, but they are much better than they were several years ago.

**Mr Elliott:** I still make the point though that you are putting the cart before the horse by doing the individual aspects before looking at it overall.

**Mr Crawford:** We started work on these proposals and a lot of the proposals that we will bring to the Committee at the beginning of this calendar year. So, if we had waited until the new forecasting model was in place — that is, until after April next year — we could have had an 18-month delay in making savings. Given that there are projects that are in pipeline to make £24 million worth of savings, that would have been a £36 million delay in making the savings and, to be honest, the Department could not have afforded to wait. You are right in a way: it would be ideal if we had not inherited a bit of a mess in legal aid on devolution, but we do not have the luxury, I am afraid, of waiting to do the model, then do the big analysis and then move ahead. You are right: that would be the better way to do it if we did not have the financial problem that we have.

**Mr Elliott:** OK. I have one final question about the savings and property. It seems that quite a big percentage of the savings are coming from that. How do you see that impacting on the wider community? Do you believe that that will result in fewer people accessing justice? That property is not easily turned into cash.

**Mr Crawford:** We are saying that those people who have sufficient resources in savings or property — it covers both — and could afford to pay their legal costs ought to have been doing so, and that is what that new test will deliver. As we said to other members, we will need to keep monitoring that to make sure that we do not see a dramatic fall in the number of people bringing cases to court, because that is not the intention. The intention is to carry on bringing the cases if they believe that it is important, but that they pay for the legal assistance themselves.

We have examples of people who were able to pay for their case. One case in point was a judicial review of a school, and that made the papers some years ago. The total cost in legal aid was £26,000 for a three-day judicial review hearing. The issue involved a school rule about the length of a child's hair. The family was well able to pay for the legal costs. Had they been asked to pay it themselves, they may not have brought the case. However, given the way that legal aid was structured in capital terms, they were able to get through on the financial eligibility criteria at that time. We are saying that cases such as that may not be brought. In others, we will clearly want to make sure that we are not losing those cases that will genuinely put people at risk or cause serious problems, particularly for children.

**Mr Elliott:** OK. Thank you.

**Mr Anderson:** Thank you, Robert and gentlemen, for your presentation. Robert, you touched on a point about ways that people may use to get around this, such as seeking legal aid on behalf of children. Are you satisfied that all the loopholes are closed? You talked about the £100,000 housing equity disregard. What would stop someone outside the jurisdiction with big assets and little or no assets here from qualifying for legal aid in the UK?

**Mr Crawford:** There is a presumption, I believe backed by international agreement, that the rules of the jurisdiction that is offering legal aid apply. That is an interesting question because the Legal Services Commission has a judicial review challenge about that at the moment. It is similar to the point that you make, because the person has property outside the jurisdiction and lives outside the jurisdiction but their legal case is within Northern Ireland. Legal aid applies to people who are in Northern Ireland for that purpose and can be granted. The argument of the Legal Services Commission is that the person should pay the contribution that applies under our rules. The person's argument in the judicial review is that they should pay the contribution, which is minimal, that applies

in their jurisdiction of residence. That case is being fought out. I do not know how it will end up, but it is something that we want to nail down legally. However, you are right: if we were to lose that case, that would be a loophole that we would have to seek to close through tightening the legislation.

**Mr Anderson:** If you do lose it, that could be the biggest loophole going in the sense that people with big assets in different jurisdictions could be getting legal aid. How do we overcome it if that case goes against the Legal Services Commission?

**Mr Crawford:** The only assurance that I can give on that is that we will overcome it because we will have to. It is right there in front of us in a legal case; it is not something that we are speculating about.

**Mr Anderson:** So, you will be coming back to ensure that, in some way, that loophole is closed.

**Mr Crawford:** If we needed to amend legislation, we would be coming back looking for a quick amendment. If, for example, the case was decided next week and we lost, we may be able to incorporate something into the rules that we are planning to bring forward, but I doubt —

**Mr Anderson:** Have you some ideas about how that could be done?

**Mr Crawford:** We always have some ideas, but a lot depends on the precise determination by a court. We do not want to jump, in a sense, until we see what the court says about us because we need to plug exactly what that loophole is, if necessary. However, I am still hopeful that the commission will win the case.

**Mr Anderson:** Let us all be hopeful. You need to be well aware of that.

**Mr Crawford:** We support the commission in that, and it is important that it fights those cases.

**Mr Anderson:** OK. Thank you.

**The Chairperson:** Robert, thank you very much.

Mr Lynch had a question on the next session. Does anybody else have a question around sentencing hearing fees?

**Mr Lynch:** I think that my question was answered, Chair.

**The Chairperson:** OK.

**Mr Crawford:** Chairman, I wonder whether we could comment on that, because it is written into the Committee's consideration.

**The Chairperson:** Yes.

**Mr Crawford:** You may or may not be aware that there were legal proceedings about the issue that caused us to bring forward this amendment, and we are grateful to the Committee for an accelerated consultation. Those proceedings progressed to the Supreme Court today, and leave to appeal was granted. The appeal was heard by a panel of five judges, and it was upheld on the narrow ground that the particular provision in our rules was unlawful, essentially by being inadequate. However, they looked at the new rules that are before you and expressed the view, in very legal language, that they were not, I think they said, obviously unlawful for the purpose of filling the gap that they identified. They will issue the written judgement after Christmas, but I think that the extempore judgement that they issued today was intended to tell us that we should proceed with making the rules. On the subject of the Committee's own consideration, that is the outcome of the legal process that was running until today.

**The Chairperson:** OK, thank you very much, Robert. I wish you well in your new role.

**Mr Crawford:** Thank you.