Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Crown Court Fees Rules: Department of Justice

28 May 2014

NORTHERN IRELAND ASSEMBLY

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Crown Court Fees Rules: 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 Tom Elliott
Mr William Humphrey
Mr Seán Lynch
Ms Rosaleen McCorley

Witnesses:

Mr John Halliday	Department of Justice
Mr Nigel Hamilton	Department of Justice
Mr Mark McGuckin	Department of Justice

The Chairperson: From the legal services division in the Department of Justice (DOJ), I welcome Mark McGuckin, the deputy director, John Halliday and Nigel Hamilton. Mark, I invite you to give us an outline of where we are.

Mr Mark McGuckin (Department of Justice): Thank you, Chairman, for your introduction. The purpose of our visit to the Committee today is to update you on our proposals to make statutory rules that will change the remuneration arrangements for solicitors and counsel representing defendants in the Crown Court. In February, we provided an interim report following the public consultation on Crown Court fees. Following that briefing, we continued to engage bilaterally with the Law Society and the Bar Council. Our aim was to get a better understanding of their objections and to hear their views on options for guilty pleas. We were keen to ascertain whether there were any areas on which we could reach agreement.

You are already familiar with some of the concerns that have been expressed. There was, for example, a suggestion that our comparison with the graduated fees scheme operated in England and Wales was fundamentally flawed and that the graduated fees scheme did not remunerate solicitors for attending counsel in the Crown Court. We are clear from the published guidelines that attendance at court was covered in the graduated fees scheme and that, overall, the comparison was valid. However, it is the case that, in England and Wales, solicitors no longer attend counsel as regularly as they did previously, and that differs from the current position in Northern Ireland. The Minister was mindful of the potential for unintended consequences if the level of fees resulted in a fundamental change without a full assessment of the possible implications. As a result, we have adjusted the reductions, pending fuller consideration of the issue. In addition, as part of the process of engagement, a couple of errors were identified in our analysis, and the final proposals have been adjusted to reflect those.

We have listened very carefully to the representations that were made to us about the current structure, whereby existing fees might be protected, some offences might be reclassified to recognise seriousness, and new fees might be required. When possible, we have incorporated those into our proposals. The new rules that we propose to make will have the effect of reducing levels of remuneration for solicitors by 27% and for counsel by 22%, bringing the level of remuneration in Northern Ireland more into line with that in England and Wales. The new rules would have the potential to provide savings in the region of £3·6 million to criminal legal aid. Following the introduction of those changes, the Department is satisfied that the cost of running similar cases in the Crown Court in Northern Ireland, compared with England and Wales, will be very similar, although solicitors and counsel in Northern Ireland would still be better remunerated than their counterparts. We are also satisfied that those savings can be made without any diminution in the quality of service provided to Crown Court defendants.

I want to set out briefly for the Committee the main changes that will be delivered in the new rules. The new rules would remove the existing guilty plea 1 and 2 fees for solicitors and counsel, and that follows a recommendation by the Criminal Justice Inspection. Solicitors would get a single guilty plea fee with a three-band structure providing enhanced fees determined by the number of pages of served evidence. Those fees recognise that more remuneration would be provided for bigger cases. Counsel would get a single guilty plea fee that can be augmented by trial preparation fees in appropriate circumstances. Again, those fees recognise that more remuneration would be provided for bigger cases. The enhanced fees triggered by pages of served evidence would be rebalanced so that the fees paid for less serious cases of offence are no longer paid at the same rate as those for the more serious classes of offence.

The additional fees relating to pages of served evidence, at rule 18(b) of the 2005 rules, would be removed, but served evidence above certain limits will still receive an enhancement. Taking account of the savings flowing from these measures, the remainder of the scaled fees were reduced in order to deliver the required savings, but with the following exceptions that arose following representations by the Law Society and the Bar Council. Trial refresher fees and fees in the tables of additional fees should be preserved at existing rates for solicitors and counsel. The fees in classes A and D should be preserved at existing rates for counsel. The classification of cases for hijacking and driving offences causing death should be reclassified upwards to class D. Specific fees should be provided for confiscation hearings, which would be at the level of the highest daily refresher rate. We will amend the existing interpretation of the rules governing the payment for half-day and full-day refresher. Those are the key changes to the fee structure, and the full details are in the report.

In addition, we consulted on a number of other proposals. We intend to proceed as follows. We will take the necessary action to introduce rules setting out the conditions to be met before a defendant can change his legal team in the middle of a trial: that is the assignment of solicitors and counsel rules. We will amend the rules to require claims to be received by the commission within three months of the conclusion of proceedings rather than being submitted within three months of the conclusion of proceedings. We will amend the rules to require a formal review of these rules to be completed every three years rather than every two years. We will re-categorise applications for extended and indeterminate sentences, sexual offences prevention orders and disqualification orders under the title of public protection applications.

Although we see merit in establishing a public defender service, we do not propose to bring forward detailed proposals at this time. Similarly, we do not propose to proceed with the introduction of a system of contracts at this time, although we should return to that in the relatively near future. We believe that the proposals that we are outlining to you today are proportionate changes to the remuneration in the Crown Court and that they pass the value-for-money test.

Finally, when we last appeared before the Committee, we were asked about how costs in Northern Ireland compare with costs in England and Wales. That is a complex issue, as the component parts of the systems are very different. We are trying to work up an analysis that would be of value to the Committee, and I will present that in due course. However, I can advise that, with the types of cases that normally run in the Crown Court in Northern Ireland, when these changes are introduced, the level of remuneration, although not the same as in England and Wales, will be quite similar.

I am happy to take questions.

The Chairperson: The discussions with the Law Society and the Bar Council did not get a unified outcome that you are able to present to us. Are you close to that?

Mr McGuckin: I think that the Bar Council and the Law Society maintained their view that there are a number of perspectives. First, the reductions that were implemented in 2011 were quite severe and, in their view, were sufficient to bring fees down to within budget. Secondly, they believed that those reductions had not worked their way fully through the system and had not taken full effect. Thirdly, they questioned our analysis and our comparison with the graduated fee scheme from a number of perspectives. The Crown Court in England and Wales hears a much broader range of cases than happens in Northern Ireland. Some cases that would be heard in the Crown Court and England and Wales would be heard in the Magistrates' Courts here. However, we presented our analysis to them and gave them access to the information that we had used. We had picked a random sample of the cases that run in Northern Ireland and, on reviewing that, were quite clear that it was representative. It is difficult, when going to representatives of the profession to say that we want to cut the fees that they currently enjoy, to get their agreement to do that.

We listened very carefully to the representations made to us and have, in the case of both the Bar Council and the Law Society, adjusted where the reductions fall to protect the areas in which they felt that the main work was being done and to reflect properly the work for which the fees were intended.

Mr McCartney: Something that has always been part of this is the comparison with England and Wales. The systems are somewhat different and the types of cases different. How do you satisfy yourself that you are making the right comparison?

Mr McGuckin: We took a sample of cases that ran in Northern Ireland — 213 of about 2,000 cases in that year. We looked at the sample and subsequently reviewed it after representations from the Bar and the Law Society and concluded that it was representative. We looked at the individual cases and applied the fee structure that would have operated had they run in England and Wales. We compared that against the fees paid in Northern Ireland, and that is how we came up with the differences at quite a detailed level against solicitors and each level of counsel — junior counsel, senior counsel, led junior and so on. It was quite clear: you could see the fee that would have been awarded had a case been run in England and Wales and the graduated fee scheme that operates there applied. That represents the cases that run in Northern Ireland, so it removes any inconsistencies due to different types of cases run in another jurisdiction or the volume of cases that operate there.

Mr McCartney: Were they all criminal trials?

Mr McGuckin: Yes.

Mr McCartney: The Law Society would make the argument that, if you stripped this down, the cost per head for criminal trials would be similar to what it is in England and Wales. You make a different proposition. You take it across the whole legal aid spectrum rather than, say, criminal, civil and family.

Mr McGuckin: We look at it from a number of perspectives. We can work out the average cost per case in criminal cases. The difficulty arises when you try to apply that in England and Wales. A broader range of cases in the Crown Court there means that there are different factors at work. That is part of the problem. We are committed to providing the Committee with a further analysis. Part of the problem is getting underneath the skin of what it includes. An enormous number of cases operate there across a wide spectrum. That is why we firmly believe that, when you take the cases that run in the Crown Court in Northern Ireland and apply the fee scheme from England and Wales to them, you get a true reflection of the types of case and the fees that would be paid if the graduated fee scheme operated here.

Mr McCartney: In the comparison, do you take into account the different economic circumstances, such as the fact that economic inactivity is higher here than in England?

Mr McGuckin: No, because we are looking only at the fees paid to the legal profession — the amount that a solicitor or barrister would get in Northern Ireland as opposed to in England or Wales.

Mr McCartney: So that is the only impact that you look at. Do you not make any broader comparison of the people involved and their circumstances?

Mr McGuckin: The defendants?

Mr McCartney: Yes.

Mr McGuckin: Nothing in these proposals impacts on the defendant in a case. There is nothing that reduces the scope. The same level of legal representation will be available to a defendant, and that, in criminal cases, is awarded by the court. All that we are doing is impacting on the cost associated with providing that.

Mr McCartney: On the impact, what percentage cut do you propose?

Mr McGuckin: It is 27% for solicitors and 22% for barristers. Our original proposals were for a cut of 46% for solicitors and a cut of 40%, on average, for barristers.

Mr John Halliday (Department of Justice): Sorry, may I correct that, Chairman? It was 30% for barristers.

Mr McGuckin: This is after the guilty plea 2s.

Mr Halliday: Yes, sorry.

Mr McGuckin: We have this debate all the time.

The Chairperson: What was the original figure for solicitors?

Mr McGuckin: It was 46%.

Mr McCartney: Do you assess the impact on employment, or is that beyond what you do?

Mr McGuckin: We would like to do more, but we do not have an enormous amount of data on the earnings. We know how much legal aid is paid to individual firms, but we do not have additional economic data on any other earnings that the firms might have and how this would impact. These fees are being paid in England and Wales, and people continue to be represented. We are not cutting by quite as much as England and Wales, and we are a step behind their latest proposals.

Mr McCartney: Do you have any comparison of the impact on urban and rural firms?

Mr McGuckin: We do not have the information because that would be a matter of asking how much a firm earns through legal aid and then asking what other earnings it had. I would not like to speculate, but I suspect that a lot of the legal aid falls within the greater Belfast area.

Mr Halliday: We asked the Law Society and the Bar Council to provide us with information on other earnings and profit margins. None was forthcoming.

Mr McCartney: You asked for that information.

Mr Halliday: Yes.

Mr Lynch: Mark, you said that you had made adjustments in some important fields of the work. What were they?

Mr McGuckin: I identified a couple of them as I went through. For counsel, we protected the class A fees, which includes murder, and class D. Those are the more serious classes of offence. We protected the trial refresher fees. A counsel, for example, gets a standard fee, and, when the case goes to trial, a refresher fee after the first day of trial. We have protected the level of those fees. It is fair to say that the level of refresher fee that we pay is lower than that paid in the graduated fee scheme in England and Wales, but our basic fee sits at a higher level. A number of additional fees are awarded, some of which are below £100, and we have protected those. Those adjustments were in response to the representations made to us. We were told that, if we had to make cuts, to try to protect those areas.

Mr Lynch: You said that you would work up an analysis and give us an update. What will that comprise?

Mr McGuckin: We are trying to look at the impact of the cost reduction in Northern Ireland since 2011, but that is complicated by the increase in business through the Crown Court. We can demonstrate quite clearly — it is a question that Mr Elliott asked before — that the very high cost cases (VHCC) have virtually worked their way out of the Crown Court. A number of bills are outstanding, but, hopefully, they will be cleared in this financial year. I understand that any that are not finished are very close to finishing. You can see that, in some of the more serious cases, now that the VHCCs are in the more serious categories and remunerated through the normal fee system, there is a slight increase. You can also see a downward trajectory in the average cost, overall, from 2011. We are trying to get some sense of the figures in England and Wales, which are comparable with ours, so that we are comparing like with like. If we simply took the overall figures for legal aid and divided them by the number of assistants, we would get quite a low figure. That, we think, obscures some facts, and we want to be able to give to the Committee information that compares the situation in Northern Ireland, on a like-for-like basis, with that in England and Wales. I apologise: it is complex and hard to make sense of.

Mr McCartney: Have you concluded your discussions with the two professions?

Mr McGuckin: We have finished this round of discussions. I noted a comment in the correspondence at the start of the session that the profession had not seen the final proposals. Our normal practice is that we would share that with the Committee in the first instance. On our return to the office today, we will send both branches of the profession the final report document. We engage with them on other areas and matters such as civil legal aid and the registration scheme, for example, and that will continue.

A number of things came out of this discussion about the reclassification of offences and whether offences are classified in the right way. We want to have discussions with them on that, so there will be continuing engagement. No doubt they will also want to talk about these proposals.

Ms McCorley: Go raibh maith agat. Has enough consideration been given to the way in which different models operate in England and Wales compared with here in the North? Here, smaller firms with less flexibility and different ways of operating will be impacted more severely by the cuts than bigger practices in England and Wales, which could spread them more widely. As a result, might people in need of justice not get the access that they are entitled to? Is it possible, therefore, that justice might not be served?

Mr McGuckin: I do not think that this will impact on the ability of any defendant in a Crown Court case to access the appropriate legal representation. I cannot say that it will not have an impact on some business models as they currently operate, but we are trying to achieve value for money. It is about maintaining the level of access to justice but doing so at an economic rate and obtaining value for the money that the Executive put into the legal aid fund.

I cannot honestly say what the impact would be on any individual business, because we do not have that information. As John said, we asked the Law Society in particular and the Bar Council for information on profits, costs, margins and so on for work outside legal aid. However, they have not been able to share that with us, if they have it. It may well be that some organisations will need to look at their current business practices and adjust them. That said, we are looking at what the economic rate is for the work that needs to be done.

Ms McCorley: We hear from legal practices that the cuts will result in some of them not being able to survive because the fees will not be sufficient for their caseload. They fear that will have to reduce their service and offer a poorer one or go and do something else, with the impact of that being felt later. That is the difficulty.

Mr McGuckin: According to our analysis, this is an economic rate. It is above what is currently paid in England and Wales for these classes of case, and people are able to manage their firms as a result. I do not doubt that other factors will have an impact on the wider economic environment and on some organisations. We think that this is an economic rate for the inputs required here, particularly in the Crown Court, and that it passes the value-for-money test.

Mr Elliott: Thanks again for your evidence. I have a couple of issues. From a legal perspective, I still do not understand the removal of guilty plea 1 and 2. Do you believe that the proposed changes will put further pressure on defendants to plead guilty earlier even though they may be innocent?

Mr McGuckin: I do not believe that at all. If —

Mr Elliott: What makes you so confident of that?

Mr McGuckin: Are you suggesting that somebody who is innocent of a crime will, because of the fees paid to a lawyer, feel pressurised to plead guilty?

Mr Elliott: Yes.

Mr McGuckin: I cannot see how the fees structure would encourage them to do that. Indeed, we are addressing some of the inconsistencies in the existing guilty plea fees — for example, at the guilty plea 2 level, the fee is much higher than if the case went to trial. There are still some overlaps, but in the class and size of a particular case, there will no longer be the benefit of a higher award for a guilty plea than had the case gone to trial. In the past, that was not quite the case for the solicitor or barrister. If anything, we have pushed it the other way, so an individual who is innocent should take the case to its conclusion.

Mr Elliott: My other point is on the overall review process of the justice system and where savings can be made. I have always fully supported savings being made wherever possible, and if that means the legal aid system, it must be done. However, I am always reluctant to take a piecemeal approach instead of having an overall review that identifies where there need to be further efficiencies, whether that is in the Courts Service, the Public Prosecution Service or the legal aid system. I feel that there should be an overall review, and it needs to be done holistically so that we get the best efficiencies everywhere instead of picking off small bits in a piecemeal fashion.

Mr McGuckin: Each organisation is looking at its arrangements and at what steps can be taken to drive further efficiency in the system. David Ford will take forward part 2 of the access to justice, which will, in part, look at some of those further efficiencies. However, to do it holistically would be a huge undertaking that would take some time. It is also fair to say that there are a number of other things going on. We are working, for example, with the Department of Health, Social Services and Public Services on how the pilot for the family system can be improved. Different things are going on around the system that, overall, would provide improvements.

Mr Elliott: I accept that an overall review would be a huge undertaking. However, the argument or allegation that will come back is that the legal aid reduction is easy picking and that it may not be where most efficiencies could be made. I do not know; I am saying only what the allegation or perception may be. I feel that there are other areas in the justice system where there can be more efficiencies. I am absolutely convinced of that, and they are getting away without having the cuts or reductions that some other parts face.

Mr McGuckin: Some proposals in the faster, fairer justice Bill will do some of that. It is not a big review. I want to return the focus to where we are today and the Crown Court fees. We have looked at the value-for-money argument and comparisons with other jurisdictions. Notwithstanding that things could be done more efficiently, the level of fees currently awarded in Northern Ireland is higher than in England and Wales for similar types of cases.

This also goes back to our discussion earlier this afternoon on the Legal Aid and Coroners' Courts Bill. With the creation of the agency, we will look to modernise the systems and processes that currently govern legal aid so that we can streamline and make it more efficient for solicitors in private practice to engage in online applications and so on. Therefore, a range of other things will also go forward.

Mr Elliott: Have comparisons been made with other aspects of the justice system in England and Wales, for example, the Public Prosecution Service? That is only one example.

Mr McGuckin: That is not my remit, and I could not honestly answer that question.

Mr Halliday: We work closely with the Public Prosecution Service because it tends to adopt a lot of our fees. Therefore, we benchmarked with it to see what it thought of our fees.

Mr McGuckin: Sorry, I misunderstood the question. Are you asking whether we talked to the Public Prosecution Service to see whether our fees were aligned with its fees?

Mr Elliott: I am asking whether the cost efficiency and cost-effectiveness of other areas in the justice system have been compared with their counterparts in England and Wales. I used the Public Prosecution Service as an example; I could have used the Courts Service or any of them.

Mr McGuckin: I thought that that was what you were asking, but John made a very valid point, and I will come back to that in a second.

I am not aware of other comparisons going on, but I have no doubt that they are because we all strive to improve our efficiency, and we all strive to find the closest model and benchmark ourselves against that. However, I am not aware of how formal or structured they are. Maybe such comparisons also give some confidence.

We discussed with colleagues in the Public Prosecution Service our proposals for changes to ensure that we did not cause any mishap to their Crown Court fees. We wanted to align, as far as possible, the fees that we pay — recognising the two different functions that are carried out there. Of course, the Public Prosecution Service will have in-house lawyers at solicitor level but employ barristers. We did some benchmarking and had discussions with them on the proposals that we have put forward here today.

Mr Elliott: That is a new part to my question, Chair, but it is interesting. It would be useful to have a comparison of the costs of the legal aid system for defendants and the costs in the Public Prosecution Service for the prosecution.

Mr Halliday: They take our fees, but they make certain differences. Generally, one prosecutor will prosecute five defendants whereas each defendant will have his own team. So that prosecutor increases the fee a wee bit because he has to take the five cases. Generally, they will take our fees but with a few differences.

Mr Elliott: It would still be a useful comparison for us to have, just to see how much it costs to prosecute and compare that with how much it costs to defend.

Mr McGuckin: We will talk to the Public Prosecution Service about that. I am sure that its fees are published.

Mr Halliday: It is a difficult comparison because the PPS has the benefit of the police putting together the case for it and marshalling witnesses; it is up to the solicitor and counsel to marshal the defence.

Mr McGuckin: They undertake a different role.

Mr Elliott: I accept that. Thank you.

The Chairperson: There are no further questions from members, so thank you very much.