Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Civil Legal Aid Remuneration in Civil and Family Courts: Department of Justice

25 June 2014

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:

Ms Maureen Erne	Department of Justice
Mr Mark McGuckin	Department of Justice
Ms Angela Ritchie	Department of Justice

The Chairperson: I welcome Mark McGuckin, the deputy director of the public legal services division in the Department of Justice. I also welcome Angela Ritchie and Maureen Erne, also from the Department of Justice. You are very welcome. As usual, the session will be recorded by Hansard, and a transcript will be published in due course. Mark, when you are ready, I will hand over to you to give us a brief briefing.

Mr Mark McGuckin (Department of Justice): Thank you very much for your introduction, Chairman. The purpose of our visit to the Committee is to update you on the outcome of the consultation on civil legal aid remuneration that we undertook last year and to outline the work that we are engaged in to move that issue forward. This is the first time that I have briefed the Committee about the fees payable to barristers and solicitors for the work that they do in the civil courts.

To put the issue into context, civil legal aid plays an important role in our civil and family justice system and absorbs about 50% of the legal aid budget. The civil legal aid schemes cover a very wide range of legal issues and types of cases. At present, people can seek and obtain legal advice on any point of Northern Ireland law. Civil legal aid is available to take or defend a wide range of cases that are heard at all court tiers and a small number of tribunals where the merits test is met. There is also a financial eligibility test for most types of proceedings.

More people qualify for civil legal aid in this jurisdiction than in England and Wales; the figures are 43% in Northern Ireland and 28% in England and Wales. The Committee will recall that we presented proposals to harmonise financial eligibility across our civil legal aid schemes. That differing level of eligibility has an impact on costs.

Another cost driver for civil legal aid is the wide scope of the provision in Northern Ireland. That is very different from England and Wales, where large areas have been removed from the scope of civil legal aid, including most private family law. In contrast, in Northern Ireland, applications will be considered for legal aid to pursue compensation for clinical negligence or to resolve disputes between parents for the arrangements for their children following a relationship breakdown, for example.

Last year, the civil legal aid scheme provided 56,500 acts of assistance. Those ranged from people receiving advice and assistance on an issue that was quickly resolved in a solicitor's office to the most complex public law cases regarding child safety in the High Court. However, that extensive service has a cost, and the unaudited accounts for last year show that civil legal aid expenditure was in the region of £50 million. The Department cannot afford to maintain that level of expenditure, so the civil fee project is one of a number of cost-saving projects that will help to reduce legal aid expenditure.

The current remuneration system is complex and varied and provides limited control over the spend and predictability of estimating future expenditure. Reform is needed, and we are keen to introduce a new scheme that will reduce costs, that is predictable for the lawyers and Government, and which will reduce the administrative burden. Last year, following an analysis of schemes in other jurisdictions, we concluded that none of them would meet the specific needs in Northern Ireland. A bespoke system was required, and we developed a new civil fee structure based on the current arrangements for criminal cases in the Magistrates' Courts and the Crown Court. That was the subject of the consultation.

We noted in the consultation document that the nature and conduct of civil and criminal proceedings varied to a significant extent, and we undertook to review the approach in light of responses to the consultation. We received responses from a wide range of stakeholders and, overall, the methodology was rejected by the legal profession, as was the proposed level of savings. Since the completion of the consultation exercise, we have engaged closely with the profession and with other stakeholders and have embarked on an evidence-based approach to develop new arrangements. The Bar Council and the Law Society have engaged closely with us in identifying the range of issues that need to be addressed to develop a bespoke system that will meet the varied needs across the different case types and court tiers.

In our further work, we are paying particular attention to the different types of civil cases, the interaction at each court tier, the cost drivers in each area, and where the majority of work is done. Our aim is that the new system will remunerate providers for the effort that they are required to put in to the individual case.

We are undertaking a detailed programme of work to develop revised proposals and test them against the historical and projected caseload. This is a complex area, and significant work will be required to ensure that our proposals are robust, capable of meeting the demands of the range of actions in civil cases and capable of delivering the confidence of the justice system.

We are also carrying out detailed costings of our proposals, reflecting as wide a range as possible of different circumstances. We are keen to understand all the interactions and cost drivers and to avoid any unintended consequences. We are committed to bringing forward a system capable of delivering a workable solution that will also deliver the savings required.

As we mention in the paper, we are taking this work forward in three phases. The first is family law, which absorbs about 70% of the overall spend. We will then look at the remaining court-based cases and, finally, at the non-court requirements. In each area, we will continue to engage with the legal profession as we develop and refine our proposals. We will return to the Committee later this year with firm proposals for legal fees for children and family cases, and, early next year, on the fees for the remaining legal cases. Legislation will be required to implement the revised fee scheme for civil and family cases, and that will be brought before the Committee as well.

That is where we are. We are engaged in a detailed programme of work, as part of which we are engaging with the Law Society and the Bar Council. I am happy to take questions from the Committee.

The Chairperson: Thank you very much, Mark. I am reassured by the extensive nature of the work being undertaken. I have one comment: it sounds like a presentation that we should have heard a year ago. Some may ask: why all this work now? Why are you now having to do what I think is reasonable by way of engaging with all the stakeholders, hearing what they are saying and bottoming

out exactly where all the work is? The consultation was launched in August 2013. Can you address that point?

Mr McGuckin: It is a fair question. The previous work on this project involved a lot of effort being put into looking at the corresponding systems in England and Wales and in Scotland and the Republic of Ireland, as well as looking at Northern Ireland's system. A lot of time was spent looking at those and seeing whether there were elements or aspects that could be lifted and applied in Northern Ireland.

When that was found not to be the case, there was a lot of emphasis at the time on developing this system for the Magistrates' Courts and the Crown Court. At that stage, the initiative was taken to see how well you could map civil cases into that standard fee system approach. That is where the consultation document came from. It was recognised in the document that there were significant differences between the two systems, but we were keen to get views coming back. We have got some very good views. Following that, as I said, we have had some good engagement with the Law Society and the Bar Council. We have looked at proposals that the Bar put forward, and we are adapting elements of them into the new scheme.

We spent a lot of time speaking to the Law Society about the different types of cases, their experiences and what drivers in the civil cases make them different so we can reflect them in the new scheme. There is good work going on now, but the previous consultation was based on the assessment at that time.

The Chairperson: Is the intention still to introduce a standardised fee for most civil cases?

Mr McGuckin: It certainly is. There is a real potential, and it is accepted across the professions, that, in many areas, you can introduce a standard fee for most cases. What you have to do then is try to identify what makes some cases different and how you impact on them. At each court tier level, you will be able to develop something of a standard approach with an element of swings and roundabouts in it, but looking to see whether there are any other aspects that might need to be reflected in the scheme for those cases that might require a bit more effort.

The Chairperson: OK. I will not pursue it any further, because I suspect that the Committee will return to it. However, I am encouraged by the engagement, and I encourage the Department to keep engaging. If agreement can be found with the professions, it will make our job a lot easier when, ultimately, you bring proposals on fees. It would be very helpful if you could try to achieve that.

Mr Humphrey: Thank you very much for the presentation. I am sure that all members will have received various correspondence from legal firms around this issue. It is something that is exercising them greatly. How close are you in the discussions that you have had with the Bar Council and the Law Society for Northern Ireland to getting resolution around these things? Is a resolution possible, and what timescale are we talking about?

Mr McGuckin: Is a resolution possible? I would like to think that we could reach at least a broad agreement between ourselves, the Bar Council and the Law Society on the structure and shape of a remuneration system. Will we get agreement on a level of cuts? I suspect that that will be much more difficult. However, what we want to try to do as a Department, and what the Minister wants to do, is get agreement on the structure of the standard fee system. Having a standard fee-based system is to the advantage of the administrators who are responsible for paying those in the Legal Services Commission, and also for the lawyers' firms. You know upfront and you reduce the administration costs. There is definitely a willingness to engage and to develop such a structure. Issues will arise when we are setting the actual levels of remuneration in that structure; that is where we will have a certain level of disagreement.

Mr Humphrey: You mentioned the total bill being £50 million: is that correct?

Mr McGuckin: Yes.

Mr Humphrey: Seventy per cent of that spend is on family law. How are your conversations going on that issue?

Mr McGuckin: We have had conversations with the Bar and with the Law Society. The Bar came up with proposals that reflected its view of how a standard fee system might look and where some of

those fees might rest. It looked at fees that had been set in our previous consultation document and adopted some of them; in others, it came up with a different view. The conversations reflect that we can develop a structured scheme, but we need to look at the actual levels of resource.

We have had lengthy and detailed conversations with the Law Society about what makes each type of case different as well as what makes each type of case at each court tier different and what the similarities in them are so that we can build them into a common structure. We have taken away a lot of that information and are working up more detailed proposals. We will go back to them over the summer with those details.

Mr A Maginness: Thank you very much. I sense that there is more engagement going on than previously. It is a very difficult area to structure, because family law in particular, which accounts for 70% of civil actions, cases or proceedings, is demand-led, and I think that that is reflected —

Mr McGuckin: Well —

Mr A Maginness: Just hear me out. I think that that is reflective of the broader societal problems that we have of family break-ups and problems in relation to children and so forth. You have a serious problem in trying to meet the cost of that demand, which is immeasurable, because you do not know how things will develop. I understand and sympathise with the difficulty, but set that against the legal profession, which is being asked to introduce standardised fees. Cases are so variable, particularly family cases, that I do not think that you can introduce standardised fees. One case might take five hearings, but another case might take 25 hearings. How do you introduce a standardised fee in that type of situation? It is such a variable. I know that it is swings and roundabouts, but it is difficult to insist on standardised fees.

Mr McGuckin: In taking this forward, developing it and working closely with the profession, we are trying to identify the areas in which it is appropriate to introduce a standardised fee scheme and then separate out the ones in which you need to look at the cases slightly differently. You are right that, particularly in civil law and family law cases, there are many different drivers operating, and that can cause a case to last longer or can result in its earlier resolution. We have some detailed analysis of each, and the Law Society and the Bar Council have been very helpful in identifying such cases, plus we have done our own research on past cases. We do not suggest that, at this time, you will be able to get a totally standardised fee system across all cases at all court tiers that will stand the test of time, but we want to get as many of those areas as possible identified and into the standard fee structure. That then reduces the degree of unpredictability for the other cases, and we can deal with those separately as necessary.

Mr A Maginness: From your point of view as the payer, you need predictability in your budget. Is this solely a budget-driven process or is any other factor involved?

Mr McGuckin: There are two things to say on that. Predictability is good for the budget holder and good for us going to DFP and the Assembly to look for resources to meet the legal aid need. It is also good for solicitors and barristers to know, when they take on a case, what is involved in it and what the fee will be and that they do not need to do expensive record-keeping so that every case and every bill put in can be verified. So, it cuts out the administration and creates a degree of predictability for them.

It is not the only driver, and cost is not the only driver either. We need to get a fee structure in place that improves the administration and governance around legal aid payments, remunerates solicitors and barristers for their work and addresses the needs of those cases. It is about getting a structure in place. Yes, we also need to make some savings because the budget is insufficient to meet the current needs, but we want to put in place the structure that will properly and effectively remunerate.

You mentioned the demand. The demand has increased significantly over recent years because of the increase in volume of such cases, and that is a cost driver as well. It is necessary to respond to those increases in demand, but, if you have a standard fee structure, you can see the impact of it much more readily and much quicker, and, as you know from your experience, particularly on the civil side, some of the cases take, in elapsed time, quite a long time to work their way through the system. A legal aid certificate awarded today may not come forward for payment until several years down the line.

Mr A Maginness: I know that mediation is seen as an alternative to court proceedings, but has any costing been done on it? I suspect — I have no evidence for this — that mediation could be much more expensive than legal proceedings carried out by legal practitioners.

Mr McGuckin: It would be fair to say that the two issues are complementary and that we should look at them as such. In some cases, mediation may well be an alternative. Mediation that is delivered effectively and efficiently and that takes an issue out of the courts can be cost-effective, because it reduces the call on court time and all those other things. It may impose a different cost on the legal aid fund or from wherever it is funded.

DHSSPS funds a mediation service and is taking forward some work in the area. I am not sure how far it has got in looking at the costs associated with mediation. It is not, as may be the case in some other jurisdictions, a current requirement that you engage in mediation. However, if it is done effectively and means that you take a family dispute out of the courts and resolve it, without recourse to the expensive surroundings of a court and all the associated issues, it could be quite cost-effective.

Mr A Maginness: I just suspect that we may be building up expense by taking it out of what you regard as an expensive court system and putting it into the Department of Health or somewhere like that. The costs involved could be equivalent to or larger than the cost of court proceedings.

Mr McGuckin: Were you to develop a mediation service on that basis, you would very much have to look at the cost-benefit analysis on both sides. Equally, if you can get a mediated settlement that does not involve acrimony in a courtroom, the outcome may be better for everybody involved.

Mr A Maginness: I accept that argument in certain circumstances.

Finally, the Family Law Solicitors' Association (FLSA) has asked the Committee to get sight of the Queen's University research paper.

Mr McGuckin: Is that the research on children and young people?

Mr A Maginness: Yes, that is what the FLSA said in its recent letter. I do not know whether it is —

Mr McGuckin: Our plan is to publish that and put it before the Committee. We are trying to get it to publication in the next couple of weeks, and we will put it before the Committee in that timescale.

Mr A Maginness: Will an equality impact assessment be done on any of your proposals?

Mr McGuckin: On our new Crown Court — sorry, on our new civil fees.

Mr McCartney: That is next week. *[Laughter.]*

Mr A Maginness: That is you wearing a different hat.

Mr McGuckin: On our new civil fee proposals? Absolutely.

Mr A Maginness: Thank you very much. That is very helpful.

Mr McCartney: I will ask you now about the Crown Court instead of this. Alban has touched on the fact that we have heard from a lot of people, particularly those who are practising family law. I ask these questions with that in mind. There is a £50 million bill, 70% of which is for family law. When you come at that, do you have an idea of by how much you have to reduce that?

Mr McGuckin: Yes.

Mr McCartney: Does that shape your thinking about how to bring that about?

Mr McGuckin: Of course it does, to an extent. As part of our engagement with the Law Society, we met representatives from its family law side. We also met the Family Law Bar Association. They are informing and shaping our thinking.

To go back to your point about the level of savings that must be made, we currently have quite an expensive administration system. A taxing system that operates in civil cases costs a significant amount, running into millions of pounds. If we can introduce a standard system, that taxing system can be removed from the costs without impacting on the level of fees being paid. That factors into our thinking about where we need the savings to be made.

At this point, we are looking at savings of around £10 million coming out of the civil landscape. We need to revisit that at each stage as we develop a new structure. We look at a new structure and at the fees that are required. It is complex, and that is why we are taking our time at it. We are working very hard in the background, but we are taking our time to ensure that we develop the structures correctly. We then build the fees into that and will be able to see where the savings can drop out of that.

When you start to separate out individual cases, you may well find that some areas are currently over-remunerated, so it will not really be a significant hardship to drop the remuneration in that area. What we want to do is to develop that structure first, look at where the fees come out and see what savings that produces. We can then see the extent to which we may need to tweak the structure at the margins to meet the overall anticipated reduction.

Mr McCartney: This is a very general observation, because people like you are more into the detail, but, the idea of a standard fee strikes me as problematic. I know that you have told the Committee today that there will be exemptions and exceptionality, but it is about knowing what those are.

I know that a two-stranded approach was taken to helping improve governance arrangements in the past, and, again, one of the criticisms that you hear people make is that perhaps sometimes there can be over-representation in some of these cases. Now, I do not know whether that is true or not, but, in the past, when we were dealing with issues around having two counsel, it was discovered that, if the regulations had have been implemented as they were designed to be, there would be many cases in which there would not have been two counsel. Money would have been saved if there had been good governance. I just wonder what focus you are putting on the governance arrangements initially, as that will help you in setting the level for standard fees.

The approach that I would take to this is that people need to have an appropriate level of representation at the appropriate time. If you reduce that, you reduce the appropriateness, so it is about trying to get that balance.

Mr McGuckin: Work is being done separately, particularly on the family law side, on the levels of representation at different court tiers. We have had this conversation recently, where there is an expectation that you will have a solicitor at a certain level and a junior counsel at a certain level and that it is only in those very serious cases that you will have a senior counsel. Now, particularly in family law, the practice built up over time, or back in 1995 when the Children Order was introduced, reflected the fact that it was a new law with new systems, structures and practices in place and that it was untested. In those sets of circumstances, when things come to court, you generally tended to opt for a higher level of representation while the matters of law were being dissolved. You now have a body of case law that you can reflect on.

We are now in the situation in which that is all well established. That is why we are looking at bringing the levels of representation back down. It was not about reintroducing or introducing new levels of representation but about re-establishing the appropriate level of representation now that the body of case law is there. Yes, that will have an impact overall, but when that solicitor, junior barrister, senior barrister or solicitor advocate is engaged on that issue, you want to ensure that you have the right level of remuneration alongside the level of representation.

To go back to the first point that you made, Mr McCartney, I understand the concerns about developing a standard fee to fit all circumstances. Maybe it would help if we were to explain it in the sense that it is a standard fee system or structure. There will be a whole range of standard fees, and you will have a set of fees for this particular set of circumstances and a different set of fees for that particular set of circumstances. It will actually be a broad scheme, so you will look up where you are at and then apply the fee to it. You will not try to get one fee to cover the totality of the case. The system will still be reasonably complex and discriminate, if you like, in the sense that it can identify types of cases and the fee that is appropriate for that type of case in those circumstances.

Mr McCartney: The Committee is going to try to do a bit of work to assess the impact of the cuts. Is there any circumstance in which people would be under-represented and the impact would be that you end up somewhere along the line with a case or inquiry that costs more than you were trying to save in the first instance?

Mr McGuckin: There is nothing in the proposals for the remuneration scheme that will impact on the scope. It will be about identifying the right level of remuneration for the level of representation at that court tier to reflect the work that is being done.

Could you get to the stage at which you cut the fees so much that people are not prepared to take on cases? That is not our experience to date. Clearly, we are looking at civil fees for the first time in this round, having looked at the Crown Court before, but that is not our assessment at this time. As we go through the process, we will want to revisit that assessment at each stage.

Mr McCartney: I do not want to question the integrity of any legal practitioner, but, if 10 cases are placed in front of you, there could be a tendency to take the more simple ones. That could mean that the complex ones are left and do not get representation, yet those are the ones that we should be dealing with for wider society.

Mr McGuckin: We would like to think that we have a sufficiently robust and intelligent system to recognise whether it is a very complex case and, as such, would attract something different.

Mr McCartney: Will that be laid out when you come back before the Committee?

Mr McGlone: Yes.

Mr McCartney: OK, that is fine.

Mr Dickson: Many of the questions have been asked, but I want to follow up on two aspects that we have talked about. The first is mediation. It is presumably not envisaged that, as mediation develops as an alternative way of resolving disputes, mediators will necessarily need to be legally qualified. Rather, they will need to be qualified in the skills of delivering an outcome for the parties who come to them. That may not be at the same cost as a lawyer's. Is that correct?

Mr McGuckin: You are right that there are a number of different types of professions that can deliver mediation. The Bar and the Law Society certainly offer mediation services.

Ms Angela Ritchie (Department of Justice): Mr Dickson, you will pleased to know that a significant number of mediators — I do not have the number to hand — are qualified lawyers.

Mr Dickson: I understand that.

Ms Ritchie: They prefer that approach to dispute resolution. We would not say that you need a legal qualification to be an effective mediator, as it all depends on the circumstances of the case. On some occasions, of course, it will be advantageous.

Mediation is at an early stage of development in this jurisdiction. In his review of access to justice, Jim Daniell outlined issues that we need to look at, such as training, accreditation, confidentiality, who the providers will be and so on. At this stage, we could not take a firm view on it. All that we know is that there are lawyers who are interested in being mediators rather than being involved in adversarial proceedings in the courtroom.

Mr Dickson: Although it is not necessarily a cost-reducing method, it nevertheless has the potential to be substantially less costly in cash terms and emotional terms for the participating parties.

Ms Ritchie: There are a lot of complex features to that, and the Department recognises that there is more work to be done. We have seen cases in which it might have been a more expensive process to go through mediation but perhaps led to a better outcome for the parties. The cost-benefit analysis is not a black-and-white balance sheet situation.

Mr McGuckin: I was talking to some colleagues from the Republic of Ireland recently, where cases can go through mediation with no resolution, and you can end up in the courts system anyway. On other occasions, cases have gone through a mediation and reduced the number of issues that have to be resolved through the court-based process.

Mr Dickson: You then get into the whole area of whether you tell the court how far you got —

Mr McGuckin: Yes, there are issues with confidentiality.

Mr Dickson: I think that Mr McCartney asked the question about the number of solicitors and of junior and senior counsel who are required at various stages of cases. When determining the fee, who is the decision-maker about the complexity of the case? If I were to say to you that a case is incredibly complex and that we need junior counsel, senior counsel and half a dozen solicitors in the courtroom to deal with it, who says, "No, you are talking a load of rubbish. It can be dealt with by one solicitor"?

Mr McGuckin: Currently, that decision is made by the adjudicators in the Legal Services Commission (LSC) and is subject to an appeal process, and so on.

Mr McCartney: Would the judge have any say in it?

Mr McGuckin: In civil cases? No.

Mr Dickson: From a public purse perspective, how can we be satisfied that a fair and reasonable test has been applied? How can we be satisfied that, when a case is complex, the appropriate fee is paid? Somebody could say that it is complex when actually there are issues that have been repeatedly addressed — you said that there are aspects of case law that are repeated in a particular case — and can be articulated perfectly adequately by somebody who is not perhaps at senior counsel level?

Mr McGuckin: It is less about the fee and more about the level of representation that is awarded. Angela can keep me right, but the decision is made by the Legal Services Commission. That decision can be appealed to the current appeals panel, and, ultimately, it will be subject to judicial review in the High Court. There are a number of safeguards to ensure that there is the right level of representation.

Ms Ritchie: As you rightly say, there are challenges for us in identifying those cases that are more complex than others. For instance, we identified an international dimension, perhaps where one parent lives on a different continent, as a cost driver in cases. That could be a cost driver in one case, but it does not make it a cost driver in all cases. That is why we are taking the time to draw up the rules that the commission will administer. We will then have to test those, because we want a situation in which the number of genuinely higher-cost cases are in the minority and not the majority.

Mr Dickson: It is also fair to say that your approach, when compared with the rest of the United Kingdom, has nevertheless left a much broader range of areas that will continue to attract legal aid. Other jurisdictions have just completely removed entire blocks.

Ms Ritchie: The reforms in England and Wales were very significant. The Justice Committee in Westminster is taking evidence at the moment, although I am not sure whether sufficient time has passed to allow it to make a considered judgement on the impact of those reforms yet.

Mr Dickson: Have there been human rights challenges or other challenges to those failures?

Ms Ritchie: I am not familiar with the detail of any particular challenges. I have just reviewed the evidence that has been presented to the Justice Committee more generally. Concerns have been expressed that removing legal aid from certain types of cases create situations in which people still needs to go to court to resolve the dispute but cannot afford to pay for their legal advice so are representing themselves, the common phrase for which is litigant in person. That is a classic example of something that might present a saving to the legal aid fund by removing, say, a housing case, but if the court case lasts four times longer —

Mr Dickson: Because people do not know how to present. The other side of the coin is that the judge perhaps gets a better insight to the concerns of the people who are presenting to him. Thank you.

The Chairperson: Before I call the next member, I ask that the door be opened and that the doorkeepers keep the corridor quiet. It is pretty stifling in here.

Mr Wells: Yes, and if you could stop growing tomatoes under the table. *[Laughter.]*

Mr Humphrey: As long as it only tomatoes, Jim.

The Chairperson: As long as it is just tomatoes, we will be OK.

Mr Wells: It really is unbearable. The witnesses will give into anything in this heat.

Ms Ritchie: That is true.

The Chairperson: We will keep the door open for a little bit to get some circulation going.

Ms McCorley: Go raibh maith agat, a Chathaoirligh. Most of the questions have been asked, so I will not ask the same ones again. When you came to your conclusions about how best to reduce costs, did you consider the impact that the family law recommendations might have on children? Did that form part of your deliberations?

Mr McGuckin: The impact of a new structure and a new fee structure is always part of the deliberations. It will vary in different cases. We are trying to get to a situation in which an economic fee is paid that recognises the work that needs to be done, ensures that the work is done and passes the value-for-money test for government in spending public money. There are always two sides to the case. It is a matter of looking at the impact and ensuring that it will still enable representation at the appropriate level to be maintained throughout all cases.

Ms McCorley: Do you accept what the Family Law Association says, which is that you cannot have a standard fee in such cases, because they are all so different and complex?

Mr McGuckin: I would not accept that you cannot have a standard fee approach for a significant number of cases. I accept that you need to make some provisions for exceptionality and lots of complex cases. That is why we are spending so much time researching and looking at what makes a case different. Angela referred to some of the issues, such as the serious nature of the case, related criminal procedures, whether one of the parents is a foreign national, how many parents are involved in a particular family dispute, whether parties have mental health issues, and so on.

As I said to Mr McCartney, if you look at it and say that it is a single standard fee, then you can understand that that would not be appropriate. We are trying to get a standard fee structure and a standard fee approach so that you can separate out lots of different types of cases and allocate the level of remuneration to them effectively. However, in looking at this, I do accept that there is always the need to keep an eye out to see whether there is an exceptional area where you cannot apply a fee and where you would see what arrangements could be made for that.

Mr Wells: I have had representations from the Family Law Association, and I want to check a couple of facts that I was given. First, it said that there has been no increase in its fees since 1996. Is that correct?

Ms Ritchie: That is correct for cases at Magistrates' Court level. I will have to check about the other court tiers. The majority of business would be conducted at our Magistrates' Court.

Mr Wells: Is that on the £58 an hour fee?

Ms Ritchie: I think that that is correct.

Mr Wells: I thought that £58 an hour sounded quite a lot, but then it was explained to me that a solicitor has to run their office and pay their staff from that. Has any research been done to show whether it is possible for a solicitor doing purely family law to keep the practice going at £58 an hour? Can it be done? Have you done any economic models to see whether that is realistic?

Mr McGuckin: We have not looked at it in terms of applying the £58-an-hour rate. We are trying to get an economic rate for the work being done. However, to put it into a standard fee structure that is not based on an hourly rate, with cost lines and everything else, which is complex, requires lots of record keeping and so on, and that has to be measured against other areas where similar work is being done.

Mr Wells: There is a standard fee of £3,500 per case.

Ms Ritchie: That would be at the higher court tier, Mr Wells.

Mr Wells: That is only for the High Court?

Ms Ritchie: The higher court tier. In family terms, it is called the family care centre, but it would be the same building; it would be like our County Courts.

Mr McGuckin: Before we quote figures from the consultation document that went out previously and that had some very detailed figures in it based on mapping across some of the civil cases to the Magistrates' and Crown Court fee structure for the criminal side, can I just say that we have moved away from those figures and fees, and they will not appear in our proposals when we bring them forward.

Mr Wells: In the information given to me, it seemed that the real scandal was what the expert witnesses were getting. I quoted one example of a gentleman who did one interview, wrote one small report and got a fee of £6,500. Surely, if you are going to attack costs, you are going to have to grind down enormously what people are getting for so-called expert witness fees.

Mr McGuckin: We will be coming to you with proposals on expert witnesses. It is another complex area, and, in all of these areas, it is very easy to pick out one individual set of circumstances and say —

Mr Wells: For £6,500, I will write you a report on anything under the sun.

Mr McGuckin: I am sure that you would and that the court would accept it.

You could have a single expert witness, or two or three expert witnesses, in the UK on a particular issue. Their day job is to do the things that they are expert in. We are adding to that by asking them to come and give an expert report. If there is a single expert, there are challenges in saying, "Right, we want you to do it for whatever the set fee is."

Mr Wells: You have got to say, "Will you do it for £3,000?" Surely they would still feel motivated to do it for £3,000 as opposed to £6,500.

Mr McGuckin: Correct me if I am wrong, Angela, but the lawyers have to come and request approval to engage an expert witness, and they will give some sense of what that cost will be. If the cost appears to be excessive, the Legal Services Commission will request that the solicitor get a number of quotes from different experts, if those are available, in order to ensure that they are getting an economical rate for it.

Mr Wells: I am glad that you are dealing with that, because it seems to be a logical extension of what you are doing here.

Mr McGuckin: Absolutely. There are many sides to this coin, and another one is to look at the expert witnesses.

Mr Wells: The fees have effectively been frozen since 1996. Has there been evidence of well-qualified solicitors leaving this field because of the fee structure?

Mr McGuckin: Not that I am aware of.

Ms Ritchie: We have not received any evidence from the Law Society that that has happened in the past. The representations that are being made to the Department are that the extent of the cuts now

will mean that experienced solicitors cannot afford to do that work. They are suggesting that, in the future, it will be more junior members working in the firms, perhaps unqualified lawyers, that will take that forward. That is obviously something that we are looking at in our proposals.

Mr Wells: Has there been any evidence of it on the criminal legal aid side, where we were told that there was going to be Armageddon, blood on the floor and people leaving in droves? Has there been a problem securing good quality counsel on the criminal side as a result of the cuts already implemented?

Mr McGuckin: No.

Mr Wells: So, the market is telling us that there are still well-qualified people prepared to do the work at that rate.

Mr McGuckin: Yes.

Mr Wells: That would indicate that the previous rate must have been quite generous.

Mr McGuckin: Not necessarily; maybe they have tightened their belts. It is not for me to advocate on behalf of the advocates, but, from what we have seen, there are no indications of people leaving wholesale or of defendants not being able to access the proper level of representation. We have had one or two occasions, in very specific circumstances, when an individual was not able to get a barrister in a post-sentencing situation. We remedied that with fees that have been put through the Committee recently. However, that was because there was not a specific fee available for that set of circumstances rather than because of the overall level of fees.

Mr Wells: Am I right in thinking that, even if you get to the point that you want to get to, on every level, representation in this part of the United Kingdom will be significantly higher per case than in England, Scotland and Wales?

Mr McGuckin: Levels of representation will be higher?

Mr Wells: For identical cases, the costs will be higher in Northern Ireland than in England, Scotland or Wales.

Mr McGuckin: I would not necessarily say that that is the case. In civil and family law, we need to do more work. Our systems are very different. You cannot look at Scotland because the systems are so different. In England and Wales, they have taken an enormous number of cases out of the scope of legal aid, so you cannot do a direct comparison there.

Mr Wells: If Jim Wells falls out with his wife — which he has no intention of doing — and there is a dispute over custody of the children, surely that is no different to Mr Smith in Luton falling out with his wife and there being a battle over custody of the children there. Why should it cost more in Northern Ireland than it does in England?

Mr McGuckin: In Luton, it would not fall within the scope of legal aid.

Mr Wells: It used to, and it was less expensive than it was here.

Mr McGuckin: I do not know if that was the case, because we have not looked at historical figures.

Mr Wells: But you told us that it is 22% more expensive on the criminal side.

Mr McGuckin: The criminal side is different; yes. The systems are different on the criminal side as well. However, what we were able to do on the criminal side was take a representative sample of the cases that ran in the Crown Court in Northern Ireland and apply the graduated fee scheme to those cases. That demonstrated for us where the costs were different and that Northern Ireland was different. We cannot do the same thing in relation to civil cases because those cases are out of the scope.

Mr Wells: It must be possible to take a series of identical cases. A lot of these are very similar; they are marital disputes, custody issues and property issues. It must be possible to take a random sample of cases in Northern Ireland and in England to see whether we are more expensive.

Ms Maureen Erne (Department of Justice): Once we develop the structures and fee proposals, we plan to benchmark the similar proceedings types and look at the assessment of the costs of those. That will happen at a later stage in the analysis.

Mr McGuckin: That will be done where that information exists. Because of the changes in the scope in England and Wales, it is not always going to be possible to do that. That is the point we are making.

Mr Wells: Following that exercise, is it your intention to bring us into line with the rest of the UK on costs?

Mr McGuckin: We will certainly use that. The discussions will be informed by any differences that exist. However, we need to look at the impact and outcome of what has happened in England and Wales. Angela referred to the removal of some areas from the scope in England and Wales, which has resulted in litigants in person. Research on the implications is being done in Westminster. Our work will be informed by the outcome of that research as well as our own comparisons, where it is possible to do them, of like-for-like cases.

Mr Wells: Even with all of that achieved, do you accept that legal aid provision in the UK is very generous compared with the rest of Europe?

Mr McGuckin: Well, I have not looked at the rest of Europe at this point.

Ms Ritchie: Comparisons with other jurisdictions is fraught with difficulties, Mr Wells. What you said about comparing costs in a family case here and in Luton sounds very simple, but you then look at the administration of the schemes in the various jurisdictions. England and Wales have in place an extremely complex system of contracts for some work and individual authorisations. So, when you ask what appears to be a very simple question of how much you pay for a divorce, it is not easy to get an answer to that. That is why, instead of asking for the big picture, we have decided that we will try to work up the evidence-based approach and then go to our counterparts in England and Wales and say, "How does this look in comparison to what you are paying?" We will refine our proposals and, as Maureen says, benchmark them so that, hopefully, by the time we come back to you, we can give an indication of whether we are in line, more expensive or less expensive.

Mr Elliott: I want to ask for one point of clarification, as I think all the questions have been asked. I thought that Mr Wells was almost having some sympathy for the legal profession. *[Laughter.]*

Mr A Maginness: Perish the thought.

Mr Wells: I quickly drew back from that.

Mr Elliott: His weakness was quickly overcome.

One quick point of clarification: you told Mr Wells that the fees or figures in the consultation will not be included in the proposals. What did you mean by that? Are they not relevant? Why would they not be included?

Mr McGuckin: It is because we are changing the whole structure. We put forward a set of proposals for a new fee scheme that we developed from our experience of working on the development of a standard fee structure for Magistrates' Courts and Crown Courts on the criminal side. It is fair to say that the proposals were rejected broadly by everybody who responded to them. There is no point in flogging a dead horse, so we have put those to one side. We have started from the baseline of looking at each individual case, looking at each type of case that runs in each court tier, looking at each court tier and building up a new structure.

Mr Elliott: So, those were proposed fees.

Mr McGuckin: Those were proposed fees, and that is why I have said that you will not see anything that looks remotely like that when we come back with our revised proposals.

The Chairperson: Thank you very much for coming to the Committee.