

FROM THE OFFICE OF THE JUSTICE MINISTER

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FROM: DAVID GRAHAM
DATE: 18 March 2024
TO: KATHY O'HANLON

TAXATION REFORM UPDATE

Summary Update to the Justice Committee on Taxation Reform.
Business Area: Enabling Access to Justice Division.
Issue: Taxation Reform Update.
Restrictions: None.
Action Required: To note.
Officials Attending: N/A – Written briefing.

BACKGROUND

As you will be aware, the Enabling Access to Justice Reform Programme is currently out for consultation to seek views on the priority and timetabling of the various reform areas. One of the deliverables included in the programme was that proposals in relation to reform of remuneration for High Court bail applications would be issued for consultation by 31 March. We have been developing those proposals however analysis of options is still ongoing. Once this is complete, we intend to share draft proposals with the Law Society and the Bar for feedback ahead of the formal consultation issuing. We will of course update the committee ahead of that consultation being issued, which we anticipate will be before the end of April.

Engagement with the Law Society to date has been positive, and we are keen to build on this by sharing draft proposals. It is a particularly important step with regards to the Bar,

with whom we have had limited engagement with regards to taxation reform generally, and no significant engagement on this specific area, despite numerous attempts to initiate that engagement.

We note that the Committee recently had the opportunity to engage with the Bar on the subject of taxation reform, when representatives attended the Justice Committee on 6 February to give evidence in relation to the Justice Bill. There were observations made by representatives of the Bar in relation to clause 28 and taxation reform generally that we would like to take this opportunity to respond to so that the committee is fully aware of the background and context to reform.

Detail

With regards to clause 28 of the Justice Bill specifically, the Bar raised a number of concerns. The Bar referred to the clause as amounting to the legislative equivalent of a “blank cheque”. This is not the case. Legal Aid fees and rates will be set out in secondary legislation. The enabling provisions to make that secondary legislation are set out in the Access to Justice (NI) Order 2003 (civil legal services and Criminal Court of Appeal), and the Legal Aid, Advice and Assistance (NI) Order 1981 (other criminal remuneration). In order to implement a revised remuneration framework for cases currently subject to taxation, the Department can do so via a remuneration order made under the Access to Justice (NI) Order 2003. Any remuneration order is subject to negative resolution. The purpose of clause 28 is to ensure that when the Department has made a remuneration order, a potential loophole to sidestep that remuneration order does not remain, whereby a representative might instead seek an order for taxation of costs under the 1978 Judicature (NI) Act.

The Bar also expressed concerns that clause 28 of the Bill proposes “radical change” to the assessment of legal costs in Northern Ireland. The Department has in the past undertaken similar reform, for example in respect of criminal legal aid. Previously the Taxing Master had a role under the Legal Aid in Criminal Proceedings (Costs) Rules (Northern Ireland) 1992 to determine remuneration in criminal cases. The role of the

Taxing Master changed with the introduction of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005, which introduced a system of standard fees in Crown Court proceedings, with the Master retaining an appellate role where representatives are dissatisfied with assessments carried out by the LSA.

It is worth noting that the Department launched a consultation on the proposed amendment to the Judicature Act in March 2022, which included the rationale for the proposal and a draft of the clause. The Law Society and the Bar were contacted directly as key stakeholders. The Bar did not respond to the consultation, nor did they acknowledge the post-consultation report issued in May 2024.

In relation to taxation reform generally, the Bar is concerned that taxation reform is an attack on the independence of the Taxing Master as an independent judicial office holder. The policy intention of taxation reform is not to interfere with that independence but rather to bring the legal expenditure currently assessed by the Taxing Master under the purview of the Accounting Officer, thereby making it subject to the same scrutiny processes as other legal aid expenditure. The reform seeks to act upon recommendations made by the Public Accounts Committee (PAC) and Northern Ireland Audit Office (NIAO) in reports of 2017. Since then, annual taxed legal aid expenditure has increased and in 2023/24, £41.7m or 36.6% of all legal aid spend was attributable to taxed cases. The recommendations are still relevant to the current taxation system. As part of the engagement process for taxation reform, officials have met with both the Lady Chief Justice and the previous and current Taxing Masters. The engagement has been positive and is ongoing.

Finally, the Bar commented in relation to the Bellamy Review of Criminal Legal Aid in England and Wales, saying that one of the outcomes of that review was that “brief fees are a good thing”. The brief fees referred to by Bellamy are standard fees set out in legal aid legislation under the “Advocates Graduated Fee Scheme”. They are broadly comparable with the standard fees found in our Crown Court Costs rules. They are not

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comparable to the brief fees marked by counsel in taxed cases, which are not set in legislation and are decided upon by the barrister who has advocated in the case.

I trust that you find this update helpful.



**DAVID GRAHAM
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