

The Justice Bill – Bar of Northern Ireland Written Evidence

The Bar of Northern Ireland notes the significant work completed by the Minister and the Department of Justice in the preparatory work associated with the Justice Bill and progress to this point and the the critical scrutiny role fulfilled by the Justice Committee in scrutinising the Justice Bill line-by-line and proposing amendments if appropriate.

1. Clause 28 – Taxation Reform

Clause 28 outlines radical changes to the assessment ('taxation') of Legal Aid costs in Northern Ireland by inserting a new provision (Section 59A) into the Judicature (Northern Ireland) Act 1978.

The aim of this Clause is to remove entirely any role for the court (usually the 'Taxing Master') in determining the fees to be paid by the Legal Services Agency ('LSA') to the lawyers of a legally-aided person where, in any civil or criminal proceedings before the High Court of Court of Appeal, the LSA rather than the opposing party, is responsible for paying the legally-aided person's costs.

The DOJ's rationale for this change is that it will support the future introduction of alternative methods of determining the remuneration payable in relevant Legal Aid cases. The provisions will take effect on a project-by-project basis to "ensure the proper operation of any new systems."

2. Stated Evidence Base for Taxation Reform

- In 2011, the Northern Ireland Audit Office published a report entitled "Managing Criminal Legal Aid" which briefly discussed the role and duties of the Taxing Master.¹
- This was followed by a report in 2016 by the Public Accounts Committee. This recommended that the Department conduct a review of how expenditure, currently adjudicated upon by the Taxing Master, could be "properly brought under the purview of the Accounting Officer".²
- The Department launched a consultation exercise on taxation in 2022. They received two responses; one from the Law Society NI who noted that the Taxing Master was a "suitable mechanism that should not be changed", and one from an individual member of the public who agreed with their proposals. The Department appear to acknowledge that substantial further consultation regarding taxation reform is still required.³

3. Motivation for Reform

- The Department has noted that the key objective of taxation reform is "to preclude the High Court and Court of Appeal from granting orders for taxation of legal aid costs where the Department has the necessary legislation and administration in place to determine payment..."⁴
- The Department also cites concerns with the Taxing Master being independent and is therefore, "not accountable to the Departmental Accounting Officer". They went on to state that the

¹ [8935 legal aid final.pdf](#)

² [report-on-managing-legal-aid.pdf](#) – see recommendation 3 on pg 7.

³ See para 33 of the Explanatory and Financial Memorandum of 17.9.24 submitted with the Justice Bill.

⁴ [Post consultation report on taxation and statutory charge.pdf](#)

“separation between the Department and judiciary has also caused issues when attempting to assess the level of official error attributed to the legal aid fund”.⁵

- A further issue raised by the Department is that there is “often little predictability” over the assessments of legal fees from a Departmental perspective. They have argued that the future taxation reforms will “provide the Department with the opportunity to introduce a degree of predictability and establish a line of accountability.” This was also noted in the 2016 PAC paper which noted, “there is [a] need for improved transparency and accountability”.
- Finally, the PAC noted their alarm at the “extent to which legal representatives have had their claims reduced” by the Taxing Master. They submitted that this represents an unacceptable level of claims that are disproportionate or not reasonably incurred.⁶

4. The Bar of Northern Ireland’s response to Clause 28

4.1. A disjointed and incoherent approach to reform:

- The Department are undertaking a reform programme on the topic of Enabling Access to Justice. It describes the programme in terms of five ‘pillars’ comprising of: a Review of Civil Legal Aid framework; a review of Criminal Legal Aid framework; a review of taxation assessment process; modernisation and a statutory registration scheme for legal practitioners.
- In particular, it is difficult to reconcile why the Justice Bill would propose taxation reform at this time when the Department’s own Review of Taxation is still at a relatively early stage.
- Furthermore, Members are being asked to vote on a principle only. It remains completely unclear what alternative measures will be introduced to replace the Taxing Master.

4.2. Independence of the Taxing Master:

- The Taxing Master is an independent Judicial Officer Holder, and it is a settled and general principle that the judiciary should operate without inappropriate or unwarranted interference. Clause 28 therefore seeks to restrict the independence of the Taxing Master.
- The Taxing Master is already legally bound to protect the Legal Aid fund, and there is no evidence of a failure to fulfil this statutory obligation, nor even any evidence of the Department ever having alleged such a failure, whether to the Master or to this House. It is unclear what the Department perceives to be the disadvantages of having a demonstrably independent system and it has not articulated the comparative advantages of any alternative approach.
- The Bar is gravely concerned that the DoJ simply does not like the outcome of some taxation decisions in respect of legally aided cases and is therefore seeking to remove publicly funded cases from taxation altogether.
- The precedent this would set, where a government body removes a class of case from an independent judicial process because it does not like the results of that process, should be of concern to all citizens.

⁵ Ibid, para 5.5.

⁶ (n 2)

- In England and Wales, there is a Senior Cost Judge (Chief Taxing Master) who is responsible for the assessment of legal costs. In 2021, the UK Government launched a consultation aiming to transfer the responsibility of the assessment of civil Legal Aid costs over £2,500 from the HM Courts and Tribunals to the Legal Aid Agency (LAA). However, respondents to the consultation raised concerns about the impartiality of the LAA as an assessor of the Bills. Respondents noted that the LAA, as the ‘paying party’, may be incentivised to assess bills at a lower amount than the HM Courts and Tribunals would. The proposals were rejected by a large proportion of respondents, and the Government put the proposals on hold until they gathered more evidence. Since 2021, practitioners can choose whether they submit their costs for assessments to either the LAA or the Senior Costs Judge.
- Remarkably, and in spite of the experience in England & Wales, the DOJ at page 34 of its 17 September 2024 Explanatory and Financial Memorandum in respect of the Justice Bill, does not seek to hide its assault on the longstanding principle of independence, claiming that the introduction of Section 59A ‘will allow for the reform of the taxation of legal aid costs, the basic principle being that if the Department is paying, then the Department determines the amount’. Contrary to what is asserted there by DOJ, if a ‘basic principle’ could be said to exist then it is that costs are determined through the taxation process.

4.3. Legal Aid Budget Predictability and Accountability:

- It is evident that the Department’s motivation behind taxation reform is aimed at achieving predictability over Legal Aid expenditure. This is not a sufficient justification to interfere with an independent judicial function, and predictability is an unachievable position given that Legal Aid is a demand-led public service.
- The Department has noted that taxation reform will provide an “...an opportunity to introduce a degree of predictability...” However, in terms of Clause 28, the DoJ has stated that the provision “in and of itself” will not save money as they have yet to determine a fee structure and will be unable to assess financial savings until that is carried out.
- Any attempt to force fit Legal Aid into the constraints of a fixed budget represents prioritisation of affordability over merit. The Department has already demonstrated that, when budget is not available, it will apply wholly unjustified and repercussive measures such as arbitrarily delaying Legal Aid payments to practitioners (recently the subject of criticism of the DOJ by McAlinden J in a case taken by the Bar Council and Law Society against the DOJ⁷). This precedent should prompt concerns about granting the Department any further scope to prioritise budget predictability over the merits of the fair, equitable, and sustainable payment requests submitted to it by the professions.
- We urge the Department to recognise the demand-led nature of publicly funded legal services and adopt a needs-based approach to Legal Aid and allocate to it an appropriate budget which invests to deliver a quality value service to citizens in receipt of publicly funded legal services.
- Demand for Legal Aid is pronounced across NI due to long-standing socio-economic difficulties. Northern Ireland is the ‘poorest region’ of the UK and, in 2021, it was reported that Northern Ireland’s disposable income averaged at just £17,646 per year. This connection between Legal

⁷ [2025] NIKB 6
<https://www.judiciaryni.uk/judicial-decisions/2025-nikb-6>

Aid and socio-economic deprivation is evidenced through the fact there is a higher number of Legal Aid applications granted per 1,000 of the population in areas with socio-economic difficulties.

4.4. Delays to Payments for Practitioners

- Legal professionals are already enduring unprecedented, unfair, and unsustainable delays to payment for work completed under the Legal Aid System, as the Legal Services Agency Northern Ireland (LSANI) deals with a budget deficit by delaying payments to practitioners.
- Delays were on a trajectory of up to 24 weeks during some points in 2023, giving rise to a one-day withdrawal of services on part of the Criminal Bar Association in November 2023.
- We are concerned that Clause 28 and the implementation of a new system of remuneration would increase payment delays further. This will have an adverse effect on the sustainability and viability of the profession and will restrict access to justice to communities that need it the most.

4.5. Pre-Existing Checks and Balances

- A concern raised by the Public Accounts Committee in their paper in 2016 was an “unacceptable level of claims submitted by the legal profession that are disproportionate or not reasonably incurred...”. In arguing this, they quoted figures provided by the Department for the years 2012-2013 until 2016, which showed that nearly 90% of bills were reduced after taxation, representing a reduction of £9 million (13%) in claims of £69 million.⁸
- With respect, this criticism by the PAC was both unfair and, more importantly, missed the important point: that fees are sometimes reduced or disallowed on taxation is proof positive of the value of the system. Taxation is no ‘rubber stamp’. Rather, it is an independent judicial process where fees claimed *are disallowed* if it was not reasonable to incur them and where fees claimed *are reduced* if, although reasonably incurred, the amounts claimed are too high.
- In addition, it is important to recognise that there are safeguards and sanctions in place to ensure that practitioners do not mark an excessive fee. Clause 30.2 of the Bar Code of Conduct notes, “It is improper for a barrister to mark an excessive fee. A substantial reduction on taxation of the fee marked may be deemed to be prima facie evidence of professional misconduct.”⁹ Similar protections exist in respect of the Solicitors’ Profession.

4.6. Alternative Methods

- As previously noted, Clause 28 is envisioned to support “future introduction of alternative methods of determining the remuneration payable”. In this way, Members are being asked to vote ‘blind’ on a principle, whilst it remains entirely unclear what the alternative methods are, what the time frame is, and how the future systems will recognise the time and skill invested by practitioners.
- In particular, Members should also be aware that in this particular regard, what the Department has stated in the Explanatory and Financial Memorandum is incorrect. They assert at page 34

⁸ (n 2)

⁹ [Code of Conduct | The Bar of Northern Ireland](#)

that the new Section 59A 'will preclude the High Court and Court of Appeal from granting orders for taxation of legal aid costs **where the Department has the necessary legislation and administration in place to determine payment for those services**' (our emphasis). In fact, the prohibition imposed by Section 59A contains no such pre-condition. It does not mandate that there be any alternative system in place.

- Whilst we of course appreciate that the Department intends to put some other system in place, the sequence of legislative steps here is potentially of great importance. Rather than have the Assembly decide whether or not to remove Taxation in a context where the Assembly is able to assess the adequacy of the proposed alternative, you are being asked to take the first step on the basis that the Department will not commence the relevant provision (note: Clause 33(3) gives DOJ this power) until it has an alternative ready. This will allow the Department to remove taxation entirely from the High Court and Court of Appeal once it is satisfied it has a valid alternative, regardless of the views of stakeholders such as lawyers and regardless of the views of the Assembly.
- As for potential alternatives to Taxation, we are concerned that the Department may introduce statutory scale fees, which are not viable, due to the Departments repeated inability to review scale fees in the limited areas where they have been introduced. For example, Family Care Centre fees are dictated by the Civil Legal Services (Remuneration) Order (Northern Ireland) 2015, and the Department has not fulfilled its statutory obligation to review these fees since 2015. As for Crown Court fees, the Department's failure to review are well-known in light of the current Criminal Bar Association industrial action.
- There has also been a failure from the Department to collaborate to consider and create alternatives, such as exploring with the Family and Judicial Review Lawyers the creation of a flexible system of guidelines fees such as those in the so-called 'Comerton Scale' in the field of High Court Personal Injury Litigation. The 'Comerton Scale' is set (and periodically revised) by the Bar, having regard to the views of the Taxing Master and established cases, and outlines the fees which Barristers should usually mark (i.e., absent exceptional circumstances) in High Court personal injury cases.
- The Comerton Scale introduces key attributes of predictability of fees (and therefore spend) and efficiency of administration for payers, but also controlled flexibility in order to accommodate non-standard or exceptional cases. It reduces the workload for the Taxing Master in this sphere of litigation so that he or she has to deal only with the most unusual or exceptional cases and it is generally approved of by the 'payers' (principally, in the personal injuries field, insurance companies). The scale was reviewed again recently, with a new scale in effect since 1 January 2025.
- The use of the Comerton Scale to mark fees has been endorsed by the judiciary over several decades. In ***Carr (a minor) v Poots [1995]*** the judge noted that "it is well known that in practice it is the basis of the scale usually adopted by members of the Bar in marking brief fees, commonly known as the Comerton scale. For practical purposes resort to this scale has advantages when one is dealing with straightforward cases, on the swings and roundabouts principle." Further, in ***McLaughlin v Hutchinson and another [2012]*** Lord Justice Gillen dictated that there was no need to depart from the Comerton Scale to determine the fees payable.

4.7.A Two-Tier System of Access to Justice

- One potential indirect consequence of the removal of taxation of fees in legally aided High Court and Court of Appeal cases is that it creates a two-tier system of access to justice. It is unclear whether the Department has simply failed to consider this foreseeable consequence of their actions or whether they are carrying on regardless of it.
- Fundamentally, the Department wants to remove taxation from this entire swathe of litigation so as to reduce the legal fees they, through the LSA, have to pay. Thus, whatever their alternative system is, it will almost certainly result in lower fees for lawyers acting legally aided cases.
- One foreseeable effect of this will be to discourage lawyers from acting in legally aided cases when they could act in non-legally aided cases, where taxation of costs remains available, instead. This risks leading to a system where, unlike at present, the best lawyers act only in non-legally-aided cases.

4.8. DOJ's Motive: Money not Principle

- It is important to recognise that the Department's motive here is not a principled one. The Department is not seeking to have access to taxation denied to all litigants, only to those who meet the financial conditions for access to Legal Aid and only where the Legal Aid fund is paying.
- Thus, a prisoner injured in HMP Maghaberry who obtains Legal Aid to sue DOJ following an injury sustained whilst working in the prison kitchen will have no access to taxation of costs if he ultimately fails in his claim. Whereas he will have access to taxation if he wins. A non-legally aided DOJ employee working in the same kitchen will have access to taxation of his costs if he wins or loses his claim against DOJ.

5. Other Comments on the Justice Bill

5.1. Part 2: Custody and Bail of Children

- The purpose of this section is to enhance compliance with Article 37 of the UN Convention on the Rights of the Child. The UN Committee on the Rights on the Child recently raised concerns on the "draconian and punitive nature" of the youth justice system in the UK, highlighting in particular issues such as the low minimum age of criminal responsibility, that children who are 16 and 17 years of age are not always treated as children in the justice system, and that children can be remanded into police custody and often spend overnight in prison cells.
- It is integral that children are only placed in custody as a measure of last resort. The Bar therefore welcomes various provisions in this section ensures; a presumption of bail for children, save for specific exemptions; that a Constable must consider the seriousness of any breach of bail before deciding to arrest a child; and that there is active prevention against children being detained in custody and refused bail due to a lack of suitable accommodation. Clause 14 also adds that the court must openly state its reasons for remanding a child in custody for more than three months.

- However, we note disappointment at the omission of provisions raising the Minimum Age of Criminal Responsibility. We responded to the Department's consultation in 2022 showing support for the recommendation of raising the age from 10 to 14, in order to bring Northern Ireland in line with the principles contained in the UN Convention on the Rights of the Children.

5.2. Part 4: Administration of Justice

- Currently, a judge can enter a "No Bill" for a manslaughter or murder charge but cannot for a related charge under Section 5 of the Act; clause 25 aims to close this gap.
- Clause 26 introduces Registered Intermediaries for defendants with communication difficulties during appeal proceedings whilst giving oral evidence. This aims to give defendants the ability to participate more effectively in court proceedings by assisting them in understanding and responding to questions during the trial.

Justice Committee: Overview of Brief Fee

1. Introduction

The intention of this short summary is to facilitate, pending further discussion and consideration, an initial understanding of the basis, merits, and comparative experience of the use of Brief Fees. It is not intended as a comprehensive submission on the subject.

2. What is a Brief Fee?

To assist with this question, we can look at various sources including official guidance, relevant case precedent and an explanation of what happens in everyday examples.

Formal definition

- An authoritative definition of a Brief Fee can be found in textbooks such as Butterworths Costs Service:

*“The **brief fee** covers:*

(a) all the work done by way of preparation for representation at the trial or hearing;

(b) attendance on the first day;

(c) (where there is no refresher fee) the work done in taking a note of the judgment of the court, having it transcribed accurately, attempting to agree it with the other side if represented, submitting it to the judge for approval where appropriate, revising it if so requested by the judge, providing any copies required for the appeal court including solicitors and lay client, and providing a copy to an unrepresented appellant;

(d) any necessary 'after-care' conference with the lay client following judgment; and

(e) the commitment of time that delivery and acceptance of the brief involves.

*Included in (a) is all necessary work which is an incident of the proper representation of the client carried out after delivery of the brief. Thus routine conferences with the client, meetings between counsel and with experts and the preparation of examination-in-chief, cross-examination and (ordinarily) written submissions or skeleton arguments (whether opening or closing) as well as lists of dramatis personae, chronologies, schedules and other necessary forensic documents are all covered by the **brief fee**. Counsel are only entitled to charge for work which they have been instructed to do, and where it was done on legal aid, work which has been authorised by a legal aid certificate. This means that in a privately funded case counsel must either negotiate a **brief fee** that is sufficient to cover all such work, or make some other special agreement for the delivery of supplemental instructions and/or the agreement of an additional fee; and in legal aid work he may on the legal aid taxation require that the **brief fee** (and the refresher rate) properly reflect the amount of work that actually had to be done. Work done before delivery of the brief, or in anticipation of the delivery of the brief, is also included in (a). The work has to be done some time and it is not uncommon (though not to be encouraged) that the brief is delivered late and the barrister has to start his preparation on the strength of the solicitor's statement that he will deliver a brief. This does not prejudice the assessment of the proper **brief fee** when the brief is later delivered.*

*A **brief fee** may expressly exclude work (such as work on witness statements, expert reports and pleadings) which is otherwise charged separately. As Hobhouse J commented in *Loveday*, the **brief fee** takes everything into account 'unless some different agreement is made'. Thus, where counsel has charged separately for work which would normally fall within the **brief fee**, and the entitlement to make a separate charge has been agreed, the appropriate course*

*is to take that into account when assessing the reasonableness of the **brief fee**. There is no basis for disallowing separate charges provided that they fall within the agreed exclusion, were reasonably incurred and were reasonable in amount."*

Case Law Precedent

- The brief fee is the principal remuneration paid to a barrister for the use of his or her skills as an advocate, negotiator or lawyer to resolve the issues which confront his or her client. The scope of the brief fee was defined by Mr Justice Hobhouse, as he then in *Loveday –v- Renton (No 2)*¹ was:

“The brief fee covers all the work done by way of preparation for representation at the trial and attendance on the first day of the trial”

This definition was accepted in this jurisdiction by Carswell LJ in the case of *Nan Boyd –v- Rachel Selena Ellison and Another*²:

It is to cover the conduct of the trial in court for the first full day, counsel being by custom entitled to refreshers for succeeding days: *Loveday v Renton (No 2)* [1992] 3 All ER 184, 190b, per Hobhouse J”

The *Loveday* case is a very important judgment for counsel as not merely does it contain a definition of the scope of the brief fee but there is a very detailed discussion of what work is to be included in the fee and it is manifestly clear that such work is not confined to time expended in court:

“In assessing a brief fee it is always relevant to take into account what work that fee, together with the refreshers, has to cover. The brief fee covers all the work done by way of preparation for representation at the trial and attendance on the first day of the trial. But in heavy litigation, particularly where there is a team of barristers and experts, additional work is involved in ensuring that the client is properly represented and his case fully developed beyond simply appearing in court”³

In *Loveday* Hobhouse J held that all preparation is to be taken into account when assessing the amount of a brief fee, including meetings of the party’s legal team and meeting with the other parties’ lawyers. The amount of the fee must be commensurate with the work done. Preparation will vary from case to case and it is very difficult therefore to arrive at an amount applicable to all cases. In the Taxing Office, for example, cases in which there are allegations of serious abuse, physical or sexual, particularly if there is a contemporaneous police investigation, are regarded as placing greater responsibility on counsel and meriting a higher fee.

The judgment of Weir J in *David William James Crozier –v- Derek Lyons*⁴ has established that junior counsel appearing with senior is entitled to two thirds the fee of senior no matter at what point the proceedings conclude.

¹ [1992] 3 All ER 182

² [1995] NI 439

³ I am quoting from a copy of the judgment reproduced in a digest of costs cases and I apologise that I am unable therefore to cite page numbers

⁴Unreported 23.03.04)

Pennycuik J observed long ago in the still leading case of **Simpsons Motor Sales (London) v Hendon Borough Council [1965] 1 WLR 112** the correct approach to considering the reasonableness of counsel's fees - in that case the brief fee - is as follows:

"One must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content to take on the brief... There is in the nature of things, no precise standard of measurement. The taxing master employing his knowledge and experience, determines what he considers to be the right figure."

Typical Application

When marking a Brief fee, counsel take into account a variety of factors, but the following aspects would routinely come in to play in determining what fee to mark:

- The type of service being undertaken.
- The complexity and financial value of the matter. Note that complexity includes:
 - complexity of factual matters, e.g. volume / type of evidence to be reviewed
 - the nature and complexity of the legal issues
 - the level of consultation required
 - the number of applications before the court
- The amount of preparation time required.
- The anticipated duration of the case.
- The barrister's experience.
- Whether the case involves one or two counsel.
- The position being adopted by the other parties to the case.
- The seniority of the barrister.
- The urgency of the work.

This is not an exhaustive list and the extent and degree to which these issues are present will vary from one counsel to another and from one case to another.

Entitlement to a brief fee

The trial of a matter need not have opened for counsel to have an entitlement to a brief fee as that entitlement arises when the trial brief is delivered and accepted by counsel and not by the opening of the trial:

"It was always considered in my own experience that the fee marked on the brief, notionally when it is delivered to counsel, is that which will be paid whatever thenceforth befalls the action. It is to cover the conduct of the trial in court for the first full day, counsel being by custom entitled to refreshers for succeeding days: Loveday v Renton (No 2) [1992] 3 All ER 184, 190b, per

Hobhouse J. If the case is settled by counsel through negotiation, either before or on the morning of trial or after its commencement, the fee remains the same, and this applies even if the case is settled by the solicitors or the parties themselves, once the briefs have been delivered.”⁵

In the later case of Northern Bank Limited –v- Leyburn⁶ Girvan J refined this principle somewhat by holding that the entitlement to the brief fee arose when counsel accepted the brief and committed themselves to appear at the trial and not necessarily on the date on which the trial brief was delivered:

“The real issue in this case is when Mr Keogh received his instructions to appear at the trial of the action. Concentration on the mechanical questions of when papers were "received", "accepted", or "delivered" misses the central question....

When the papers were sent to Mr Keogh they were not sent with instructions as such to appear at the trial. Even if they were I am satisfied that the solicitors and Mr Keogh both appreciated that Mr Keogh had not been asked to commit himself and had not committed himself to appear at the trial in the absence of the provision of legal aid. Under paragraph 12.14 of the Code where a barrister accepts a brief he has an obligation to attend at trial. The reverse of that is also true. Where he has not undertaken an obligation to attend the trial it cannot be said that he has accepted the brief.”

It is important to note the comments of Carswell LJ that, once the entitlement to the brief fee has arisen, counsel is entitled to be paid that fee “whatever henceforth befalls the action.” Counsel may (and frequently do) of their own volition agree to abate his fee should proceedings settle early and not proceed to a hearing but they are under no obligation to do so.

3. The Use of Brief Fees

Advantages & Disadvantages of Brief Fees

- In Legal Aid work, if a brief fee is **not** used then all fee claims are required to be individually assessed and paid on an hourly rates basis.
- The assessment of the number of hours claimed on each case is administratively expensive for the LSA, requiring time and additional staff, and, for the reasons explained below, might in many cases result in a greater fee being ultimately paid than would otherwise be the case.
- Although standard brief fees have been adopted in various areas of Legal Aid, the Department of Justice has failed to conduct the necessary statutory reviews of these fees which has then contributed directly to a breakdown in relationships and even the withdrawal of services by the barristers impacted by such neglect.

⁵ Nan Boyd –v- Rachel Selena Ellison and Another [1995] NI 439

⁶ [1999] NI 162

- The use of Brief Fees means that a barrister should not be required to argue with the Legal Services Agency about whether the number of hours they worked on the case was justified or not. One only has to look at how budgetary pressures experienced by the Department have resulted in Legal Aid payment times being extended to see the potential for budgetary pressures to be cited to reduce and deny the hours required in a particular case and to do so in a fluctuating pattern which ignores the merits of the argument but is instead based on budget availability. A brief fee avoids such issues.
- A brief fee reflects a combination of risk and fair reward for the barrister. By using individualised brief fees, a barrister with greater experience and skill, who could prepare a case in fewer hours, would not be paid less than a barrister with less experience and skill who might require longer to prepare and who, under hourly rates, would have claimed more hours and be paid more.
- In this context the use of a brief fee incentivises competition and creates choice for instructing solicitors (and lay clients) who can achieve expedient and efficient outcomes by selecting from a range of suitably experienced barristers and their quoted brief fees rather than a system that has the unintended consequence of failing to reward experience and instead simply rewards elapsed time.
- A brief fee involves a certain risk exposure for the barrister. The brief fee for a case is intended to cover all preparation and should represent a reasonable sum for the amount of preparation required. However, over time the amount of preparation required for that brief fee might go up, with for example additional technology-related evidence or disclosure that has to be studied, that didn't exist in the days when the brief fee was first set. This means that more hours are being spent for the same brief fee. Whereas an hourly rates scheme would better reflect the amount of work involved.
- Over many years the Department has advised the profession that certain aspects of Legal Aid must operate on a "swings and roundabouts basis". A brief fee, which entails some risk and incentive for the barrister involved, is aligned to that philosophy.

Wider Usage

- Brief fees are commonly used, not only in Northern Ireland but also in England & Wales, with the approval of the Bar Standards Board (BSB) which acknowledges that there is no standard amount that a barrister will charge and that barristers are allowed to set their own prices for their services.⁷ The BSB requires barrister practices to say to say how they commonly charge for the legal services they provide i.e. they must say whether the fees will be charged on a Fixed fee or hourly rate or other type of arrangement.
- See for example the following extract from an article⁸ on the website of 5 Pump Court Chambers, one of many sets of barristers operating successfully in England & Wales:

"There are two main ways in which barristers charge:

1. On an hourly basis (similar to how most solicitors charge for their time). The hourly rate applied will be based on their level of experience, both in terms of the level of specialisation required and the length of time that they have been practicing. Barristers will record their time and the bill will depend on how many hours the work takes.

⁷ [Barristers and their fees](#)

⁸ <https://www.5pumpcourt.com/blog/how-do-barristers-charge>

2. On a fixed fee basis. Most work undertaken by barristers is charged on this basis. A client will agree a fee in advance for the piece of work to be done – whether that is a hearing at which the barrister is to appear, or drafting of a particular document, or some other work.

The most common form of fixed fee is a ‘brief fee’ which is the fee charged for a hearing. Brief fees will be calculated according to the length of the hearing; the amount of preparation required; and the seniority and experience of the barrister being briefed. For a hearing which is to last for a day or less, the brief fee will cover all of the preparation and attendance at court, and (in most cases) the time spent by the barrister in drafting an order to put the judge’s decisions into effect.

For hearings which are likely to last for more than one day, the brief fee covers the preparation and the first day of the hearing. For future days, a refresher fee is charged which is less than the brief fee because it is to pay the barrister for only the attendance at court. For example, for a three-day case, the brief fee might be £10,000 (which covers the preparation of the case and attending on the first day) with refreshers of £3,000 for days 2 and 3 (which cover attendance on those two days). The total cost will therefore be £16,000.

In addition to the brief fee and refreshers, there are other fees which might be charged. The most common ones are as follows:

- Travel and hotel costs, especially where the case will last for more than one day;
- Conference fees, for a meeting with the barrister before the case – this is normally charged where the meeting is several weeks or more before the hearing, or where additional advice has to be provided (for example where advice on settlement is being requested in the hope of avoiding the hearing);
- Fees for written submissions after the hearing. On occasion, the court requests the barristers to provide closing arguments, or arguments on costs, by written submissions. These can take a substantial amount of time to draft and so there might be an additional charge.
- Advice on appeal, if the judgment does not go in the way that you want. “

Continued Use of Brief Fees Following Independent Review:

The Bellamy Review of Criminal Legal Aid in England & Wales⁹, was set up to look at the criminal legal aid system in its entirety and sought to ensure that it:

- provides high quality legal advice and representation
- is provided through a diverse set of practitioners
- is appropriately funded
- is responsive to user needs both now and in the future
- contributes to the efficiency and effectiveness of the Criminal Justice System
- is transparent
- is resilient
- is delivered in a way that provides value for money to the taxpayer

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In light of these aims and the impact that successive governments' policies of austerity have had upon the quality of criminal justice in England & Wales, it is significant to note the findings in relation to brief fees were as follows:

- *“A fixed brief fee plus a “refresher” for each day in court seems ... a sound principle from the point of view of controlling costs and ease of administration and these should be increased generally.*
- *13.89 In that regard, the first issue is the mechanism for arriving at the brief fee. ... the guiding principle should be the gravity of the offence, the concomitant responsibility borne by the advocate, and the complexity and difficulty of the case.*
- *While the PPE may be one indicator of these factors and is still important in determining the AGFS fees in fraud and drugs cases ... PPE is not in itself a reliable guide to seriousness or complexity, as already discussed in relation to the LGFS.*
- *13.91 In the light of the above, I recommend that the MOJ should further review the relationship of the various brief fees with each other, potentially to ensure that the PPE element is not causing unjustified distortions. “*

In January 2020 the Crown Prosecution Service (CPS) commenced a comprehensive evidenced-based review of their advocate fee schemes. It is well documented that the criminal justice system in England & Wales, especially since LASPO, has been on a determined and ultimately damaging austerity drive.

This has saved significant amounts of public expenditure but has been to the detriment of the overall legal system and Access to Justice. It is therefore interesting to note that, despite that sustained austerity drive, the main changes made by the CPS from 1 February 2020¹⁰ included:

- **increasing a range of brief fees**, for trial and guilty plea cases, for junior advocates;
- **increasing a range of daily (refresher) fees**;
- introducing additional payments to all advocates for the prosecution of multi-defendant cases;
- providing additional payment for consideration of unused material;
- making targeted adjustments to the Very High-Cost Case scheme; and
- increasing rates paid to advocates prosecuting in magistrates' courts and the Youth Court.

In doing so the CPS acknowledged: *“the important contribution the self-employed Bar has made to the work of the CPS over the last 30 years or so, a relationship which I hope will endure in the future. Prosecuting advocates play an essential role in our criminal justice system, making it one of the best in the world. The dedication and hard work of the criminal Bar is clear to see whilst adapting to new ways of working, new forms of digital evidence and the increasing complexity of criminal cases.”*

¹⁰ [CPS: Counsel Fee Review | The Crown Prosecution Service](#)

4. Conclusion

This short paper provides merely an initial overview of Brief Fees. It makes clear that their use is not only founded in legislation but has been examined and tested in various court cases and exercises undertaken by various independent bodies who have cited the advantages of brief fees when seeking to control costs (and the crucial issue of costs predictability) and ease administration.

Any consideration about potential changes to the use of brief fees must involve an objective evaluation of the comparative advantages and disadvantages of any alternatives and the evidential basis in support of any proposed change.

The Bar of Northern Ireland is keen to assist the Chair of the Justice Committee with any further questions arising in relation to this subject.