Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Crown Court Remuneration

7 December 2010

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Lord Morrow (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Lord Browne
Mr Alban Maginness
Mr Conall McDevitt
Mr John O'Dowd

Witnesses:
Mr Robert Crawford) Northern Ireland Courts and Tribunals Service
Mr John Haliday)

The Chairperson (Lord Morrow):
I welcome Mr Robert Crawford, head of public legal services in the Northern Ireland Courts and Tribunals Service and Mr John Haliday, the service's criminal legal aid policy adviser, who are here to discuss the results of the consultation on Crown Court remuneration. We have received a briefing paper from the Department. We also have copies of the responses to the consultation from the Bar Council of Northern Ireland and the Law Society of Northern Ireland.

Mr Robert Crawford (Northern Ireland Courts and Tribunals Service):
I will begin by outlining the proposals and the responses that we received to the consultation, and our intended responses to those proposals, which have the Minister's approval. There are a couple of points that are not covered in the response to the consultation report that we provided to the Committee and which were arrived at following further consideration and costing. The Minister is now minded to move on those points, and I will identify those as we go along.

The big driver for this exercise was the rising cost of legal aid. Legal aid overall has increased

over 10 years from £36·6 million to £104 million in 2009-2010. We have looked at Crown Court cases in this round because that is where we anticipated the biggest chunk of savings might be made. The proposals that were published for consultation on 24 September 2010 — the consultation ended on 19 November 2010 — envisaged that we would make about £16 million of savings in that area.

The proposals followed earlier proposals that were made last year to replace the existing 2005 rules scheme with the graduated fees scheme (GFS) that operates in England and Wales and to change thresholds for very high cost cases (VHCCs). The published proposals moved away from that, removing VHCCs altogether from the scheme and remaining with the 2005 rules methodology but cutting the fees under those rules by 20% for barristers and 30% for solicitors. In the proposals, all cases are now covered by a standard fee for up to 80 days. There has not been a case in Northern Ireland that has lasted longer than 80 days. We have included in the proposals that, if such a case were to come up, it should go to the Minister for approval under exceptional grant funding arrangements.

We believe that the proposals provide greater certainty and accountability, and we have set that out in the consultation papers, so I will not dwell on that. We received 38 responses to the consultation document, which have been included in the consultation report alongside our views on those responses. We carried out an equality impact assessment at the same time, and members of my staff met representatives of the Human Rights Commission and the Equality Commission to explain not just the proposals, but their context in the overall legal aid reform programme.

We have not received any substantive comments on the proposals from an equality standpoint, but we received comments from the Equality Commission and the Committee on the Administration of Justice (CAJ) on aspects of the legal aid process and the lack of data on which we were forming judgements. We will follow those comments up, even though they are not in the proposals. We have been in touch with the Equality Commission, and we will contact the CAJ for further comments. We acknowledge that there is a lack of data. We do not have it, and we have a difficulty in that we cannot require people to provide it. We approached the professions and others for information, but it appears not to be there, so we will see what we can do to address that gap. As CAJ correctly points out, it is incumbent on the public body to seek to "mitigate the gap" — I think that that was the phrase used.

The main responses came from the legal profession: 26 solicitors' firms, the Law Society, the Solicitors' Criminal Bar Association and The Bar Council responded. There were some substantive comments from the Public Prosecution Service (PPS), which I will deal with later. I imagine that there will be other questions, but the main comments raised were on the extent of the cuts and on particular areas where cuts are being proposed.

Both the Bar and the solicitors acknowledged that there was a need to make significant changes to VHCCs. No significant issues about the removal of VHCCs have been raised with us as a principle. Solicitors across the board argued that the proposed 30% cut was too high, and the basis of that argument was the impact that it would have on solicitors' firms. There was a suggestion that a 5% to 10% cut may be acceptable to the solicitors' side of the profession. The Minister has decided to accept the point made about impact as that could affect jobs and employment, and he has adjusted the proposal to a 25% reduction for solicitors.

To give a wee bit of flavour, I will outline the figures in the equality impact assessment for the convenience of the Committee. Some 287 firms did Crown Court work in 2008-09. That is the last set of good figures that we have, because not all the claims are in. A total of 176 firms, or 61%, received less than £20,000 for Crown Court remuneration. We thought that the impact on those firms would probably be quite minimal, as the cut will not have much of an effect on them. Most of the work is clearly in other areas.

Some 68 firms, or 24% of firms, got £20,000 to £100,000 in that year. There would be some impact there, although the majority of those earn closer to £20,000 and not the £100,000 at the end of the spectrum. A total of 42 firms, or 15%, received £250,000 to £450,000. Basically, 41 of those firms are in that bracket, and one firm received more than £1 million in that year. Clearly, the impact there would be considerably more. It is on the basis of that relatively small number of firms, which the Minister acknowledges, that he has decided to adjust that reduction to 25%. That will be reviewed. There is a statutory requirement to do so, and the rule is that it must be reviewed within two years. The impact assessment will be redone during that period to determine whether we have, in fact, got it right. As with every other area in the rules, the review will take place within the two-year period.

The Law Society also sought a new fee to recognise the additional preparatory work involved in complex cases. It put some proposals to us for the fee for cases in which there is served prosecution evidence of over 750 pages. We have accepted that, and we have also slightly adjusted the figures upwards to reflect the fact that it also sought some additional remuneration in cases in which there is difficulty in getting disclosure material from the PPS or the PSNI. The Law Society gave us some quite persuasive examples of such cases, but we had no way of capturing the costs or the extent of the work involved. Disclosure evidence is not remunerated separately in other jurisdictions, so we adjusted the figure upwards very slightly to give some recognition of that point.

In compensation for that, the Law Society offered to forgo the higher rate for attending court in cases that last longer than 25 days. So, the higher refresher fee, which would be between £560 and £700 a day, would go, and the rate would be capped at £490 a day. We estimated that the cost of meeting the proposal, with our adjustment, would be £390,000, and capping refresher fees would give us £340,000 of that, so there was not much difference there. However, the acceptance of that proposal or suggestion is based on the idea that it is a good response to consultation; it recognises that the Law Society is saying that this is where the real work falls, and attending court is not where the work is put in. We felt that that was a reasonable thing to accept.

The solicitors and the Bar argued for no change to small fees. Some of the fees set out in the schedule are very small, maybe £60 or £80. We have not put that in the post-consultation report. The Minister, following some further costing work that we did, has now decided that he is minded to accept that any fee of £100 or less should not be cut by the proposed 20% or 25% and that any fee between £100 and £125 should not be cut to below £100. The cost of that works out at under £150,000. It simply recognises the fact that some fees, in the scheme of things, are already very small. In order to get the savings, we have taken a broad-brush approach in making a 25% cut. Some of those fees are already very small, and we recognise that the remuneration that they provide is set at about the right level. A further cut is not, perhaps, justified, given those low levels.

The Bar argued that the proposed 20% cut was too high and proposed a 10% reduction. That argument was not accepted. In order to get to the graduated fees scheme, which we rejected in light of representations from the legal profession, we would need to cut the Bar's remuneration by 28%. Keeping the reduction at 20% will leave the Bar's remuneration approximately 10% higher than in England and Wales at the end of this exercise, because fees in England and Wales are going down again. We think that that level is about right. There is a margin that has caused criticisms of the way in which the system is working in England and Wales. We have not gone for a 28% reduction; keeping it at 20% still leaves a 10% difference.

There was an argument about page counts in the context of access to higher rates for guilty pleas — GP2s, GP3s and GP4s — where we set a range of rates of payment depending on the amounts of evidence served. Previously, there would have been a rate at first arrangement, known as a guilty plea 1, and a higher rate where there is a guilty plea after first arrangement. We have added two pleas to those rates, which means that anything after first arrangement will fall into a guilty plea 2, 3 or 4 category, depending on how many pages of evidence are served, recognising that all that evidence has to be read and that there is work involved in that.

We have accepted that argument, and we have adjusted the thresholds. The argument was that very few cases would reach the higher rates. It is the intention that very few cases should reach the higher rates, but we felt that, perhaps, we had cut things a little bit fine, having gone through the costing of the representations. We have now adjusted those thresholds down by 20%, and we reckon that we will get more cases into those higher limits.

I will move on to the representations from the PPS. The PPS raised the issue of the cost that it will incur as a result of the changes to defence remuneration. There are a few figures that did not come out, and it is important that the Committee should recognise them. Defence and prosecution costs have never been properly aligned here. There is a commitment in England and Wales to move them closer together. At the moment, we reckon that the existing rates are about 17·5% apart, before either of us changes.

To get a GFS for counsel here into the same place as England and Wales by 2013 or 2014 would require a reduction of 28%. We have gone with 20%. If we had gone with a 28% reduction, the 17·5% differential would still exist, if they move to a GFS. The 20% reduction will widen the gap if there is a move to the GFS rates in England and Wales. It is correct to say that that gap will widen, but it is not quite correct to say that the full cause of the gap is to do with what we are proposing, because that gap already exists. If we did nothing — if we did not make the proposed 20% cut — that gap would increase to 37%. No doubt members will want to come back to that. We will leave that point for the moment, as far as the PPS is concerned.

Overall, we believe that the proposals leave Northern Ireland in a good position. We are making the cuts that we need to make. We have looked at our overall costings again, which were quite conservative. If we were to get the number of cases falling strictly where we believe that they should fall in the new arrangements and exactly where the sample suggested they would, the saving would be around £18 million rather than the £16 million that we originally costed.

For us, the savings figure works well to plug the gap in funding in order to get inside the budget. It also recognises differences between England and Northern Ireland, in that we have adopted a bespoke system for Northern Ireland, which we were urged to do by both the Law

Society and the Bar, while, at the same time — I have not even really talked about VHCCs — removing all subjectivity from the system. There will no longer be brief fees, for example. There will no longer be cases that we cannot stand over.

Members may be aware of the Audit Office's ongoing value-for-money study of criminal legal aid. Its report will be published in January 2011. We expect that the VHCC system, in particular, will be criticised heavily. As head of the division, I acknowledge that that system, as it exists at present, has no effective controls.

The Chairperson:
Mr Crawford, you are actually saying that, even with those revised proposals, costs here will still not compare with those of England, Scotland and Wales.

Mr Crawford:
Depending on how you look at those savings figures, we still end up being between 9% and 10·5% more generous and expensive simply due to Crown Court remuneration arrangements and standard fees.

The Chairperson:
It will still be more costly?

Mr Crawford:
Yes.

The Chairperson:
OK. Will the proposed savings come from the available budget? Will you operate within budget?

Mr Crawford:
The proposals will bring us below the budget. If we were to get the full scale of savings on the upper end of that estimate, we would actually make a saving beyond the budget figure.

The Chairperson:
What percentage?

Mr Crawford:
The budget that we are aiming for in 2013-14 is £79 million. We would overshoot that, possibly, by a little over £2 million. The original figure was £16 million in savings. This would take us to £18·5 million. I must stress that that depends on everything coming in perfectly as we have estimated it. That is not a certainty, however, because our forecasts are based on hypothetical data.

The Chairperson:
What is the cut and thrust of your proposals? Is it simply to ensure value for money, or is it to get inside the budget?

Mr Crawford:
It is actually both. We are looking for both tests. Clearly, the first priority is to get within the

budget. If we do not do so, money will have to be found from other areas of public expenditure. In the current financial situation, that funding is not there. The other, value-for-money test must be there in any examination of cuts. The legal aid budget of £79 million was agreed in 2009 in the settlement between the then Prime Minister and the Northern Ireland Executive. Unlike other areas of public expenditure, it has not been targeted for further reductions. In looking at that, we made the assumption that we needed to get below budget while, at the same time, we were concerned that, if we did a little bit better, it would be a fair cut to legal aid compared with other areas of public expenditure, without damaging access to justice.

The Chairperson:
What discussions have you had with the PPS on that issue? I suspect that you heard the discussion earlier about equality between defence and the Crown. Will there be an equality test? Perhaps you are content.

Mr Crawford:
Those proposals do not do that. The points that were made by the PPS are relevant. The fact is that the gap may widen if we move fully to the GFS rates in England and Wales. Of course, we could move to a GFS at different rates. That is yet to be settled. In response to a PPS presentation, the Minister agreed that we will work with it to examine the feasibility of moving to a better alignment of rates. We need to review proposals anyway. Certainly, we have met the PPS on a number of occasions and examined whether it was possible in the current round.

There are two competing arguments. One is to stay with the 2005 rules methodology, which is easier and quicker to implement in order to make the reductions that we need. The other is to move to a GFS. Because of the need to make savings quickly on our side, we have gone with the 2005 rules methodology, which is also much preferred by the legal profession. It is easier and simpler for the profession. That has left the PPS a little bit detached from us. As soon as these proposals are through — if we get approval — we want to move with them to see what we can do for both of us in the next round of changes.

Mr McDevitt:
When you came before us just before the summer, you seemed to be on the cusp of agreement. Where are you today?

Mr Crawford:
We do not have agreement with either the Bar or the Law Society. I said then that we felt that we were in agreement in some areas, and I was feeling optimistic at the beginning of and during the summer. That optimism evaporated because we were not able to agree the final rates of the cuts. There is broad agreement on the need to change VHCCs, and that is clear from the responses that we received from the legal profession. There is also recognition that there needs to be a reduction in expenditure. The difficulty is that the legal profession believes that we have cut too much.

Mr McDevitt:
Your objective in the negotiations was to get within the budget of £79 million.

Mr Crawford:
Our first objective was to get within the budget of £79 million, but I think that we made it clear that the content of the proposals also had to be acceptable. For example, at the start of the

negotiations, we were looking at a much lower cut in very high cost cases — we were looking to take £5 million out of those cases. That is what the Department of Finance and Personnel (DFP) will challenge us on. We will now take £3·2 million out of standard fee cases, which is a much lower cut in the majority of cases. What has happened in between is that the scale of the problem in very high cost cases has become obvious. Therefore, the cut in the standard fee cases is smaller, but the cut in very high costs cases has grown.

Mr McDevitt:
It is always useful to know what you are negotiating on. Therefore, is your negotiating objective to get within the £79 million budget?

Mr Crawford:
That is our first objective. However, we made it clear during the negotiations that the Minister had to be satisfied that he could accept and stand over the percentage cut in standard fees.

Mr McDevitt:
I am a bit confused. I presume that we have all heard informal feedback on this issue, and people in the professions have suggested to us that the goalposts have been moved. I looked through the record, and I cannot find a single instance on the public record, up to as far as two weeks ago, when the Minister has said anything other than that his sole objective is to get within budget. Not only is he saying that, but he is seeking to reassure us that this is not a cost-cutting exercise.

Mr Crawford:
The first objective is to get within budget. I should have said that DFP is yet to give approval to our business case. The Minister is also mindful that he is under pressure to make general savings in the justice budget. Therefore, the first objective is to get within budget. Until the early part of the summer, it was not clear that we would do that. We had come up with proposals that were eventually published; they were produced at the start of July. That was the first time that we believed that it was possible to meet the budget.

Mr McDevitt:
Do you accept that the Goldblatt McGuigan report, which forms the basis of the Bar Council consultation response that you received on 26 November, delivers a solution within budget?

Mr Crawford:
Technically, it does not quite do that. The report counts in staff savings, which, in the end, our accountants told us we could not count. However, to be fair to Goldblatt McGuigan, we had given it a figure for staff savings, although it was not quite as high as the one that it used. To some extent, it could be forgiven for that. However, the £300,000 is very close to the actual figure.

Mr McDevitt:
Does it deliver the solution within the negotiating objective?

Mr Crawford:
It delivers a solution at or about the £79 million.

Mr McDevitt:
Was that the negotiating objective?

Mr Crawford:
It was the first and primary negotiating objective.

Mr McDevitt:
I am struggling. I can refer you to the Minister's statements in the House since that date in which he has reaffirmed that the sole objective is to get to the £79 million and in which he has reassured Members that there is no ulterior cost-cutting motive. Therefore, to be fair to all parties, I am trying to figure out the objective of this exercise.

Mr Crawford:
First, I assure the Committee that we spoke with the legal profession in the past number of months when we began to get clarity on the nature of the proposals that we intended to publish and on the scale of the percentage cut that, in the end, the Minister will be required to approve. Costing has been going on throughout the process. The figure for the standard fee saving has not gone up; it has gone down. The scale of the saving in very high cost cases, because of the overpayment in those cases, has gone up. We realised how much more was being paid out than should have been the case.

Mr McDevitt:
You do not reject the contents of the Goldblatt McGuigan report, do you?

Mr Crawford:
There are elements of it that we disagree with, but that would not have led us to register an objection to the consultation report. There are some things in it that are inaccurate, such as the description of the process and the characterisation of what has happened, but they are not material to the proposals.

Mr McDevitt:
To be absolutely clear: do the proposals meet the fundamental test by fulfilling your principal negotiating objective? In other words, do they deliver you a scheme and a solution within the £79 million budget?

Mr Crawford:
They deliver a solution that comes in at just above £79 million. That makes a lower percentage cut in standard fees than we and the Minister are comfortable with. We have become very aware of how much more money was spent than should have been in very high cost cases in recent years.

Mr McCartney:
I will pick up on some of the points that Conall raised. First of all, I am not sure whether the comparison with England and Wales per capita is the best comparison. For example, in spending on the arts, when you delve into that spending, you sometimes see that, per capita, the bigger the population, the bigger the spend. The per capita comparison is not a fair one, particularly for here.

It is within the parameters that were set out in the Hillsborough agreement that the budget should be reduced to £79 million. The Bar Council is arguing that it has put a proposition to you that fits with that. However, the negotiation has broken done, and now it looks like we are getting a salami cut. In other words, you know that you can do that, so you are taking it a couple of inches further. Is that a fair reflection of what is happening?

Mr Crawford:
No. First of all, I need to correct one thing: the comment about the percentage being more generous relates to comparisons between the scales of fees here and those in England and Wales. We have not used the per capita comparison.

We are saying that, like for like, across the board of Crown Court remuneration, our fees will be providing between 9% to 10·5% more remuneration that those in England and Wales. England and Wales are our best jurisdiction benchmark. It is also the most expensive benchmark in the island; so, we would still the most expensive anywhere.

Originally, we had anticipated making a £3 million saving on very high cost cases. As time went on, we started to see how much the overpayment was. For example, in-house costing has estimated that simply removing brief fees from the system would have saved us £9 million last year had people been working at the rates that were proposed in September last year. Those are hypothetical figures, but that £9 million should not have been paid. We have recouped £1 million from overpayments in intervening in appeals already. The very high cost case system could not be defended by anyone. The value for money study by the Northern Ireland Audit Office will bear that out.

In attempting to reach a reasonable solution on standard fees, we had an idea that we needed savings of about 20% to 30%, which does not bring us anywhere near the level of the GFS in England and Wales, and that the rest of the savings would come from very high cost cases. Instead, more has come from very high cost cases, but that has come because from money that should not have been paid in the first place.

In a way, we are getting what is a bit like a windfall: money that should not have been paid out. We have not changed our ambition of getting a standard fee remuneration arrangement that cuts the cost of standard fee cases but leaves Northern Ireland in a better position as regards remuneration than England and Wales or any other jurisdiction.

Mr McCartney:
We have been briefed and people have given us evidence. Two of the main things that we were told were that there would be a predictability around the budget and that administration would be a lot simpler. Therefore, people entered into that process in good faith, and the evidence is in front of us. The Minister said publicly and wrote to the Law Society and the Bar Council to say that he wanted it kept within the £79 million, so people set out to do that. That was achieved, but, all of a sudden, it was no longer —

Mr Crawford:
I will pick up on the point that people set out to achieve that. If you look at appendix 1 of the Bar's proposal, you will find the original proposals, and the costings show the iteration of things. We set out in good faith to make reductions, but when we initially engaged in meetings in

February, we did not expect to get fully to the point of being able to meet the budget figure of £79 million. Originally, we were looking at £3 million from VHCCs, but as we went through the process of costing and recosting, we realised that more money had been spent on that than should have been the case. What I am saying is that we have reduced what we wanted to take out of standard fees. The original figure was £5 million, and the proposals today are £3·2 million. I have no doubt that DFP will criticise us for that. However, on the other side, we have realised that far more money was spent than ever should have been on VHCCs. Does that mean that we could give money back on standard fees? That is essentially what the Bar's proposal is recommending. However, at 10% for the Bar, it would put the Bar at 25% more expensive in our Crown Court remuneration than England and Wales.

England and Wales was not the only example, but if you factor in where PPS is going to be on its GFS proposal, that will lead to a 40% gap. If you use the PPS benchmark, instead of that of England and Wales, we are caught on where we can go on that.

Mr McCartney:
In respect of high costs trials and evidential threshold, is it different for solicitors to qualify than it is for counsel?

Mr John Haliday (Northern Ireland Courts and Tribunals Service):
It exactly the same threshold for —

Mr McCartney:
Is it the same number of pages of evidence for solicitors and barristers?

Mr Crawford:
Yes, that is correct for the GP3 and GP4.

Mr Haliday:
Initially, we built in some additional money for solicitors for the preparation of cases. Therefore, if it was over 750 pages, but they did not quite make the threshold to jump to a GP3 fee, they could get an additional sum to cover the preparation work. That was taken from other money that was put in for not extending the trial grid fees.

Mr McCartney:
I want to make this simple. I accept all these initials, but I read somewhere that a solicitor will qualify at 750 pages of evidence whereas a brief will not qualify unless it is 2,000 —

Mr Crawford:
The two things are different. There are two separate parts of the fee structure. One part is for the pages of evidence that attract the higher fee scales, which were in the original proposals. They have now been reduced by 20%, and the majority of cases, with the exception of two, are now below 750. That means that everybody, including solicitors and barristers, will qualify at that. The two exceptions are murder trials and category G trials, which are dishonesty trials. Both those usually require more pages of evidence, and it is right that there should be a higher figure there.

We have transferred some of the remuneration that would have gone to solicitors and made

proposals for attending courts, which last longer, into preparatory work, which they will do in all cases, not just the more complex cases.

Mr McCartney:
What is the difference in savings between your current proposal and those produced by the Bar?

Mr Crawford:
The real difference is the percentage. We reckon our current proposal is a 10% difference.

Mr McCartney:
What is the figure?

Mr Crawford:
In millions?

Mr McCartney:
Yes.

Mr Crawford:
Ten per cent on the Bar side and the standard fees would probably give us just under £1 million.

Mr McCartney:
The difference between your proposals and the Bar Council's is, therefore, less than £1 million?

Mr Crawford:
At the moment, we are taking around £3·2 million out of it on 20% and 25%. That works out at about 22·5% on average. Therefore, a little bit less half of that is £1·5 million, which is perhaps a better figure.

Mr McCartney:
The Law Society has asked why it must make a 25% cut. Is that the real figure right across the spectrum?

Mr Crawford:
As regards the 25% cut rather than the 30% cut, solicitors actually argued that that would have an impact on jobs and employment and that that would not be appropriate at the present time. The Minister has accepted that, with the caveat that it must be kept under review. That 25% cut is across all the fees, just as the 20% cut is across all of them.

Mr McCartney:
The Law Society made a different argument in its presentation.

Mr Crawford:
Sorry, I am not sure that I follow that point.

Mr McCartney:
Its net loss is higher than 25%.

Mr Crawford:
Yes, it makes that argument, but the actual cut in fees is 25%. We are not sure that its argument is necessarily right, and we think that it is hurt a little bit more by that.

To get the graduated fee scheme for solicitors, the percentage cut would need to be 57·6%. The Bar has made precisely the other argument that we are being more generous to solicitors, because we have not cut their fees by as much.

Mr McCartney:
We will have to come back and address certain aspects of the report.

Mr Crawford:
I did not say this at start, but there will be an opportunity to look at the new proposals that we mentioned. We propose to update and revise the post-consultation report and send that to the Committee again. That will be with members early next week, in time for their next meeting. The Committee may find that helpful.

Mr O'Dowd:
Thank you for the presentation. During the last half-hour's discussion, I have not heard anyone mention justice. This is about delivery of justice and a defendant's right to proper and adequate justice. Is there a danger that some of the more experienced members of the Bar Council will stop taking on certain cases, which may result in lesser representation for some defendants in court?

Mr Crawford:
We do not believe so. I will give some examples of real cases that we costed and that show how the figures would change. These figures are the trial fees and are not based on any applications or anything that happened pre-trial. Under the old rules, for a five-day trial, a led junior received £5,500 and a QC received £9,500. Those figures would go down to £4,400 and £7,600 respectively. Under the 2005 rules for a 15-day trial, a QC received £18,400 and a led junior received £10,200; whereas, we propose that they receive £14,720 and £8,160 respectively. For a 20-day trial, a QC's equivalent fee was £28,300; however, we propose that he will receive £22,640. The big difference is in VHCCs. For a 69-day trial, we propose that a led junior receive £63,200 and a QC receive £114,400; whereas, they previously received £190,000 and £285,000 respectively.

Our view is that — the Committee may take a different one — those rates are not ungenerous for the work done. They are certainly higher than the most expensive comparator, and we could not continue to justify payment at those rates for VHCCs, particularly when the paperwork was purely a briefing.

Mr O'Dowd:
I think that I have said to you before that barristers and solicitors are a wee bit like politicians in that there is not much public sympathy for them when it comes to payment. However, when individuals are in legal trouble, the first people they look to is their solicitor and barrister. On many occasions, people come looking for their local politicians to deal with other issues.

Having heard you read out a list such as that, I accept that the money does sound very good. However, that money is for the time that a barrister spends in court. It is the preparation of a

court case and the detailed defence of a court case that take a prolonged period of time. Barristers also play a role in going through particularly detailed pieces of information or evidence, including the forensic-type evidence that is now presented in court rooms, which takes a considerable amount of time.

Mr Crawford:
We recognise that. However, we are making a 20% cut to the standard fees that were paid previously. There were no other fees for that before and, therefore, cannot be taken away. The big difference is in the preparatory work for very high cost cases. Those hours were paid for and, unfortunately, the system got out of control. The point that I am making is that it is just a 20% cut on standard fees.

Mr O'Dowd:
It goes back to my original question. The debate is almost about how we match up the percentages rather than how we match up the delivery of justice in the courtroom or during preparation for the courtroom. I accept that there is a need to live within a budget of £79 million, but my concern is how you live within that £79 million.

I am a former Chairperson of the Public Accounts Committee (PAC), so every time I see a PAC, report I take great interest in it. A recent Westminster PAC report expressed concern around the quality of justice being delivered in England at the minute because of the very fact of barristers withdrawing from the system and the greater use of solicitor advocates in courts. Are we going down that road?

Mr Crawford:
I hope that we do not get into the situation that was described by some of the commentary in that report, which I have read. By leaving Northern Ireland with a margin that is 9% to 10·5% above England and Wales, we are building in a margin of safety to prevent that happening.

There are other factors in England and Wales, including complicated contracting arrangements, which we have not brought in here and do not propose to. I know that those arrangements are disliked by the profession.

The percentage that we have said that we are taking may look rather blunt, but, from our point of view, we have to bear in mind that the assertion that people will not work at those rates is not borne out by any hard evidence. Presently, senior English counsel are coming to work in Northern Ireland at junior counsel rates. Our rates will still be higher than those in England and Wales and we are confident that quality people will be prepared to work at those rates. I have no evidence to the contrary, other than assertion.

Mr O'Dowd:
I have no doubt that people will work for it. I would work for it. That does not mean that I would be the right person to do it. *[Laughter.]*

Mr A Maginness:
You would be brilliant.

Mr O'Dowd:
I would have a go.

From the public's point of view, and by any measure, barristers are well paid. I accept that. However, it is a profession that looks after the rights of the individual in a courtroom, so pay has to be commensurate with that. I am concerned that, in the mathematical equation that has been set out in front of us, justice has been missed. If we come up with a different mathematical equation that includes justice and keeps us within the £79 million budget, I am prepared to support that, or, if I am convinced that justice has been brought into this equation, so be it. I am concerned that justice has not been included.

Mr Crawford:
To briefly respond: the difficulty that we have is that the assertion has been made that quality counsel will not work at those rates. However, counsel do prosecution work at much lower rates, which is a point that should be registered. If the evidence does not exist for 20%, there is no evidence that we would get a better result with a 15% or 10% cut. We have to make a judgement, and our judgement is that, by leaving the rates above those in England and Wales, we are minimising the risks. However, I accept that there is always a risk that some people will not work at those particular rates.

Mr McCartney:
At 10%, you will get support only from those who are going to represent people. That is the big difference. At 20%, you may be at odds.

Mr Crawford:
Yes; we anticipate that.

The Chairperson:
When will the Minister make a decision on the levels of remuneration?

Mr Crawford:
We propose to send a slightly updated report on the response to consultation to the Committee in the next few days, which will reflect the things that I set out today. The Minister would like to take a decision quickly, but he wants to consider the views of the Committee before doing so. We also need to get approval from DFP, and we are in the process of finalising a business case that will take into account any comments that the Committee makes and the Minister accepts. The Minister would like to take a decision in January, and to have regulations made or laid by the end of January. The new remuneration arrangements will save £1·5 million a month and, from our point of view, which I accept is a bureaucratic approach, that is a saving of over £300,000 a week. Therefore, from the Minister's point of view, settling that quickly is definitely at a premium.

Mr A Maginness:
I am member of the Bar, although I have not had a criminal brief in 20 years and the new arrangements are not a matter of personal interest.

Looking at the overall position with you, the Bar and the Law Society, it seems that you have almost reached all your negotiation objectives. You have reached a situation whereby the Bar, in

the Goldblatt McGuigan document, seems to indicate that it will be able to achieve the savings by 2013-14, allowing you to reach your target of £79 million. I think that is for common cases. Is that correct?

Mr Crawford:
As I said earlier, it is close.

Mr A Maginness:
Yes, as close as it can be. You are also removing the problem of very high cost cases by effectively getting rid of them. What you are now really concerned about is the issue of standard fee cases, and the argument is whether there should be a 10% reduction in fees, which the Bar proposed, or your 20% reduction. Is that the difference?

Mr Crawford:
The Bar also proposed a 20% reduction for solicitors, rather than —

Mr A Maginness:
Yes, but you proposed a 25% reduction for solicitors, so the Bar has been a little more generous to the solicitors that you have. Is that right?

Mr Crawford:
In this particular case.

Mr A Maginness:
Is that right?

Mr Crawford:
In this particular case.

Mr A Maginness:
Yes. I thought that there was some reluctance to agree that.

Your objectives have been achieved in so far as you are achieving budget, a reduction in fees in standard cases and are getting rid of the very high cost cases. In addition, there are other aspects that have been proposed by the Bar and the Law Society that are within your objective of predictability. Is that right?

Mr Crawford:
Predictability in any standard fee regime is better —

Mr A Maginness:
Yes; so you are getting predictability, which you did not have before and you are getting accountability in so far as the Courts and Tribunals Service can properly administer the scheme by reference to specific objective parameters that are laid down in the proposals. Is that right?

Mr Crawford:
Yes. I mean that —

Mr A Maginness:
So, you have accountability and predictability. You also have familiarity in the extension of the grid for standard fees under the 2005 rules. So, you do not really need to change the rules that much. Is that right?

Mr Crawford:
That is right. That was, of course —

Mr A Maginness:
So, you have got that. You also have lower implementation costs.

Mr Crawford:
Yes.

Mr A Maginness:
You also have workability as an agreed scheme that the Bar or the Law Society can recommend to its members.

Mr Crawford:
Can I say that all of those —

Mr A Maginness:
I want to make the point that you have achieved an awful lot in your negotiations. Is that right?

Mr Crawford:
I was going to ask whether I could also say that —

Mr A Maginness:
Sorry. Did you, or did you not, achieve an awful lot in your negotiations?

Mr Crawford:
No, and I will explain why.

Mr A Maginness:
Right, well, tell me why.

Mr Crawford:
Because, with the exception of the timescale for implementation, all those things would have been achieved by the graduated fees scheme that was proposed a year and a half ago.

Mr A Maginness:
So, you saying that you want to go back to the previous scheme?

Mr Crawford:
David Lavery wrote to the chairman of the Bar in June to state that, if agreement were not reached, that would be the Courts and Tribunals Service's fallback proposal.

Mr A Maginness:
So, you are actually saying today that you will go —

Mr Crawford:
No, we are not saying that. We prefer what we proposed. However, I am saying that the things that you mentioned are not outcomes or advantages that are met only by a 2005 scheme.

Mr A Maginness:
But they are met.

Mr Crawford:
Yes, but, to make it clear: this is not the only way of meeting them.

Mr A Maginness:
The PPS seems to come into the equation now, whereas, before, it was not much referred to throughout our discussions. I am subject to correction, but the PPS and its fees to counsel and so on did not feature in your previous presentations. Correct me if I am wrong.

Mr Crawford:
We may have mentioned that there was an issue for PPS. We have not —

Mr A Maginness:
Yes, but it now seems to have come into the equation.

Mr Crawford:
I was responding to points made by the PPS earlier today.

Mr A Maginness:
I know that you are not a lawyer, or, maybe you are, I am not sure, but equality of arms is not equality of payment.

Mr Crawford:
I do not think that we have said that. The PPS —

Mr A Maginness:
No, but the implication was that it was equality of payment. Equality of arms is where representation for the two sides and so forth can be balanced out. The PPS is a huge organisation with 600 staff and all the resources of the state at its disposal — police and so forth. It has a huge advantage compared with the defence. What you want to do is to try to equalise that.

Mr Crawford:
We would make that point in response to some of the matters raised earlier about the relative costings in particular cases. Costs that were quoted earlier related to counsel. The costs, for example, in the trial of the person charged with the theft of the dummy was a total legal aid cost, which included solicitors and barristers' fees et al, whereas the PPS cost was only for counsel.

Mr A Maginness:
I have seen the answer to that question. They were estimated costs that did not give a breakdown

of costs for the prosecution's barrister's fee; it just said "prosecution costs". That could mean the estimated in-house costs of the solicitor who briefed the barrister and all that sort of thing. In my view, that is a notional cost that is charged to the PPS; it is not an actual cost in money paid over to anybody. Is that true?

Mr Crawford:
Yes. Our view was that the actual cost paid to counsel in that case might have been around £2,500. However, the other costs — to legal aid or application fee — that might or might not have gone to counsel, and there is about £2,000 for solicitors. There is also the cost of the Magistrate's Court.

Mr A Maginness:
Yes, and they are all fixed costs in any event.

Mr Crawford:
We have a further question on that to respond to, so that will be made clear.

Mr A Maginness:
However, the question of the PPS fees is entirely new to the whole debate.

Mr Crawford:
I do not think that it is entirely new. The PPS approached us about the issue some months ago, and we had at least two formal meetings with the service about it. We have not reflected that to the Committee because we have not felt that we could go down the road that the PPS suggested, which was to go back to the graduated fees scheme. I think that that would have been the only thing that would have repaired the issue for the PPS. Not having accepted that, we did not feel it appropriate to reflect it to the Committee.

Mr A Maginness:
But, your negotiations cannot be dependent on the PPS says.

Mr Crawford:
Absolutely not, and we previously made the point to the Committee that the two are separate. Earlier, I tried to draw out the effect of the defence remuneration on the PPS, on the gap —

Mr A Maginness:
At the moment, the PPS pay less in fees to its counsel than does the defence from legal aid?

Mr Crawford:
That is correct.

The Chairperson:
On that point, although the PPS is not represented here now, but if I have picked it up right, its total bill £37·4 million. Is that right?

Mr Crawford:
Yes.

The Chairperson:
Is the other portion £60 million?

Mr Crawford:
It is not comparing like with like. The £60 million figure that is quoted is for criminal legal aid in total. That includes payments to counsel and to solicitors. Of course, solicitors' costs are higher than any in-house costs of PPS, because it does not employ firms of solicitors.

Mr McCartney:
David Lavery said that the fallback position was to go back to the previous, but he also said that he would like it to come inside the budget of £79 million.

Mr Crawford:
I accept that point. As recently as May, we still had not fixed our minds on the 2005 rules, and the graduated fees scheme was still an option.

The Chairperson:
Am I right in saying that the £37·4 million that was mentioned is the total running costs of PPS?

Mr Crawford:
We think that that is its total running costs. It is not a figure that we have dealt with, but we think that that is right.

The Chairperson:
Does that include everything?

Mr Crawford:
Yes, but the costs of its in-house solicitors' service are lower than the defence costs.

The Chairperson:
Yes, I think I get that bit. I want to get it clear in my head that those are the total running costs for the PPS for all aspects of its work.

Mr Crawford:
As we understand it, that is right.

Mr McDevitt:
Having listened to the guys for an hour, I am bit confused about what test we are expected to apply. They are telling us that they have shifted the goalposts, but they cannot point to any evidence on the record from the Minister or any statement to allow us to say what the new negotiating objective is. Reading the correspondence between you and the professional bodies that is available to us, the records of the House or the Minister's statements in the press, the only test that I can find is that the legal aid budget needs to be within £79 million. Therefore, Mr Crawford, that is the only figure against which I am able to test any submission. I will struggle to make a fair test if you are saying that, in all good faith, two professional bodies have made proposals to you that meet that criteria but that, frankly, you would like more just because life is life.

Mr Crawford:
That is a slight exaggeration, perhaps. As I said before, the primary test had to be to get to within budget. For a long time, it did looked as if we would not get —

Mr McDevitt:
That is not what the Minister said, Mr Crawford. For months and months and months, he had ample opportunity to say that reducing the budget to £79 million is not the game and that he is also interested in A, B and C. However, he is saying the opposite. He is saying that it is about the £79 million and that this is not a cost-cutting exercise. In other words, the objective is not to drive down costs.

Mr Crawford:
If it were, we would be pushing for the full 28% on counsel and the full 57·6% to bring us in to line with the graduated fees scheme, which is where we were a year and a half ago.

Mr McDevitt:
To be fair: all I can do is test it against what the Minister has said is his benchmark. You are asking us to accept something that is benchmark plus from your perspective and, from the point of view of other people, benchmark minus. You are not giving us any good reason for that other than a financial one. You could not address Mr O'Dowd's questions about the quality of justice, for example.

Mr Crawford:
The simple answer is that any proposal would have to satisfy an overall value-for-money test for public expenditure. In expressing doubts about a 10% position, we recognise, and the Minister recognises, that he would have to justify the scale of any reduction to deal with that. The Minister has said that to the Bar face to face, so it is not that only written correspondence has been sent.

Mr McDevitt:
Do you not believe that the £79 million meets the value-for-money test?

Mr Crawford:
I do not believe that a reduction of just 10% does.

Mr McDevitt:
So, you have been negotiating on terms of reference that were flawed from day one. You knew that it would never meet the value-for-money test.

Mr Crawford:
No. At the start we did not realise that the savings from VHCCs would be so great, but, in meetings with the Bar, particularly, and with the Law Society, we have made it clear that the percentage reduction in standard fees would be a matter for the Minister. I am probably quoted in its response as suggesting that the Minister would not accept anything that was not in double figures. If that is not attributed to me, I am clarifying that it was me who said that. I think that that was clearly intended to give them a steer as to what the Minister may or may not accept, without having had his approval on —

Mr McDevitt:
I am trying to figure out who is making policy here: you or the Minister?

Mr Crawford:
In all negotiations, you may have somebody who is negotiating —

Mr McDevitt:
And, that is your job.

Mr Crawford:
— but I do not think that it helps if you lead people to believe —

Mr McDevitt:
With the greatest respect, and I will leave it here, Mr Chairman, but that is what I am struggling with. We are being asked to make a value judgment on this, but it seems to me that the goalposts have been shifted during the process. You have ratcheted it. That is fair enough; you are perfectly entitled to do that, but the Minister has not been ratcheted accordingly. You are entitled to negotiate the best deal, but do you think you have been a bit too successful?

Mr Crawford:
I am not sure that I have been successful at all, yet.

Mr A Maginness:
Oh, you have.

Mr McDevitt:
That begs the final question: has either of the two professional bodies indicated the consequences of failure to reach agreement?

Mr Crawford:
In a sense. They have certainly made the point that it might be difficult to persuade the members to take on work, if that is the point you are making. We use England and Wales as a comparator. Our rates are higher than Scotland, which are lower than England and Wales, so that is not the only comparator. However, we made the point earlier that we believe that by having rates higher than the comparable jurisdictions, we think we would attract good, capable counsel and good, capable solicitors to do work at those rates. I know people may disagree, but that is the view we have come to in the absence of any real evidence to the contrary, other than the assertion from the negotiator on the other side, as it were.

The Chairperson:
Right, we are going to stop there. We went on slightly longer than we thought, but that was as much to do with this side of the table as the other side. Thank you for your presentation, Mr Crawford and Mr Haliday.