Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Criminal Legal Aid: PAC Report

10 May 2012

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Tom Elliott
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr David Lavery	Department of Justice
Mr Nick Perry	Department of Justice
Mr Paul Andrews	Northern Ireland Legal Services Commission

The Chairperson: I welcome to the meeting Nick Perry, the permanent secretary of the Department of Justice (DOJ), David Lavery, the director of access to justice in the Department of Justice, and Paul Andrews, the chief executive of the Northern Ireland Legal Services Commission. Mr Perry, I will hand over to you for a brief outline, after which members will have questions.

Mr Nick Perry (Department of Justice): Thank you very much, Chairman. We provided the Committee with an updated version of the Department of Finance and Personnel (DFP) memorandum setting out the Department of Justice's response to the Public Accounts Committee's (PAC) recommendations following last autumn's hearing. Perhaps I could take the opportunity at the outset to update the Committee on the progress that we have made in implementing those recommendations and also to say a few words about where we are more generally on criminal legal aid, 12 months after the introduction of last year's reforms and six months after the PAC hearing. In light of the publication of the Legal Services Commission's (LSC) accounts this week, I want, in particular, to say something about the specific issue of fraud prevention.

As the Committee is aware, last year's reforms were about modernising the criminal legal aid system in three fundamental respects: first, by changing the framework for remunerating criminal legal aid by ending very high cost cases (VHCCs), introducing standard fees for almost all criminal legal aid and moving assessment of all Crown Court fees to the LSC; secondly, by reinforcing the machinery by which criminal legal aid is administered and strengthening the LSC's capability around budgetary forecasting, accounts preparation and fraud controls, among other changes — I will come back to that in a moment; and thirdly, by strengthening the governance arrangements around criminal legal aid through standing down the appropriate authority, phasing out the role of the taxing master in criminal legal aid

and moving the Courts and Tribunals Service's policy and sponsorship responsibilities for legal aid into the core Department. A great deal of work has been done under all three headings, but a lot more is still under way, including steps to address all nine of the PAC's recommendations. The Committee is closely involved in several aspects, including the proposed changes to the application of statutory charges, which the Committee will take further evidence on today, and the introduction of recovery of defence cost orders. The responses to the consultation are due to be considered by the Committee on 24 May.

I will turn to the memorandum and would like to highlight developments on three specific recommendations that may be of interest to the Committee. Recommendation 1 called for a radical overhaul of the current system and recommended that it should be replaced with a less complex framework of clear accountability at the heart of the new structure. Since day one of devolution, fundamental reform of legal aid has been one of the Minister's top priorities. The first phase of that work has been the reform of criminal legal aid, to which I referred, which, when fully implemented, will achieve savings of £20 million a year.

The second phase of major reform is about to get under way. The Department will publish its responses to the Daniell report shortly, in the form of a strategic programme for access to justice, which will include a further programme of reforms in legal aid. That commitment is now also reflected in the Programme for Government. The Minister intends to publish his action plan by the end of June, and I understand that he will brief the Committee in detail on 7 June on his approach.

The effect of last year's reforms will start to have a real impact in this financial year — 2012-13 — when we estimate that the legal aid bill will fall to just under £92 million. The full benefits of our changes to Crown Court fees should be seen in 2013-14, when we estimate that expenditure will fall again to under £83 million. I expect that savings from future reforms, which the Minister will announce next month, will take effect during 2014-15 to bring legal aid within budget at £75 million during that financial year.

The PAC recommendations also refer to the number of old cases that are still in the system. We are working hard to get the remaining pre-2009 Magistrates' Court cases paid under the old 1992 rules and the remaining very high cost cases dealt with as quickly as possible. We have stood down the appropriate authority, and the commission has required all outstanding claims under the 1992 rules to be submitted.

The commission has received 2,600 bills, which it is assessing, and the estimated value of those bills is around £3·75 million. All the very high cost cases are now subject to the more rigorous checks that we outlined to the PAC last autumn. The number of cases still in the system has reduced from 292 last October to 251, and the estimated value has reduced from £22 million to £17 million. Therefore, we are making progress in bringing costs under control, and that remains a key priority.

The second area that I wish to mention is progress in response to recommendation 3, which calls for the introduction of new procedures for appointing more than one counsel. As the Committee is aware, new rules setting tighter criteria came into force on 16 April, and I am pleased to report that they appear to be working well. Initial monitoring suggests that more than one counsel has been granted in less than 10% of cases. It is still very early days, but, if that pattern continues, we estimate that that change will produce savings in the region of £2 million per annum.

That brings me to recommendation 7. The PAC recommended that the Legal Services Commission take urgent action to identify the risks to fraud and to establish proactive counter-fraud arrangements to manage them. That area has been the subject of recent media reporting with the Comptroller and Auditor General's (C&AG) comments on the Legal Services Commission's most recent accounts.

The Department and the commission accept that the current situation is not acceptable. In relation to fraud, the commission and the Department are working hard at a number of levels to implement the PAC recommendation and to respond to the Northern Ireland Audit Office's (NIAO) comments. At a strategic level, the introduction of standard fees for almost all criminal legal aid cases is a significant step forward in reducing the potential for fraud. The abolition of very high cost cases and exceptionality for Crown Court cases since 2011 strengthens the control over that area.

In respect of oversight and assurance, the Department will bring forward a statutory power to give the commission the power to carry out inspection visits to scrutinise the records of solicitors and barristers. That will form part of the compulsory registration scheme, which the commission proposes to introduce next year. Under that scheme, legal representatives who wish to take on legally aided work will have to meet specified requirements, including permitting access to records and files for the purpose of providing assurance in respect of legal aid fraud. However, in the meantime, following discussions with the Law Society, the Legal Services Commission will, this year, undertake compliance visits to a range of solicitors' offices under the current voluntary arrangements. That will include reviewing individual files and verifying claims for criminal legal aid.

The first inspection will include a cross-section of 10 solicitors' firms, and further inspections will be arranged. Those visits will be used to validate the proposed registration scheme and to provide a level of assurance to address the qualification of the commission's accounts.

The commission is actively seeking to recover overpayments and to take action against those applicants or practitioners who attempt to exploit the system. Last year, £1·5 million of over-claims were recovered by the commission from practitioners, following the Department's intervention on cases assessed by the taxing master in which interim payments had been made. We expect to recover a similar amount this year.

One case of suspected fraud by a practitioner is currently before the courts, and another is being investigated by the police. The commission routinely investigates individual claims and will require files to be submitted to satisfy itself of bills. The commission will automatically refer suspected fraudulent claims to the PSNI.

Better management information systems to enable the patterns of claims and, therefore, potential irregularities to be more easily identified have been put in place. Routine checks on benefit recipients claiming criminal legal aid continue to be carried out as a matter of course. Those checks are being strengthened.

There is certainly a great deal more to be done, but I assure the Committee that we take the issue extremely seriously. The commission is determined to remove the C&AG's qualification at the earliest opportunity.

We recognise the need for improvement in the governance and accountability of legal aid, beyond the PAC's recommendations. Although the focus of recent reforms has been predominantly on criminal legal aid, the access to justice review, as I mentioned earlier, highlights several areas in which change is needed in civil legal aid. In addition, the commission has carried out its own audit of civil legal aid to identify whether lessons learned from the NIAO and PAC reports can be read across. To facilitate that work being taken forward, policy responsibility for civil legal aid was transferred from the commission to the Department last November. A comprehensive programme of reforms to improve the governance and accountability of civil legal aid will be included in the departmental action plan, which the Minister will announce next month.

The Chairperson: I want to pick up on a couple of points, after which I will bring members in. You said that, since devolution, the reform of the process has become a priority. I acknowledge that, in my view, there has been a drive to reform the process. The Minister has been involved, and the majority of the Committee has supported him. I welcome all that. My concern is about where the priority was before devolution? Every year since 2003, the accounts have been qualified. Will you comment on the Department's view on all this activity prior to devolution? After you have done that, I will move on.

Mr Perry: I will invite my colleagues to comment on the historical piece. In 2003, 2005 and 2009, there were significant attempts at reform of the legal aid structure at large. The 2009 reforms, in particular, were built on for the 2011 reforms. From the outset, there were issues about the capability of the Legal Services Commission because of the way in which it was set up. It was said that it was given too much to do in its early days with regard to managing the machinery of legal aid and taking forward an ambitious civil legal aid reform programme. There were also issues about management information systems and personnel. Over the past few years, as part of the broader reform

programme, one of our key priorities has been to strengthen the LSC's capacity. My colleague might want to comment further on that. There have been a series of attempts to make progress on legal aid. Some parts of that have worked better than others, but it has always been on the agenda.

The Chairperson: I am sure that it has been on the agenda, but has some deference been shown to the way in which the system operated and the fact that barristers could make outrageous claims with no evidence to substantiate them? The attitude was almost one of this being the system, so we will just let it go by. Until recently, there does not seem to have ever been an attempt to have a challenge function.

Mr David Lavery (Department of Justice): I will comment on that, because I worked in the Court Service at the relevant time, prior to devolution.

From 2005, there were serious efforts to reform criminal legal aid. The Court Service could see clearly that there was a need to introduce a standard fee approach, because the conventional way for barristers to charge for legal work was by marking a brief fee and then putting additional fees on top of that. We did not feel that that was a suitable arrangement for the expenditure of taxpayers' money and thought that a standard fee system would be much better. We appeared before the Public Accounts Committee last September. If you had asked me in 2005 whether we had fixed criminal legal aid, I would probably have said that we had. The problem that subsequently emerged was the frequency of cases that were certified as exceptional and qualifying as very high cost cases. There was certainly an attempt in 2005 to put criminal legal aid fees into a standard fee regime. It took us until 2008-09 to realise that there were problems with the structure of the rules that we introduced. The new rules that we introduced at the end of 2009 brought about significant improvements. The Audit Office acknowledged that. It is only since April of last year that we have eliminated the scope for exceptionality, which has really been the escape hatch for high cost cases.

I suspect that the political will to address reform may have been more because it was a very small version of a much bigger problem at a national level in England and Wales. As you will understand, the Minister for legal aid until 2010 was the Lord Chancellor. He was also the Minister for the English legal aid system. It had similar problems, but the magnitude of those problems — the amounts of money involved — were much larger. That is where the political energy was going.

The Chairperson: Is the certification to do with the two-counsel issue?

Mr Lavery: No. The 2005 rules proposed that, for Crown Court cases, there would be a standard fee payable for the majority of cases. However, it was recognised that some cases, because of their complexity, would not fit well into a standard fee system. They allowed the Legal Services Commission to certify that a case was of exceptional complexity on the basis that the case was likely to last more than 25 days if it went to trial. That was the test that was introduced in the legislation. The certification in that case was that it was exceptional and should be categorised as a very high cost case.

The Chairperson: Recommendation 3 refers to the two-counsel issue. Correct me if I am wrong: when the changes were initially announced, the Minister said that he thought that they would save £500,000, and you state that, if the current pattern continues, it will be in the region of £2 million. Will you elaborate on why the change will achieve that type of saving?

Mr Perry: I think that I said £2 million, but I have just had a note that says that it is £1·5 million. It is dropping.

Mr Lavery: Sorry; I am not helping the permanent secretary. The figure that we quoted in the past was £1·5 million. We rounded that down. We thought that, at its height, that could save about £2 million. We rounded it down a bit because we thought that the courts might be more willing to certify more cases for senior counsel than happens across the water. As Nick said, early indications — they are very early indications; the change has been in place for only a matter of weeks — are that we are getting a much lower level of certification than perhaps we had modelled. If that were to continue to be

the pattern, we might save the full £2 million. We reduced the projected savings slightly in case courts were more willing to certify for two counsel than happens across the water.

The Chairperson: What has been the real driver to get it to less than 10%? Is it because people now have to make a written submission to request it, and the magistrate needs to give a written document to justify it, as opposed to making the case and it just being nodded through? Is it purely the paper trail accountability that has led to that dramatic change?

Mr Lavery: It is a much more transparent system now. The magistrate did not have to give reasons previously, nor were there the explicit criteria that you have to apply. It is a much more transparent arrangement. The fact that someone has to give reasons for a decision probably alters behaviours to some extent.

There is a health warning with anything that you say on these topics. In theory, the cases that have gone through now and have a certificate for one counsel could go to the Crown Court and say that they had got a certificate only for one counsel, but that the case was really difficult and that they would need two counsel. Those may be adjusted by the Crown Court. It will take more time than we have had so far to see whether a sustainable pattern emerges. However, it is absolutely clear that we will get fewer cases with senior counsel; it is just that the percentage figure will take a while to settle down.

The Chairperson: Likewise, I take it that the Legal Services Commission is watching very closely so that, if an award is given for two counsel, it will challenge that.

Mr Paul Andrews (Northern Ireland Legal Services Commission): I can confirm that we get the documentation, both the application and the grounds that have been given for the grant of the counsel. We are working closely with our colleagues in the Department, and I do not think that any case that has come before us has raised an eyebrow; they are all significant cases in which two counsel would be expected.

The Chairperson: I got slightly distracted, but I will come back to the PAC report and the most recent annual report. They said that the defence used — the Legal Services Commission is not able to go in and audit practitioners — is not an acceptable defence. You are now saying that there is a voluntary scheme in place to which the Law Society has signed up. Has the Bar Council agreed to the voluntary scheme? Will there be a statutory provision so that, if you need it, the Legal Services Commission will have the right to go in and carry out these checks?

Mr Andrews: I will take that question, Chair. The relationship with the Law Society has been very constructive in establishing a regime, which, when we bring it before the Committee for consultation, will be a proven regime that works in terms of visibility and confidence in the process. I am awaiting the letter from the Bar that signs up to that, but I also need to say that I am expecting that letter. I have had conversations with the chair of the Bar who recognises the importance of the initiative for the Bar as well as for public confidence in the expenditure of public money.

I made the observation to the Public Accounts Committee that, as far as the commission is concerned, when we bring forward the statutory scheme, only those who are registered with the commission will have access to public money. That will apply irrespective of whether it is a voluntary sector organisation that provides oftentimes significant assistance to people or to members of the Bar Council or the Law Society. We expect that it will cover everyone. At a practical level, it is sensible to start that design and development with the Law Society, which will have the most day-to-day contact with the system. The Bar can then be folded in at an appropriate opportunity because we will have to do similar work with the Law Society and the advocacy services that its members provide, which we will also need to tie in. That is a rather long answer to your question: it should be all-inclusive.

The Chairperson: You mentioned that you recovered £1·5 million of over-claims by legal practitioners and legal aid last year. Was that part of the ability of the Legal Services Commission to intervene if someone appeals the decision of the taxing master, or was that money that had been paid out and,

having reviewed the case, you found that you should take it back? I am not clear about how that over-claim came in.

Mr Andrews: It arose in the context of the very high cost cases that were concluded and submitted for payment. You probably noted from the PAC evidence that there was a backlog in the assessment of those cases. The Lord Chancellor and the Treasury agreed to create an interim payment scheme that would have represented around 60% of the value of the claim submitted. After a three-month period, if a claim had not been assessed, there was a payment on account, if I can put it in those terms. That meant that, when the taxing master assessed the case, if the amount he assessed was less than the amount that had gone out in the interim payment, the commission simply automatically recouped the money from the practitioner. In other words, instead of making a payment to a practitioner, we withheld it to net it off the overpayment that had been made. Again, the Committee will have noted from the previous evidence sessions at the PAC that the interim payment scheme ceased in 2010, so we are dealing with a rump of cases that are perhaps subject to appeal as to whether the taxing master's original assessment was correct. I think that, when Nick referred to the subsequent claim, that is the outworking of the final batch of cases where the taxing master has made his determination and, subject to there being no appeal to the High Court, that is the amount of money that we would expect to recoup through the same mechanism as I described to you.

The Chairperson: You mentioned that there is currently one case of fraud before the courts — or is it attempted fraud?

Mr Andrews: We think it is a potential fraud. Let us leave it sub judice like that. It is currently before the courts.

The Chairperson: Just so that I am clear: is that one case before the courts and another being investigated?

Mr Andrews: Exactly.

The Chairperson: Are both of them legal people, or are they the people who applied for it?

Mr Andrews: They are the legal practitioners.

The Chairperson: The legal practitioners, not the applicants.

When I read the report, I referred it to the Chief Constable in an individual capacity. I subsequently met the police to ascertain what their investigations were like. My understanding is that the police have got information from the Legal Services Commission. During that meeting, it was relayed to me that there were cases of claims made. In one case, someone in the legal profession made a claim and was awarded well over £100,000 less than what had actually been claimed. That individual did not even attempt to appeal against that. That was one example. The police did not tell me who was involved, but there was quite a list of claims where the award given was very significantly below what was claimed. To my mind, that is an attempt at fraud.

It strikes me that in any other world of business, if I provided a service, submitted a bill for it and did not get what I claimed for — certainly to the tune of well over £100,000 — I would challenge it. The fact that people were not even appealing such decisions — or, when they appealed and the Legal Services Commission intervened to ask for evidence, they walked away — strikes me as a systemic problem and a culture within the legal profession of making outrageous claims. That, in any other person's opinion, is attempted fraud. Are the police investigating all those claims, and is the Legal Services Commission actively providing them with information to facilitate them?

Mr Andrews: Can I stop on a matter of clarification so that there is no confusion between us on the point? When we say that a case is being investigated by the police, we are not talking about the case that was in the PAC report and which may have been the reason for your original letter to the police. That is a separate matter which is being investigated by the police — just to be clear about that.

In respect of the matter that you had raised and was the subject of case study 2, I met officials from the Police Service. We provided them with all the information that was in the possession of the Legal Services Commission. We took the opportunity of talking them through the process, how it worked and the changes that had subsequently been made. We subsequently got a letter to say that the police were not proposing to pursue that matter any further. So, as it stands, case study 2 and that type of case — if I can put it in those terms — had been certified in the lesser amount by the taxing master and had been paid as the proper amount.

I know that David has dealt with the particular case study 2 case in some detail for the PAC. I am not sure whether it would be helpful to provide the Committee with some context of the case before we get into the matter of whether the claim should be construed as fraudulent. I am happy to take your guidance on that approach.

The Chairperson: Just on the wider issue, as far as you are concerned, are the police currently investigating all the claims referred to in the report, or has that come to a conclusion?

Mr Andrews: My understanding is that that has come to a conclusion.

Mr Lavery: The problem is that the system operated on the basis that the barrister, in particular, could assert the value of the work done. The brief fee is essentially that. Clearly, that is not a suitable way to use taxpayers' money. The standard fee system gets you away from that. As you know, the abolition of very high cost cases completely closed that avenue.

The Minister also issued a direction to the taxing master that, in assessing the fees in the backlog of outstanding very high cost cases, brief fees would not be paid. We have closed that opportunity down. It is as you describe it: someone is asserting the value of the work done. There is no published list of fees, and, clearly, that has now been eliminated.

Mr Weir: I will leap in to defend barristers.

Mr Wells: Surprise, surprise.

Mr Weir: I will do so in the absence of Mr Maginness.

Mr Wells: Are you making a declaration of interest?

Mr Weir: I am registered as a barrister, but I am not entitled to take any cases.

Chair, I wondered earlier whether you were making a political point when you referred to barristers making outrageous claims that could not be substantiated. I hope that that was not a dig at Mr Allister.

I refer to David Lavery's point. To be fair, although there can be some cases of direct fraud, there is a degree of misunderstanding in the system that sees some of the overcharging, for want of a better word, as fraud. That is not the nature of the beast. The procedures have been changed to effectively eliminate that. In the past, it has maybe been a question of some people in the legal profession chancing their arm. It is almost the equivalent of someone trying to sell a house at an inflated price if someone is mug enough to accept that price. That is maybe a closer analogy. Systems have been put in place that can negate that.

Chair, you covered very comprehensively most of the points and left very few scraps for the rest of us. You referred to recommendation 9. Paul Andrews talked about the Law Society and the voluntary system. The compliance rate is currently around 80%. You are hoping to move that towards a compulsory system, and you expect to get some sort of similar system with the Bar. Again, in defence of the Bar, where there have been problems in the past with money and issues around fraud and people facing criminal proceedings, it has tended to be much more on the solicitors' side than the Bar end of it. I do not know whether that suggests that the Bar is a lot better at covering its tracks or whether it has a much more honest group of individuals. Clearly, you are in negotiations about moving

from a voluntary system to a compulsory system. Do you have a target date or a time frame for that to be implemented?

Mr Andrews: We hope to see that implemented in the course of 2013. I am reluctant to put an actual date on it. It probably has the feel of being around September 2013, because we will have to bring it before this Committee. One of the things that is of interest is that, although we are talking about this in the context of counter-fraud, which is a very important aspect, the other aspect is to ensure that the proper quality of service is being provided at public expense. We need to recognise that there are two sides to this argument. Part of that is to do with a rolling programme that says that we need to have the assurance that the office-based systems in a solicitor ensure that the proper procedures are followed, that the proper notifications are served, that proper briefing goes on to counsel to engage everyone and that there is proper payment of disbursements when they are properly incurred so that others are not waiting for money that has already been paid to the solicitor on their account. Although the Law Society already does some of that work, we think that we have a responsibility as the provider. The next tier of that is to talk about the level of advocacy or representation that is provided. Of course, that could be by either a solicitor advocate, if we talk in those generic terms, or a counsel. That is where, perhaps, you end up getting into further discussions about whether there is an element of peer review in that rather than just a paper-based system.

Mr Weir: Obviously, when you get the Bar Council signed up, you pretty much have a lockdown on all barristers in that regard. At present, as you indicated in your paper, you have about 80% compliance. Is that other 20% because of people perhaps just not getting around to things? Is it because there may be some firms that do legal aid work so infrequently? Is there any particular reason for that 20%, or do you draw any adverse inferences from that?

Mr Andrews: I do not particularly draw an adverse inference in this respect. I think there is only one prominent firm that has not signed up, but it has said that it intends to sign up. It is just going to wait until it sees what the statutory scheme is like. That is, of course, that firm's right at this point in time. An awful lot of the other firms are simply taking the view that legal aid is such a marginal part of their practice that they are probably going to wait and see what is actually involved in the scheme before they commit further to it. If I look behind your question and ask whether there are going to be deserts of people, with the prominent firms of solicitors who do the most work of a legal aid nature not signing up to it, I can assuage your concern and say that that is not the case.

Mr Weir: Obviously I do not know what impact the one firm you have mentioned has from a percentage point of view. If you are talking about 80& of the firms having signed up, but perhaps a lot of the remainder being people who are on the margins as regards legal aid, do you have any assessment of the percentage of the value of work done?

Mr Andrews: I do not have that to hand, but my recollection is that it is a marginal percentage.

Mr Weir: A marginal percentage is not covered?

Mr Andrews: Yes.

Mr Weir: OK, thank you.

Mr S Anderson: Thank you for your presentation. I declare an interest as a member of the Public Accounts Committee. All Committees, not just the Public Accounts Committee, take a great interest in this subject. It was very much in the public domain. We had the legal profession at one stage threatening to withdraw its services. At the end of the day, it has proven to be a good exercise in the sense of the figures you are telling us and the savings that are in there, which we are looking for, and we hope to get year on year.

As my colleague has said, I am looking for the scraps here. I am interested in what the PAC said when we talked about immediate action under recommendation 4. We talked about urgent action under recommendation 7 in relation to fraud. Are we on course with the speed of change to take urgent and immediate action? The recommendations have been accepted, but how quickly can we get that speed

of change in place? There is no doubt that there are a lot of savings in here. I take on board your reply to the Chair in relation to fraud. I think it was said that we have more or less sifted through all of that. Are we at an end there? I question that, when you see how quickly we got through that. We are talking about the invoicing. My understanding is that there was maybe no invoicing. It was just more or less that there is what we need to get paid, and that was it. I am just asking about the speed of change and how we can get that all tied down in the very high cost cases, and, of course, the fraud aspect in everything as well.

Mr Andrews: Perhaps I can be of some assistance and take recommendation 4, as you drew attention to it, which refers to very high cost cases. There has been quite significant activity in that area. As you will recall, the Minister issued a direction to the taxing master as to how the oldest of the VHCCs under the 2005 rules should be assessed. The 2009 rule cases are technically covered by the same direction but are a very different beast, because the taxing master, where counsel were not presenting contemporaneous records — I assure Mr Weir that I only say that because solicitors have different timekeeping records than the Bar —

Mr Weir: As somebody who used to get received waiting for the cheque to arrive from the solicitors, I am very well aware of the different timekeeping regimes of some solicitors.

Mr Andrews: In effect, the taxing master has simply taxed off where there were not contemporaneous records, and that continues to be the case. There have, perhaps, been some hard lessons learned as to how contemporaneous records are kept and presented to the taxing master. That is well established. We now have good co-operation with the taxing master on visibility, which we discussed with the PAC over those invoices. From time to time I have occasion to seek clarification on some of his decisions, and while I am sure the taxing master finds that irksome, he is gracious enough to respond to me, which enables me to proceed with my determination of the matter.

We have also made significant strides in the revocation of VHCC certificates, where individuals have not complied with the terms of the grant. We have revoked 19 VHCC certificates. The initial seven went on appeal and the taxing master decided that there would be one final warning shot. He reinstated the certificate and said that he did not expect to see anything like this again. Unfortunately, one of the individuals whose certificate was reinstated did not comply, so we have revoked it for a second time. There is a lot of activity in that area, and there is now a process of sending out monthly reminders, final reminders, and "if it's not in by next week you are revoked" letters. That has made a significant change to the culture.

As Nick said, the number of claims that remain to be assessed under that is shrinking, and they are being assessed, more or less, as the cases come in, because the taxing master is very much on top of that workload and is progressing it. Additional capacity has been put into that office, which has seen, perhaps, the speed of progress about which you were probably wisely sceptical, but it is there.

I come with some trepidation to recommendation 7 and the qualification on counter-fraud. As you will recall, I said at the PAC that I personally wanted to see it removed at the earliest opportunity. My feeling was that, because of the evidence base that the C&AG will rightly expect to have, it will take time for us to have the evidence from the fruit that we are trying to sow. A considerable body of work is going on. In all fairness, there will be a time delay before the evidence is available to the C&AG to persuade him that we have taken the necessary steps. Again, as you will recall from the conversation at the PAC, the other qualification on our accounts is provisions, and, over time, that qualification has diminished. I hope that, through the work that we are doing now, we will see a similar pattern over counter-fraud until we aspire at the earliest opportunity to see that removed. We will work very closely, not only with our colleagues in the Department, but with the C&AG and his staff to ensure that the necessary steps are taken.

Mr S Anderson: The PAC report mentions the increase in the staffing of the fraud investigation unit. If steps are in place, why do we really need that if these people are playing the game and producing everything as they should as members of the legal profession? We are left with a situation where we are increasing the size of a fraud unit to more or less say, "We are here to catch you out." The point is

that you would not expect that coming from the profession. We could talk about this all day, but it is sad that, maybe, we are in that situation where we have to increase that unit to get to the bottom of it.

Mr Andrews: I very much share your concern; I would not want to inappropriately increase the size of the unit where, perhaps, there is no long-term need for it. We have a short-term issue that we need to work through and get proper systems embedded, not only in the commission but within the fraternity of those who provide the services. In a sense, our current strategy is to try to use the registration scheme, which, under the enabling legislation, allows us to levy a fee for those who want to do legal aid work in order to fund the regulatory aspect of the system. We want to use that as a source of supplementing the assurance that the commission requires, that Nick as the departmental accounting officer requires and that the C&AG will require. We are trying to take a slightly different direction, so that we are not creating a wasteful use of resource. We are trying to use a different approach to the same end. The other thing we need to recognise is that there has to be that visibility of engagement in the profession's offices.

In respect of criminal legal aid, we probably do not need to move over the threshold of our door, because we have access to the court records online. We can match the bills to the court record. We feel that there is only one version of the truth: the court record. If the court record is inadequate in any way, it can be corrected, and we will reflect that. However, we are not in the business of second-guessing what the record is. There are ways that we can do things more efficiently. In all fairness, historically, the commission has not systematically documented and presented a lot of the things that it has done so that it can produce a body of evidence. That is something that came out in other aspects of the PAC report, and it is just as true here. Those are some of the issues that we are working on.

Mr Dickson: I do not want to delve too much into the history of all this. However, it is genuinely concerning — I speak from some experience as someone who has been a public servant for over 30-odd years — that despite the Audit Office's intervention in a whole range of public bodies and the public service over that time — certainly, the production of annual accounts and clean certificates of audit are the standard that every public servant who has that responsibility aspires to. So, this is deeply disappointing to me. What set the law profession apart from the need to meet those high public standards and, indeed, the appropriate audit standards? I think that that is deeply concerning. Has anybody attempted to quantify just exactly how much money was squandered, wasted or even defrauded over the years?

I want to ask you about the comment that if somebody requires more than the standard fee, the area is examined and that you now feel you have a handle on that. If the work done is less than the standard fee, what is done to examine that? How many fees fall under the standard fee rate?

Mr Andrews: I can start on your two questions and will start with the issue of accounts. As a relatively newly appointed accounting officer, I could not agree more with what you said. The reason for the delay in the annual accounts is a very specific one, and it is to do with resource accounting. When the Legal Services Commission was established, it did not have a mechanism that enabled it to produce resource accounts. It also had a very high turnover of finance staff, which meant that it was constantly churning and starting the process again, so much so that a backlog was created that meant that it was not producing resource accounts; rather, it was producing accounts that reflected the actual payments that had been made. Hence, the original qualification was a very fundamental qualification, because it was not an estimate of provision at all. So, that has been worked on with some considerable enthusiasm by a new and enhanced team in the finance section, which has produced the accounts from very much a standing start. In the past two years, it has effectively produced something like eight sets of accounts. So, we are now currently up to date with our accounts. Not only has the 2010-11 account been laid, but the 2011-12 account has been submitted to the Department and the Audit Office within the agreed timescale and will be audited in due course over the summer. It has been a very long road, and a number of staff have put in very hard work.

That in itself was the first wave of activity, because now we need to remove the qualifications from the accounts. We said at the PAC, and the text of the C&AG's press release is supportive of this, that we are quite close in working with the C&AG to remove the qualification on provision, because it is a

technical thing about the life cycles of cases. People's eyes tend to glaze over when you talk about those things, but there is a technical issue being addressed there.

Counter-fraud is a different scenario. As I said to Mr Anderson, my concern is that it will take a period of time to remove that qualification. I am determined, as is the commission, to remove that qualification. There are a number of actions in hand and other actions that were taken in conjunction, not only with the Department but with other agencies that have provided some of their experience in these things, and we will take those forward.

The standard fee for Magistrates' Court cases and Crown Court cases is one size fits all, based on a swings-and-roundabouts principle that you may have a case in which there is a relatively quick and early plea entered, if it is a criminal case, which means you may have a bigger margin of profit on that case, but that there will be other cases which you make a loss on.

What we are trying to get away from, and the commission fully supports the Department's approach on this, is individualised fees. At the heart of the 1992 rules, which we discussed at some length at the PAC, was the goal of providing fair remuneration in each and every case. Now, we are saying that there should be a general understanding that you receive a certain fee for a certain type of case that is disposed of in a certain way.

The important factor is that the Department, in legislation, has required of itself to undertake a periodic review of those standard fees, because if you were finding, for example, that in all the cases the defendants were suddenly pleading guilty at an earlier stage, it would have to be reflected in the fee. From an administrative point of view, the processing required and the evidence required from a counter-fraud perspective means the standard fee is far more appropriate than having to have an individual fix and an individual fee for each case.

Mr Lavery: Just to supplement one point Paul mentioned about the accounts, the Legal Services Commission was not a well-performing organisation in its early years. That is self-evident. It was established at the end of 2003, and three years later no accounts were produced because of the problems that Paul referred to. We almost put the commission into "special measures" at that point: I appointed the Court Service's head of finance to head a new finance team in the Legal Services Commission in November 2006 to try to get to grips with those performance issues.

The following year, 2007, we commissioned a landscape review — a real root-and-branch examination of how the organisation was performing. Paul was appointed as the new chief executive in 2009. There has been rapid progress in the past few years. As Paul has explained, all of the accounts are up to date. They are still qualified — we cannot dodge that bullet — but there has been rapid progress.

We made a choice in 2003 to adopt the legal aid department of the Law Society as the foundation for the new organisation. We had a choice to either let the Law Society close it down, as it had run legal aid since the scheme was introduced in 1965 in Northern Ireland, and make the people working there redundant and set up something new or try to take the legal aid department and rebrand it as the commission. That was a judgement. In hindsight, it may have been a bad judgement, but it was decided at the time that to get buy-in by the Law Society and others and retain the expertise that the staff had, we should use the existing machinery that was called the legal aid department of the Law Society. To some degree, an underperforming organisation that could not produce resource accounts and had backlogs and administrative problems was repositioned as a new organisation. However, an organisation cannot be turned around overnight. The Committee needs to understand that there is a history.

The Chairperson: That has been useful.

Mr Lavery: The organisation has certainly been transformed. It has arguably taken far too long to transform, which is Mr Dickson's point, but it has been transformed. The next challenge is the review of access to justice, on which Jim Daniell produced a report. It recommends that this work should be done by the Department, and the commission should become an agency of the Department. The Minister is looking at that now.

Mr Elliott: Thank you for the presentation. It is clear that some progress is being made. However, when I hear some of the history, I am amazed by the totally relaxed attitude that appears to have been in the system. I do not know whether the blame should be placed on those who exploited the system or on those who were in charge but did not see it happening, or, if they saw it happening, did nothing about it.

The report refers to fraud. From what I read, the report does not go as far as to say that there was fraud, but it is playing about with words. Recommendation 7 would not be in the report without there being at least an inference of fraud. I am surprised that more cases have not been referred for police investigation or to the Public Prosecution Service. You said that half a million pounds was reclaimed last year, and the amount will possibly be the same this year. Have the people involved been recommended for investigation? What other investigative processes are ongoing with regard to the implication of fraud?

Mr Andrews: In respect of the £1·5 million that was recovered last year, as Nick said, we hope to recover a corresponding amount this year. In many ways, that goes back to a point that the Chair raised that perhaps manifested itself in a slightly different way. However, the police were privy to all the information that the commission had about the case that the Chair mentioned, and it was referred to the Chief Constable. However, as I said to the Chair, the police concluded that they do not propose to pursue the matter any further.

In respect of the commission's responsibility, the fee was assessed as proper by the taxing master. As you will appreciate, Mr Elliott, the fee was assessed as proper at a significantly lower rate than that which was claimed. Therefore, the commission is obliged to pay the fee and has no residual power thereafter. However, that is drawing something of a line, while recognising that there are a small number of claims, as Nick outlined at the outset, which still have to go through the system. However, there is considerable vigilance on the part of the taxing master and then the commission when we receive it to raise queries or concerns.

It would be inappropriate to discuss individual cases, but I assure the Committee that the taxing master could consider a case and say that a practitioner may have done those number of hours, but the taxing master is not convinced that it was either necessary or the most efficient way to do business, so the number of hours will be reduced accordingly. That deals with the historical very high cost cases.

In respect of other matters, the commission will routinely receive complaints from individuals who are in litigation against someone who is in receipt of legal aid. Sometimes, we receive those through MLAs, and we investigate them. That is really to do with what is perceived to be applicant misrepresentation of their means. There are also cases in which the commission can and does investigate patterns of claims from practitioners. As I said to the Chair, one of those cases is currently referred to the PSNI for investigation. Perhaps we should just formally —

The Chairperson: Paul, when did you refer the matter to the police?

Mr Andrews: If you accept some latitude in my answer, Chair, I think that it was referred to the police approximately three months ago. However, we must put on record that, as far as the commission is concerned, if it has evidence of fraudulent activity, the default position will be, and is, to refer that to the police. If it is by a member of the legal profession, we will also refer it to its regulatory body. That is very much the position of the Department.

Mr Elliott: Are there any figures for the number of cases that the taxing master indicated should be reduced?

Mr Andrews: No figure is currently available to me because, even in an ordinary case, the taxing master can tax off any item that he is unpersuaded about, even if that is to tax off £5 for a travel claim. There will be regular taxing off by the taxing master. I suspect that what you have in mind is of a more significant dimension. The answer to your question is that I do not have such figures available to me.

Mr Elliott: Would it be possible to get figures, even if we had a sum in mind of over £100 or £500?

Mr Andrews: Could I suggest, in terms of proportionality, that a taxing master could quite freely tax off several hundred pounds by an adjustment. If you wanted to go through that process, you would probably need to have a slightly higher threshold or you would get an absolute deluge of cases. The taxing master's role is to look at whether an individual fee is properly claimed, and at times he will say that something is simply not appropriate. I am happy to do that, but I would like to try to arrive at a figure that is more proportionate, with due respect, Mr Elliott, if you do not mind.

Mr Elliott: Sometimes when legal aid is being claimed, there is an indication that a defendant does not appear in court and, obviously, the court has adjourned. That can happen on several occasions. Are there any investigations on, or information about, how often that happens? Are there any rules to stop an adjournment on so many occasions?

Mr Andrews: If we were to take that in the context of criminal legal aid, there is a standard fee. Therefore, if a case is disposed of on its first appearance or its thirty-first appearance, and it is disposed of as a guilty plea, it is the same fee. In that sense, a solicitor has the encouragement to ensure that a client appears. Historically — I think that this is a historical practice in the Crown Court prior to 2005 and in the Magistrates' Court prior to 2009 — there would have been a time-and-line basis of assessment. You rightly identify a historical problem. In all fairness — I do not want to mislead the Committee in any way — there are occasions when that happens in civil legal aid, and we are keen that members of the judiciary raise that with us. If people have been provided with legal aid to assist them in defending a civil action, we want to know why they are not there. We will consider discharging or revoking their legal aid certificate and then try to reclaim the money from them that we have expended on a solicitor. There is a side eddy, if I could put it like that, in civil legal aid. However, the issue in criminal legal aid is now a historical issue with regard to the time-and-line assessment, which, as Nick and David said, has been removed by the standard fees.

The Chairperson: I want to touch briefly on the taxing master issue. Is it necessary to have a taxing master? Have we ever looked at whether other jurisdictions do things in a better way?

Mr Andrews: Every jurisdiction has something that looks, performs and acts in a way that we would recognise as the taxing master. Sorry, David, I was too quick to answer.

Mr Lavery: They are a feature of most common law systems. There is a taxing master in Dublin, Edinburgh and London. They are there in part to protect clients, because a taxing master's main job is to determine the appropriate amount of costs that will be paid by the losing party in litigation. That is what they are set up for: if you sue somebody, you get whatever the case is worth plus, usually, your legal expenses paid for you. A taxing master is there mainly to make sure that the bill of costs is appropriate and fair. The role then developed to include the master independently assessing your own bill of costs if you are concerned about it.

We built on that arrangement when legal aid was introduced. We said that we had somebody who specialises in looking at what is appropriate, and that was when the taxing master was given the legal aid role. However, under the standard fee arrangements, the taxing master is now completely out of the picture. The taxing master is an endangered species in that area, because Paul's people will be able to assess what a case is worth, based on standard fees. There will not be the mystery about it that there has been in the past.

Mr Wells: Gentlemen, it is worth reading paragraph 3 of the PAC report's executive summary into the record, because it is very damning:

> *"The Committee considers that no one has emerged with credit from this review. The architects of the system, including some of the witnesses before the Committee, have much to answer for. The Department, and its predecessors, are ultimately responsible for the inherently flawed design of the system; Court Service put in place a series of defective remuneration schemes; the Commission is responsible for the administration of the system, but has not demonstrated the capacity to do so*

successfully; and the legal profession has exploited the loopholes within the system, to quote the Accounting Officer, 'playing fast and loose with public money'. All this has been hugely costly to the public purse."

Indeed, paragraph 4 mentions that £150 million extra was required. How many people were sacked after the report was published?

Mr Perry: No one was sacked, Mr Wells, because the —

Mr Wells: Fired, dismissed, removed; how many people are no longer working as a result of that report being published?

Mr Perry: No one was dismissed.

Mr Wells: No one. How many people were disciplined?

Mr Perry: No one.

Mr Wells: No one. How many people were demoted?

Mr Perry: No one has been demoted.

Mr Wells: How many people were spoken to?

Mr Perry: Clearly, collectively, it is a very powerful report, and all of us who are involved now in the fundamental business of reforming and reshaping public legal aid take all those criticisms and points extremely seriously. As I said in my opening remarks, that is what we have been about over the past two years — reshaping and reforming.

Mr Wells: So seriously that, as a result of a report indicating that we have lost at least £150 million, squandered as a result of inefficiency at every level — that may not seem a lot by barristers' standards, but it is a lot of nurses, schools and motorways — not one person has had a point deducted from their pay scale, had a black mark put against their record or been disciplined in any way for the systematic failure in every aspect of dealing with legal aid in Northern Ireland. Is that what you are telling me?

Mr Perry: On the specific point about disciplinary action: yes. However, you are right to identify that there were systemic problems with how legal aid operated, and we have been fundamentally reforming that.

Mr Wells: Yes. I will be beating a path to Mr Andrews's door in the next few weeks, because I certainly do not feel that that is the case. I regularly report examples to show that the Legal Services Commission remains extremely naive to this day in how it deals with costs.

In March, a table was published of the top-earning barristers and QCs in Northern Ireland. The top earner was Mrs Eilis McDermott, who managed to scrape by on £800,000 a year. All that money was, of course, from the taxpayer through the Legal Services Commission. How is it physically possible for anyone in Northern Ireland to earn £800,000 a year in legal aid?

Mr Andrews: It is possible only if the cases that represent the remuneration span a period and come to payment at one point in time. That is the only way that that should be possible.

Mr Wells: So what is the maximum that any barrister could earn in a year, if he or she is surviving, getting by simply on Legal Services Commission payments, which is, of course, taxpayers' money? What is the maximum that he or she could earn?

Mr Andrews: Allow me a little latitude in answering because I am trying to be helpful. I think that a barrister doing only very high cost cases on the described hourly rate, assuming that he or she worked constantly and that all those cases came to payment in the one year, can theoretically earn something like £600,000.

Mr Wells: So you are saying that, if it was averaged out over a number of years, it would be physically impossible to earn £600,000 a year from legal aid payments. In other words, you are saying that the reason that a figure of £800,000, which frankly strikes me as a lot of money, came about was that a series of cases from previous years had accumulated and were stacked up in the one year, which is why there was such an inordinate amount of money. The same lady may have scraped by on £250,000 the previous year.

Mr Andrews: The reality of the profile of payment in very high cost cases is that it was clustered in the payment for the last two and three years, Mr Wells.

Mr Wells: So on a 10-year average, no one could possibly be earning anything like that?

Mr Andrews: Certainly not under the new arrangements, where there are not those very high cost cases.

Mr Wells: You are telling me that, under the old arrangements, a barrister basically decided what he or she was worth and that was the tariff. Barristers made an assessment of the quality of their work and billed the taxpayer for it.

Mr Andrews: I venture to say that they may have had that view, but it had to be certified by the taxing master.

Mr Wells: I would love to know how many times someone put in for a vast fee and it was halved. I am not interested in having £5 deducted for travel allowance. Heaven knows why someone on £800,000 a year gets travel allowance at all, but that is a different issue. I want to know how often has someone come in and you have taken £50,000 or £30,000 off the bill; that would be very interesting. From my experience, under your predecessor, the Legal Services Commission was a very trusting and rather naive organisation. It seemed to accept, almost verbatim, whatever was claimed from it. I want to know what percentage was cut from people's bills by the taxing master. Mr Elliott asked a very important question that needs to be answered.

Mr Andrews: As I said to Mr Elliott, I am very happy to answer the question. If the Committee would allow me the latitude of trying to go through that and present some information to you, I am more than happy to do so, Mr Wells.

Mr Wells: Mind you, lots of private sector staff who have over-claimed more than £100 have been sacked on the spot for doing so. There is a view that it was only £100 here and £100 there and that someone overestimating — that is a very nice way of saying exaggerating or falsifying — their claim to the tune of £100 does not constitute fraud. It is fraud, and it should have been treated as such. However, under LSC guidelines, the taxing master will just kindly say that it is a bit much and deduct it from the bill. That should not be happening. It should be regarded as quite a serious incident.

Mr Andrews: For clarification: the taxing master does not operate under LSC guidelines. In criminal legal aid, the taxing master operates under the statutory scheme, which is not part of LSC guidelines. The taxing master is freestanding in that respect.

Mr Wells: A couple of years ago, a magistrate in Dungannon stopped a court case and made it very clear that he was no longer prepared to allow a certain firm of solicitors to put in a legal aid bill for a case that it knew would never run the full term. Are you aware of that famous court case and statement made in Dungannon?

Mr Andrews: I will say no in case I have got the wrong case, Mr Wells.

Mr Wells: It might have been in Armagh. I will tell you what was going on. A certain well-known firm of solicitors would submit a bill to the Legal Services Commission for a case on the basis that it would run the full term. The case had a not guilty plea and would run for maybe five days, and a bill would come in for the full amount. However, that firm knew, of course, that the defendant would plead guilty and that the case would run maybe 10% of the length of time expected, yet the bill to your office was always for the full amount. Are you aware of that scam?

Mr Andrews: That could not be deployed under the standard fee regime. If there is a guilty plea at an early stage, there is a standard fee. If there is a guilty plea before a trial commences, there is a separate fee. I have to say, Mr Wells, that I would not be astounded if that had happened in cases under the 1992 rules.

Mr Wells: The point is that, under the old system, a judge was exasperated that it was happening so often. The defendant would have told the defending counsel that he or she was going to plead guilty. However, counsel would have argued that it had to prepare the case on the basis that there would be a not guilty plea and that it would have to submit all the defence material. Counsel would know full well that there would not be a not guilty plea, and a bill for the full amount was always submitted. That was happening before the fixed tariff came in.

Mr Andrews: As I understand it, that is the very reason why the fixed fee was brought in.

Mr Wells: I fail to understand why, given that it is well known that that was going on for years and given that the judge in a public open court — it was reported in the local papers — stopped the court case and said that he was fed up with it, nobody's head rolled and no disciplinary action was taken, even though hundreds of thousands of pounds of taxpayers' money was being paid out on something that everybody knew was a scam.

Mr Andrews: In my engagement with the legal profession and, more importantly, with the judiciary, I have made it clear that I want to know about anything of that nature that concerns people or about any other practices that are inappropriate or of concern to the judiciary.

Mr Wells: How many firms of solicitors were prosecuted by your predecessor for that type of scam?

Mr Andrews: To the best of knowledge, there has not been — I stand to be corrected — any successful prosecution of a firm of solicitors.

Mr Wells: Therefore, £150 million has gone down the drain, and there was very little urgency by your predecessor or any of the staff about it. Am I right in thinking that, frankly, very little has been done about it?

Mr Andrews: As articulated by the Public Accounts Committee, the assessment of fees under the 1992 rules was not a role of the Legal Services Commission but was a role of the appropriate authority, which this Committee agreed, by virtue of rules that were introduced in December, to stand down, and that function was transferred to the Legal Services Commission. As Nick said, we set a sunset provision to tell people to get their bills in now and told them that we will not look at them under the 1992 rules. We have 2,600 of those bills to look at, Mr Wells, and we will be particularly interested in those sorts of issues.

Mr Wells: I am sharpening my knives for the real stuff on the civil legal aid side.

Mr Andrews: I look forward to meeting you about your concerns in that area.

The Chairperson: You will not have long to wait. It is the next evidence session. *[Laughter.]*

Mr Andrews: I know; I have seen the letter.

Mr Wells: You know what I am talking about.

Mr Andrews: I do.

The Chairperson: Gentlemen, thank you very much for coming along to the Committee today.