PUBLIC ACCOUNTS COMMITTEE

OFFICIAL REPORT
(Hansard)

‘Managing Criminal Legal Aid’

21 September 2011

NORTHERN IRELAND ASSEMBLY

PUBLIC ACCOUNTS COMMITTEE

‘Managing Criminal Legal Aid’

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Members present for all or part of the proceedings:
Mr Paul Maskey (Chairperson)
Mr Joe Byrne (Deputy Chairperson)
Mr Sydney Anderson
Mr Michael Copeland
Mr Alex Easton
Mr Paul Girvan
Mr Ross Hussey
Ms Jennifer McCann
Mr Mitchel McLaughlin

Witnesses:

Mr Nick Perry	)	Department of Justice
Mr David Lavery	)	Northern Ireland Courts and Tribunals Service
Mr Paul Andrews	)	Northern Ireland Legal Services Commission

Also in attendance:

Mr Kieran Donnelly	)	Comptroller and Auditor General
Mr Michael Daly	)	Acting Treasury Officer of Accounts

The Chairperson:

We are joined by Mr Nick Perry, who is the accounting officer for the Department of Justice and he has come to respond to the Committee. You are very welcome. Will you please introduce your two colleagues?

Mr Nick Perry (Department of Justice):

Thank you very much, Chairman. I have with me Mr David Lavery, the director and accounting officer of the Northern Ireland Courts and Tribunals Service, who leads on the sponsorship of the Legal Services Commission (LSC) and on overall legal aid policy, including criminal legal aid reform; and Mr Paul Andrews, chief executive and accounting officer of the LSC. The Commission is responsible for the operational delivery of legal aid and payments to the profession. It has also specific responsibility for taking forward policy on civil legal aid.

The Chairperson:

Paul and David, you are very welcome. The normal procedure is that I ask a couple of questions and then the members will ask questions.

My first question is for you, Mr Perry. The Legal Services Commission was established in 2003, and some £340 million has been spent on criminal legal aid. The Audit Office report concludes that the current framework for managing criminal legal aid is overly complex and does not ensure value for money for the taxpayer or proper accountability for public moneys. Do you agree that the system is broken and needs to be fixed?

Mr Perry:

I accept that there have been significant problems with the criminal legal aid budget for the reasons brought out in the Audit Office's report. This is a complex area, as the report says. It is a demand-led public service, delivered by the private sector, of vital importance to the justice sector and many citizens but with costs running at unsustainable levels. Driving forward reform in this area is one of the Justice Minister's top priorities, and we have made major strides recently in addressing the main causes of those problems in three main areas. I will cover them quickly.

First, we are getting right the future framework for criminal legal aid. From this year, we have

abolished very high cost cases (VHCCs) and exceptionality for Crown Court cases, and we project a saving of over £18 million a year as a result. We have also ended almost all non-statutory fees in the Magistrate's Court. We will also, subject to the Assembly's agreement, tighten up the rules on the allocation of counsel and introduce recovery of defence cost orders and a fixed means test to enable us to target legal aid more effectively. From this year, the LSC will assess all criminal legal aid fees in the Crown Court. The appropriate authority has been discontinued and the taxing master's role in VHCCs will be phased out as the remaining cases work through the system.

Secondly, we aim to tighten control of cases already in the system, particularly very high cost cases. We are working with the taxing master to secure access to appropriate information. The Department will continue, where necessary, to use its power to intervene when VHCC assessments are appealed, and the Minister will shortly issue directions to the taxing master to tighten up assessment of the remaining VHCCs in the system.

Thirdly, we are strengthening the governance arrangements of legal aid in various ways. For example, the Court Service's policy responsibilities for criminal legal aid are being transferred to the core Department in a new access to justice directorate. That will happen in the course of the autumn, linking criminal legal aid policy firmly into the wider justice policy reform agenda. The LSC is working to strengthen its own capability in relation to its financial forecasting and budgetary responsibilities.

To sum up, I recognise that there have been real difficulties in this area. We are tackling these as a matter of urgency, and the 2011 reforms in particular put criminal legal aid on a firmer basis.

The Chairperson:
So, do you reckon that it was broken and needed to be fixed?

Mr Perry:
It was certainly no longer fit for purpose.

The Chairperson:

In paragraph 1.6 of the Audit Office's report, it says that the criminal legal aid system here is one of the most generous in the world. No other Government in the world believes that the taxpayer should pay for so much legal aid and litigation. Could you go in to some detail and tell us why spend on criminal legal aid grew so high over the years?

Mr Perry:

There are a number of reasons for that, as the report points out. One of those is the increase in the volume of cases going through the courts; another is the increase in the complexity of cases. However, the main reason, in recent years in particular, is two-fold: the use of non-standard fees and the way in which the very high-cost case system has evolved. That has made our system more expensive than comparable arrangements elsewhere. The closest comparator is England and Wales.

The Chairperson:

I still cannot understand how it has become one of the most expensive in the world. I read in the report that it was the most expensive in the world. It is hard to fathom how it got into that state.

Mr Perry:

A number of attempts have been made over the years, particularly in 2005 and 2009, to reform the way the criminal legal aid system works. Some parts of those reforms have been very successful, but others have been less so, particularly around the very high cost case regime. That is why we introduced the changes in 2011 to abolish those very high cost cases. There is no argument: our system is more expensive than comparable systems, and the purpose of these reforms is to bring us more closely into line with other jurisdictions.

The Chairperson:

Could those reforms have happened sooner?

Mr Perry:

This has been the Justice Minister's top priority since the devolution of justice, and a number of important reforms have been driven through in the past 18 months. However, there has been a

series of major reform initiatives in 2003, 2005 and 2009, which has taken us along the road to bringing the situation under better regulation, but those initiatives have not been entirely successful for various reasons. The report touches on that.

The Chairperson:

Can you explain why there is a gap of a number of years since that work was done?

Mr Perry:

Certainly: 2009 and 2011 are the two most recent; one before devolution and one after. The most significant reforms have happened in the past two years, effectively introducing standard fees in virtually all Magistrate's Court cases and abolishing very high cost cases. Those have been significant and successful initiatives in those areas. I will ask David to comment on aspects of the earlier period.

Mr David Lavery (Northern Ireland Courts and Tribunals Service):

If you had asked the same question in 2005, I would have told you that we had sorted it out at that stage, because we had introduced a system of fixed or standard fees for most of the most expensive cases, which are those that go through the Crown Court. By putting the fee structure on to a fixed or standard basis, we believed that we had Crown Court legal aid costs effectively under control.

The 2005 rules also allowed for a number of exceptional cases to be certified as very high cost cases. The difficulty with the 2005 rules was that the threshold for a case qualifying as a very high cost one proved not to be significantly rigorous. We had planned on having perhaps 15 to 20 very high cost cases a year, whereas the numbers being certified were considerably higher. The difficulty was that, although we knew there were more very high cost cases coming into the system, we did not know just how much they were going to cost the legal aid system.

Once a case became a very high cost case, the fees involved were assessed when the case was concluded. They were assessed by a specialist costs judge called the taxing master, so it was only after the case was complete that we knew their individual value. The problem was therefore disguised for the better part of two years by the lack of any significant information about the cost

of these cases. For example, when the current taxing master was appointed in June 2007, only 12 very high cost cases had been assessed for payment, and the payments in those 12 cases were not remarkable. One year later we published a consultation paper on very high cost cases. That paper states that, although we were seeing more cases qualifying as very high cost, the number of cases that had been assessed at that point was not sufficient to give us concrete information about associated costs. I would say that it was probably the latter part of 2008 before we realised the scale of the problem that the very high cost case category was going to cause.

The majority of cases were not a problem. As I said, they are subject to a fixed cost. Everybody knows how much the case will cost before it is done; it takes simply an arithmetic calculation to work out what is paid in each case. There is no assessment or ex post facto assessment involved in those, but the very high cost cases were higher in number and, as we eventually found, higher in value than we had anticipated. So, in the autumn of 2009, we introduced changes to significantly tighten up the rules on very high cost cases. We can go into those in some detail, if that would be helpful to the Committee. We made it much harder for a case to qualify as a very high cost case from September 2009, and we also changed the basis on which the fees would be assessed. Although the fees in those cases from 2009 onwards were still assessed by the taxing master, they were assessed against much tighter criteria.

We have moved away completely from very high cost cases, and, as you have heard, the rules introduced in April of this year have brought that system to an end. Now, all cases in the Crown Court will be on a standard fee or fixed cost basis.

The Chairperson:

I am interested in the dates that you mentioned. You said that different pieces of work were taken forward in 2007, 2008 and 2009. I suppose that that was the case in the 2008-09 era, because the powers were soon to be no longer the responsibility of direct rule Ministers and would become the brief of locally accountable politicians.

Mr Lavery:

With regard to legal aid, as in most areas, direct rule Ministers were probably reluctant to make decisions that they felt were more appropriate for a devolved Administration, the closer they

thought they were to devolution. However, I am not sure that that had a huge bearing on what I was describing, which was happening in 2008.

The Chairperson:
You mentioned a figure of £18 million savings. That is a big saving.

Mr Lavery:
Yes.

The Chairperson:
I dare say that those savings would not have been looked at by now, if the area was still under direct rule. Would they?

Mr Lavery:
I think there would always be a desire on the part of the relevant Minister to deal with the sort of cost increase —

The Chairperson:
There is a responsibility on senior civil servants.

Mr Lavery:
Yes; absolutely.

The Chairperson:
So, what did you do to reduce the costs?

Mr Lavery:
In September 2009, we introduced new arrangements, which made it much more difficult for a case to qualify as a very high cost case, and we introduced much stricter criteria against which the fees were assessed. We also took a power so that we, as a Department, could intervene where a case was going for review by the taxing master. We got a lot more control into the system from September 2009.

We also consulted on a reform of the system of very high cost cases. For instance, we looked at the possibility of changing the system to a system of contracting. That is how very high cost cases have been dealt with in England and Wales. However, following a period of public consultation, we were persuaded that going for the Northern Ireland approach, which involves standard or fixed fees, was better.

Implicit in your question is whether more energy was put into this issue under devolution. I think that the Minister has demonstrated that devolution can make a difference. Until April last year, the legal aid system in Northern Ireland was the responsibility of the same Minister who was running the legal aid system in England and Wales. Therefore you tended to have similar approaches to similar issues. Devolution gives us the opportunity to decouple from those approaches and to take a different approach. That is why the Minister commissioned a major review of legal aid, the 'Access to Justice Review Northern Ireland', which was published recently.

The other thing that is crucially different under devolution is that you cannot run to the Treasury to get more money. The money has to come from the Northern Ireland block; in fact, at the moment, it has to come from the Department of Justice's vote. There is, therefore, no way of bailing out the legal aid system, as there might have been under Westminster. Under devolution, money for legal aid is competing explicitly with other priorities, such as healthcare, education and housing. That has made a marked change in approach and has introduced into the system a discipline that, perhaps, was lacking under Westminster rule.

The Chairperson:

Does the fact that we could run to the Treasury explain why it was one of the most expensive legal aid systems in the world, if not the most expensive?

Mr Lavery:

I think that Northern Ireland is likely to always have an expensive legal aid system because of the higher levels of social deprivation and social need. As all Members of the Assembly will know, we have more people on long-term benefits here, and I suspect that we will always have more

people qualifying for legal aid and publicly funded legal assistance in Northern Ireland than elsewhere.

The comparable figures that the Audit Office referred to in its report were not dramatically different, but there is no doubt that this is the most expensive region in the UK. The comparisons that the Audit Office made with England, Wales and Scotland are entirely appropriate. However, I would be slightly hesitant about the comparisons that it made with other countries, as the systems can be quite different. For example, one of the comparators in one of the reports was France, where the legal system is inquisitorial. Our system is certainly the dearest in the UK and Ireland. There is no doubt about that.

The Chairperson:
In its report, the Audit Office said that some care needs to be taken when looking at the comparisons, although that goes for all figures. If I remember correctly, the figures in the report were based on legal aid spend per head of the population — some of the other Committee members may want to go into more detail on that — and the costs were very high.

Mr Girvan:
I thank the witnesses for coming along today. On the point about going to the Treasury for additional money, the report suggests that £300 million was set aside for legal aid and that the actual spend was £450 million over a few years. What was the process? Did you simply go and ask for more money, or did the request need to go through an Excess Vote process similar to that which the Committee undertook for a non-budgeted overspend by a Department? What mechanism did the Department of Justice use? How did you get around that from a legal point of view?

Mr Lavery:
Before direct rule, we were in constant discussion with the Treasury about legal aid funding in particular. It was as big a budget as the budget for the rest of my responsibilities at the time, which was running the courts and tribunals.

The way in which the Treasury chose to manage legal aid was to hold back the baseline, the

basic allocation, and to tolerate a certain amount of supplementary funding in the course of the year. That seemed to be a very deliberate strategy on its part. For example, the budget was held at about £42 million for the better part of five years, whereas, each year, the actual spend on legal aid was higher than that. In one of the spending rounds, we negotiated a higher baseline of closer to £65 million, which reduced that difficulty to some degree, but, unfortunately, that coincided with the introduction of the new category of very high cost cases that I referred to earlier. The Treasury's approach towards Northern Ireland legal aid and the legal aid system in England and Wales was essentially to manage it as an in-year pressure. As the report suggests, legal aid is a demand-led system and there is some legitimacy in that approach. My point is that you simply cannot do that now. Legal aid is now a ring-fenced departmental budget and we must consume the pressure ourselves. That creates a greater degree of discipline.

Mr Girvan:

Was it simply a matter of holding your hand out and getting more money?

Mr Lavery:

It did not feel like that at the time. There was a process of rigorous discussion and examination, but we —

Mr Girvan:

Did Whitehall, at any time, decide that you were not going to get the additional money? Did it hold back and tell you that that was it?

Mr Lavery:

The Treasury obviously and quite properly wanted a lot of management information on our forecasting and so forth, and we worked with PricewaterhouseCoopers (PwC) to do a complete forecasting model with the Treasury, so that the cost in the system was quite transparent to it. However, the Treasury appreciated that, in a demand-led system, the money was not a discretionary expenditure. It was for bills for cases that had already been through the legal system, and, therefore, it was not something that you could decline to pay.The lawyers who did that work, and the other expert witnesses and so forth, had a legal entitlement to the payments.

I am describing a different method of control over the budget, and devolution marks a step change. Before devolution, we were explaining to the legal profession that the world would be different and we would be competing for scarce resources within the Northern Ireland block grant and competing explicitly with other spending priorities. Legal aid would have to compete for scarce resources.

Mr Girvan:
For argument's sake: did, say, Scotland have to go back and ask for additional legal aid money over what was budgeted to them?

Mr Lavery:
I certainly know that that happened in England and Wales. I am not sure whether Paul knows about the Scottish position.

Mr Paul Andrews (Northern Ireland Legal Services Commission):
Since the Scottish Parliament was established, the Justice Committee there took the view that there was not a cash limit on legal aid in Scotland. Such forecasts and bills as were presented were authorised by the Justice Committee.

Mr Girvan:
They had no budget to work to.

Mr Andrews:
They do not have a set budget in the same sense that you would recognise and Mr Lavery has been discussing.

The Chairperson:
I find it astonishing that it takes a locally accountable Minister to be in place before senior civil servants and others start to do their job, which is about making sure that they are trying to get value for money. The money being spent is public money, and, if this Committee is trying to establish anything, it is about making sure there is accountability and value for money. It astonishes me that it takes an accountable Minister for that to be in place in one of the

Departments.

Mr Copeland:

Mr Andrews, Mr Perry and Mr Lavery, you are very welcome. May I press you for some further help with paragraphs 2 and 2.5?

It seems to me that, echoing the Chair's comments on affordability, we are coming to the crux of the matter. It appears that, in 98% of cases, the judiciary is responsible for deciding who receives criminal legal aid. The commission is responsible for funding the service, the Court Service is responsible for policy issues, and a number of bodies are responsible for determining the fees payable. There are an awful lot of potential holes in the fence that should be around the public purse.

Do you agree that it appears to be a fundamentally flawed structure, and no one appears to be wholly accountable for what are in some cases extremely large amounts of public money? First, do you recognise what I am saying? Secondly, will you give us some indication of what you are doing to resolve the problem, should a problem, in your view, exist?

Mr Perry:

Yes, Mr Copeland, I do recognise the issues that you describe. This is a complex area when it comes to accountability. It is the court that decides who gets legal aid on both legs of the test: the interests of justice test and the means test. As a result, the commission has found itself in the position of paying out money without being responsible for the decision to grant legal aid in the first place.

There is an issue of principle, of course, about who should take the decision to grant someone legal aid. In other jurisdictions, it is taken by the equivalent of the commission. There is quite a valuable principle in a court deciding who gets legal aid rather than the Department.

There is complexity. It is becoming simplified to some degree by the reforms we have introduced in that, from this year forward, when it comes to assessing fees that will be done by the commission. So, the taxing master's role is being removed over time, and the role of the

appropriate authority has come to an end. When it comes to assessing fees, all of that will rest with the commission, which has the budgetary responsibility.

As part of the Daniell report into access to justice, there is a proposal that when it comes to assessing the means of people applying for legal aid that, too, should transfer to the Legal Services Commission. The Department will look at and consult on that in the normal way. However, that function may very well transfer to the commission.

That would still leave the issue of a decision on the interests of justice test remaining with the court. As I say, there are arguments of principle for doing that. So, it is complex. The commission has been in a somewhat unfortunate position over the years. I think that we are clarifying that now.

Mr Copeland:
Is there a differential between the rates at which legal aid is allowed by courts in England and Wales and in Northern Ireland?

Mr Perry:
You quoted the figure of 98%. That is 98% of people who apply for and are granted legal aid from the courts here. Of course, not every defendant applies for or gets legal aid. In the Magistrate's Court last year, around 42% of defendants got legal aid. So it is not 98% of everybody who appears in court. The equivalent figure for the Magistrate's Court in England and Wales is 93%. The figures tend to be very high. A couple of years ago, independent academic research into that figure suggested that the success rate was so high because practitioners understood the rules and did not put forward unworthy cases. We are in discussions with the Justice Committee to look at the possibility of a fixed means test, which might have an impact and bring our figure of 98% closer to the figure of 93% in England and Wales.

Mr Copeland:
Are the figures of 98% and 93% directly comparable?

Mr Perry:

Broadly so, I believe.

Mr Copeland:

Perhaps you will clarify that for us at some stage in the future?

Mr Perry:

Yes; sure.

Mr Copeland:

Paragraph 2.10 explains that the legal profession could request an increase in fees if they considered that the standard rates were insufficient to cover the work that they would have to do in a particular case. As someone who used to be involved in the building industry, I would have liked to have the same laxity in preparing my invoices. It seems reasonable when it comes to more complex or exceptional cases. Figure 6 shows that, up to 2009, the majority of criminal legal aid payments in respect of cases heard in the Magistrate's Court were increased, averaging three times that of cases settled at the standard rate. That is difficult to understand, particularly as the Magistrate's Court deals with the least serious cases. Do you have a view as to why so many cases fell outside the standard regime?

Mr Perry:

I will ask Paul to talk in particular about figure 6 and paragraph 2.10. However, in general, I agree that the regime based around the 1992 rules, which was the system that that paragraph describes, was not sufficiently robust. Those rules were designed to allow a tailored fee for each case, but they did not provide a sufficiently strong control mechanism, and that is why we changed them. Perhaps Paul will say a word about figure 6.

Mr Andrews:

In fact, the 1992 rules envisaged two forms of standard fee, if I may describe it in that way. For solicitors, as you rightly said, the basic standard fee was an hourly rate, allowing individual solicitors to claim for the hours that they undertook in each case. In addition, under one of the powers in those rules, the Lord Chancellor made a set of standard fees, referred to in the

legislation as composite fees. The left-hand side of figure 6 represents the fees that were paid exclusively as composite or standard fees.

A practical worked example might help to illustrate the point at issue. If a solicitor was involved in a contested case in the Magistrate's Court, the composite or standard fee payable was £151·50 for the case. If, however, the solicitor said that he or she worked for three hours preparing the case, under the hourly rate, he or she would have been entitled to £134, and, if there had been one hour of contest before the court, he or she would have been entitled to a further £56·50. He or she could, therefore, have chosen whether to claim a standard fee of £151 for the contest, which would appear on the left-hand side of the table, or £190·75, which would appear on the right-hand side of the table. In effect, that is the system that pertained at that time.

To give a little bit of context: in the vast majority of claims for which solicitors elected to submit hourly rates for cases in the Magistrate's Court, they did not look for an increase to the hourly rate. They simply lodged the hours that they claimed were worked, and that was assessed. That is why there are two different systems. Even if a solicitor claims for two cases and chooses one as a composite fee and the other as an hourly-rate, standard fee, there is in effect a £40 difference, which is reflected in the table.

That is not to exclude the fact that in a very small number of cases the solicitor looked for an uplift on the hourly rate that was allowed.

Mr Copeland:
But that is no longer possible.

Mr Andrews:
That is no longer possible. Since 2009, all Magistrate's Court cases have had inclusive, standard fees that are assessed by the Legal Services Commission upon submission of the bill by the solicitor. The Legal Services Commission has access to the Courts and Tribunals Service's IT system, so it can verify that the individual cases were disposed of in the way that the solicitor claimed.

Mr Copeland:

Would it also be true to say that there may be a substantial number of old cases, which still need to be processed, that will qualify for the uplift?

Mr Andrews:

There will be a number of cases. It is quite difficult to quantify that, but the number of cases coming through that would be assessed under those rules is under 90 a month. So, the volume is draining down quite quickly.

Mr Copeland:

How do you ensure that the increased fees reflect only necessary and actual work undertaken by lawyers? Is there a check on that? Is there any way of checking that?

Mr Andrews:

The process, as outlined in the diagram that you referred to earlier in your questioning, indicates that, if a solicitor was looking for an uplift on the hourly rate that was payable, the case would have to be referred to the appropriate authority. As you will recall from the paper, the appropriate authority comprised two members of the legal profession and a lay person, who would reflect on the amount of work that was claimed for and decide on whether that was appropriate. The decision could be appealed — that is the subject of a separate table in the report — and, at that point, the individual solicitor or barrister could make representations before the appropriate authority. Those matters would have to be certified as proper by the taxing master.

Mr Copeland:

How many cases remain to be paid under the old, albeit more liberal, rules?

Mr Andrews:

For the Magistrate's Court rules, we estimate that there are in the region of 500 cases. However, we are working through a process, because, as Nick said earlier, we are taking a power that the responsibility for determining those cases transfers to the Legal Services Commission. Once we have the power to determine cases, we have plans to do a wash-up of those to crystallise the total number of bills that are still outstanding.

Mr Easton:

Paragraph 2.13 shows that, between 2003 and 2010, the commission paid an extra £10 million to the legal profession following appeals on cases that may already have been uplifted. Based on the information in figure 8, that is an average increase of £8,000 per case. Who made the decision to award those increases? Furthermore, the additional £10 million refers solely to payments in respect of cases heard at the Crown Court. Why are corresponding figures not maintained for the Magistrate's Court?

Mr Perry:

The appeals were made to the taxing master, so it was that judicial officer who made the decisions about granting the appeal. That factually answers that question. I ask Paul to pick up the point about the Magistrate's Court.

Mr Andrews:

The reason relates to the process that I described previously for going to the appropriate authority and then the taxing master. The number of cases in the Magistrate's Court has historically not been captured by the Legal Services Commission. The Audit Office has rightly identified that as a weakness in our system, and we are putting in place manual systems to collect the information, pending a change to our computer system.

At this time, all I can say by way of definitive comment is that you rightly point out that figure 8 relates exclusively to Crown Court cases. In Magistrate's Court cases, we have looked at the cases that went to the appropriate authority between 2001 and 2010 and found that only 4% of the cases were referred. Those 4% are cases in which someone was looking for something other than a standardised fee. We acknowledge the weakness in the system of not recording the information for the Magistrate's Court, and we are currently addressing it.

Mr Easton:

Who is this taxing master? He seems like a mythical figure, and no one seems to know. Is there more than one of them? He keeps popping up here. He is like a will-o'-the-wisp.

Mr Lavery:

The taxing master is a specialist judge who deals with the valuation of legal work. It is a feature of common law legal systems. There are taxing masters in London, Edinburgh and Dublin. You may have seen the coverage in the last year about the taxing master in Dublin's attempt to restrain professional fees. The taxing master is a qualified lawyer who is one of a group of judges within the High Court system who support the work of the High Court and the Court of Appeal. Their specialist role is to assess the value of legal work. So, if you had a civil court case and were not happy with what you were being charged, it could be referred to the taxing master for what they call a taxation. The criminal legal aid system used that expertise to assess fees up until this year's rules were introduced.

Mr Easton:

So there is more than one of them?

Mr Lavery:

Traditionally, there is one in Northern Ireland. However, at the end of 2008, we encountered a problem with a backlog in the very high cost cases that I referred to earlier, and the legal profession was making representations to the Lord Chancellor about the fact that the bills had not been paid. The taxing master at the time assessed that it would take him about two years to clear the backlog, because he obviously has a huge caseload of other work as well. The Lord Chief Justice agreed to assign an additional master to do taxing work to clear the backlog. So, at the moment, there are two people doing that work, but the additional taxing master has more or less finished his work on clearing the backlog of assessments.

Mr Easton:

My next question is on paragraph 2.15 of the report, which tells us that defendants are represented by two barristers in 55% of cases in Northern Ireland, compared to just 5% in England and Wales. I understand that there are some differences in the court systems, but it is difficult to see how that justifies such a large disparity between the two. Will you explain why we need two barristers in the majority of cases when one can cope perfectly well in the rest of the UK?

Mr Lavery:

The decision to grant authority to have a second barrister, who is usually a QC, is currently made by a magistrate — now called a district judge in the Magistrate's Court. The magistrate would receive an application from the solicitor representing the client about the complexity of the case. The district judge would then agree to grant a certificate for either one barrister or two barristers for the case when it is being sent for trial in the Crown Court. We feel that that is too early a stage at which to make that decision.

We are bringing forward new rules, which will be before the Justice Committee next month, to move the point at which that decision is made to the Crown Court, so it will be a judge at the trial level who will decide whether or not the case requires a second barrister. We are prescribing criteria against which that assessment will be made, including, for example, considerations like equality of arms. If the prosecution has a QC prosecuting the case, it might be appropriate that the defence should have a QC as well.

One other factor that has to be borne in mind is that the Magistrate's Court in Northern Ireland has higher sentencing powers than the Magistrate's Court in England and Wales. There is a block of cases that go to our Magistrate's Court that, in England and Wales, would have to go to the Crown Court for sentencing. I suspect that those are cases that routinely have only one junior counsel involved. That is not a complete explanation, but it is certainly a contributory factor. Even taking that into account, I have to acknowledge that there is probably a higher incidence of two counsel in Northern Ireland than the difference that I have referred to would explain. We expect the frequency of the use of two counsel in Crown Court cases to reduce once the new rules are introduced.

Mr Easton:

Do you envisage good savings out of that?

Mr Lavery:

We have calculated savings of the order of £1·5 million per annum based on our projections. Obviously, as you understand, it is a matter of judicial discretion, but that is the sort of figure we have modelled into our savings.

Mr Easton:

You will be glad to hear that this is my last question.

The Chairperson:

Is it OK to take a supplementary question from Mitchel before your question?

Mr Easton:

Absolutely.

Mr McLaughlin:

I listened carefully to your explanation and to the caveat that you finished with. I want to ask about another area that is not before the Committee on this occasion. There is a very vexing issue with the cost of insurance in this region, and evidence demonstrates that one significant, if not determining, factor is the cost of legal services. It goes through the Courts and Tribunals Service at a different level and attracts the participation of teams of legal representatives, often including senior counsel, and the individual ends up bearing the cost. Does the question of two counsel, where one counsel will routinely be used elsewhere if required, not reflect the long-standing culture in this region that legal services are very expensive or, perhaps, more expensive than in any comparable area? I am going back to the Chair's introductory line of questioning because I suspect that there is more continuity with the argument that I am presenting than with the explanation that you offered.

Mr Lavery:

The impact of legal expenses on, for example, motor insurance is clearly a matter of widespread concern in this community, and there is a Consumer Council initiative to look at that. One important point is that, although it is a cost that we all bear as members of the public who buy motor insurance, those types of cases are not a burden to the legal aid system, which we are discussing this afternoon. The decision that is being made in those cases is probably made by the insurance company that will ultimately pick up the bill for the road traffic accident. As the Court Service, we have been in discussion with the insurance industry for a number of years to encourage it to look at how it could reduce costs. However, in a traffic accident, it is pretty

unlikely that there will ever be a bill to the legal aid system.

Mr McLaughlin:

You are missing the point. I am not concerned about that, and I was not suggesting that. I am talking about the culture and the fact that lawyers of different levels of seniority are involved directly in setting rates. So, whether they work in private practice or private sector cases, they are, nonetheless, instrumental in establishing the thresholds of payments, which then leach across the different sectors. I am suggesting that what might appear to be an inordinate cost on the public purse has other impacts on the cost of legal services in this region. It seems to me to be a fairly obvious connection.

Mr Lavery:

I understand, and I am sorry if I misunderstood your point initially. In a sense, the area that you are raising with me is, primarily, civil cases and civil litigation, and it is a matter of individual choice for the consumer of legal services to decide what sort of representation they have. I was simply making the point that insurance companies may find it convenient to use senior counsel because of custom and practice. We pick up the bill when we pay for some civil cases through legal aid. I know that the Legal Services Commission has plans to look at the sort of issues you touched on, such as standard fees for civil cases, so that we control the cost of civil cases and the availability of senior counsel in civil cases for which we pay through the legal aid system. However, I would not try to defend the indefensible. I have to say that, as a member of the public, I have a certain amount of sympathy with your point.

Mr McLaughlin:

Given that we are discussing a report that demonstrates that legal aid services here are amongst the most expensive — if not the most expensive — in the world, I think that we can also demonstrate that there is a connection to legal services generally.

Mr Easton:

You will be glad to hear that this is my last question. Figures 12 and 13 illustrate the huge difference between the amounts paid under the VHCC and standard fee regimes. The report estimates that, between 2005 and 2010, nearly six times more may have been paid out in cases

that, ultimately, did not meet the VHCC criteria. That is an astonishing £23 million of public money that has been wasted. How can you possibly justify that?

Mr Perry:

I do not think that I would attempt to justify it, in the sense that, as the report brings out, unfortunately, the way in which the 2005 rules were drafted meant that a number of VHCCs were so classified that perhaps ought not to have been. Those figures reflect that to some extent. The 25-day threshold that was used in the 2005 rules was not in itself unreasonable. Indeed, it was based on rules that had previously existed in England and Wales.

The issue was around the likelihood of ever going to a trial that lasted as long as 25 days. Just because a case did not either go to trial at all or last 25 days does not mean that its classification as a very high cost case was not justified. There were some very complex cases, such as the Robert McCartney murder case, to take one example, which did not last 25 days but which involved a great deal of preparation and complexity. So, we accept that cases were classified as VHCCs that should not have been. However, just because a case did not reach the 25-day threshold or did not go to trial at all — the charges might have been withdrawn or a guilty plea might have been entered — does not in itself mean that it should not have been classified as a VHCC.

Mr Easton:

Do you think that you will be able to reduce the amount that is being wasted?

Mr Perry:

VHCCs have now been abolished, so we will not be in that position again.

Mr Easton:

OK; that is good to know. Thank you.

Mr Girvan:

I appreciate that you alluded to the fact that VHCCs have now been abolished on that basis. Like the Chair, I find it incredible that that situation was allowed to drag on until a devolved Minister

took it upon himself to put a bit of heat under the issue. That brings me on to my next point.

You mentioned the 25-day threshold, the difference between what happens here and what happens in England and Wales, where a very high cost case is classed as one that lasts over 40 days, the criteria that is used and the rationale behind that. I would like to know whether the Department is happy with the current arrangements, whereby the Courts and Tribunals Service sets the policy for criminal legal aid and bears none of the costs, while the commission is left to pick up the bill. That is the crux of it.

It is unbelievable that the situation was allowed to continue, given that there was a 15-day difference between what was classed as a very high cost case in England and Wales and what was classed as such in Northern Ireland, namely a case lasting 25 days. I would like some information and feedback on that.

Mr Lavery:

A threshold of 25 days was chosen for Northern Ireland because, in our system, we get relatively few very lengthy running trials. A lot of cases are maybe contested on the opening day of a trial. I imagine that the culture is that, once the defence sees the strength of the prosecution case or that the prosecution witnesses have come up to their proofs, it would ask for a re-arraignment so that the person can change their plea to guilty. The simple answer is that if we had picked the English threshold there would not have been any very high cost cases. What we were trying to do in the 2005 rules was to acknowledge that certain cases — we thought that there would be a limited number — by their complexity rather than their length, would be unfairly treated were they subject to the same fixed or standard fee as for routine cases.

Nick referred to the example of the case that, although it may not last 25 days, nevertheless requires different treatment because of its legal complexity, the number of witnesses involved and various other factors. We used the anticipated number of days that the case would last if it went to trial as a proxy for complexity. That is the way that test was applied. However, as I said in answer to the Chairperson's opening question, it was clearly too low a threshold in reality. We were getting perhaps three times more cases coming through that category than we had modelled.

Mr Girvan:

Paragraph 3.4 states that solicitors and barristers submit claims for payment once a VHCC is concluded, rather than agreeing in advance the amount of work that a case requires. It seems obvious to me that a scheme where the rate of payment is struck after the work has been done invites excessive claims. I fail to see why that expenditure should be markedly different from any other in the public sector, where the rate of payment is agreed upfront. Do you believe that that is a sensible and reasonable way to control costs and expenditure and deliver value for money?

Mr Perry:

The issue is about contracting in very high cost cases. I will ask David to pick up a number of points of detail in a moment. The introduction of contracting was considered in 2005. It was not taken up at that point because of the practical difficulties of putting the necessary arrangements in place and because the expertise did not exist here. Setting up all that would have delayed the other reforms in the 2005 rules. It was considered again in 2008 as part of a consultation, and David referred to that.

There was resistance from the profession, but there was also, at that time, considerable resistance to the concept of contracting in England and Wales. At that point, the future of contracting was by no means clear. Instead, other mechanisms were looked for in the 2009 rules to try to bear down on the cost of VHCCs. In retrospect, I have to say that contracting would have been a useful discipline had it been introduced. With the abolition of VHCCs, there is now no requirement to introduce contracting in this context, but it may be relevant in other areas of legal aid reform such as civil legal aid. David may want to add some detail.

Mr Lavery:

That was quite a comprehensive answer. One of the reasons that there was a resistance to contracting, and we looked at it seriously on two occasions —

Mr Girvan:

We tried to introduce it twice, and it was opposed by the legal profession on both occasions. It was determined by the National Audit Office in England that the value and benefits of the savings that could be delivered by using another mechanism would be greater, which just adds to what I

am saying. You have allowed yourselves to be bullied or dictated to by the legal profession, not just recently but for a number of years, probably until 2005.

Mr Lavery:

As Nick has touched on, there were three reasons why were persuaded that contracting was not a good fit for Northern Ireland. One was the opposition of the legal profession.

Mr Girvan:

You were persuaded.

Mr Lavery:

There was actually quite a good explanation for that. The Law Society was particularly concerned that the introduction of a contracting model would damage and undermine the community legal service of small and medium-sized firms that we have throughout the Province. We have about 550 solicitors firms in Northern Ireland, many of which are very small. There is wide access to legal advice in most towns around the country, and the majority of those firms do some legal aid work. Contracting tends to change the nature of the legal services market, with fewer providers doing the bulk of the work. The Law Society was concerned that the introduction of contracting might lead to a small number of big firms monopolising the legal services market to the detriment of the smaller firms. As I am sure that you will know from your own constituencies, many firms do a wee bit of legal work and wee bit of everything. The legal aid work is a good revenue stream for them.

The second reason, which Nick touched on, was that we were not quite sure that we had the expertise or the capacity to manage contracts. When you award a contract for a very high cost case, the case is managed in real time. In England, a specialist unit in the Legal Services Commission has account managers who manage contracts. Every three months or so, they discuss the next step that they will take with the legal team that is doing the case. That is a very intense process. We have only had experience of one case in which we had anything resembling that. You may remember that the relatives of the victims of the Omagh bomb brought a case in which we had to use a similar arrangement. That proved to be very resource intensive. It required a type of expertise that our Legal Services Commission, frankly, does not have.

The other factor to mention is that the 'Access to Justice Review Northern Ireland', which was published a couple of weeks ago, touches on contracting and expresses reservations about whether it would be a good fit for Northern Ireland because of the way that our legal profession is structured, particularly the solicitors' profession, for the reason that I mentioned a moment ago. When we had those consultations in 2008, the contracting system was getting into serious problems in England. There were a number of very high-profile cases in which defendants perhaps wanted solicitors of their own choice to represent them, but the solicitors were not contracted. Therefore, the Lord Chancellor had to enter into specific arrangements in order to get representation agreed in some very high-profile cases.

The thrust of your point is that the system is not good if the bill is made up after the work is done, and then you then pay for it. Contracting is one way of identifying cost at the beginning. We have gone for an alternative way, which is the standard fee approach. However, that achieves the same thing. Since April, if you were to take on a case as a solicitor or barrister, you would know the fee that you would get. It is administratively straightforward; it is predictable and it gives us budgetary control and predictability. You know the cost of cases from now on. If you know the number of cases, you know how much you will spend. Therefore, I suppose that my answer to your question is that we achieved it by a slightly less complicated route.

Mr Girvan:

I appreciate that. I do not want to drag out the matter any longer than I must. However, I, for one, feel that the recent threat from the legal profession to withdraw service delivery has, probably, ultimately, been part of the reason for the cave in on earlier occasions. That is how I see it. I, for one, do not believe that we have — to repeat the term that was used — "yellow pack" delivery of legal services in Northern Ireland: far from it, when we see the figures that are in front of us. It is sad that we have to come to the stage at which something has had to be dragged kicking and screaming to make change. That is how it appears. The matter is coming down to pounds, shillings and pence. We do not have it. We need to cut the cake accordingly. That is why we are here today to look at what has happened historically, which is that the profession has been allowed, for want of a better way of putting it, to write its own cheque. That is the impression that the public are getting. That is my impression. Therefore, I am not

convinced about many points that you have made.

Mr Byrne:

Thanks to the three gentlemen. Paragraph 3.5 tells us that you estimate that around five cases each year qualify as very high cost cases. However, in practice, there are, on average, nearly 30 a year. As a result, expenditure has been far greater than expected. In 2010-11, the total spend on very high cost cases was £13 million, which represents some 25% of the criminal legal aid budget, whereas it was only 8% in England and Wales. Do we really have more cases that fall into that category or, perhaps, has the scheme been out of control and exploited by the legal profession? Has it been a cosy club of legal people enjoying the gravy train of legal aid?

Mr Perry:

As David said, there is no doubt that the number of cases proved to be much higher than predicted, and, ultimately, that was down to a defect in the way in which the rules were drafted or interpreted. I agree that the system did not work effectively here. There should not have been so many cases, and that is why we have moved to abolish very high cost cases.

Mr Byrne:

There are routine adjournments in many of the criminal legal aid cases, and the clock keeps ticking for the costs for the lawyers, and nobody seems to be too concerned about it. I think that that means that a lax approach is being taken.

Mr Lavery:

Adjournments are a real problem, but my answer to everything, as you will have worked out this afternoon, is standard fees. Standard fees get away from that problem. It does not matter whether you have one hearing or ten, you get the standard fee. We have learned that lesson, Mr Byrne. We are looking at a study in Scotland, where they changed their system in the Magistrate's Court. They used to have one fee if somebody pleaded guilty and a higher fee if somebody contested the case. They have merged the two, so everybody gets the same fee, regardless of whether the client pleads guilty or contests the case. It has speeded up the throughput of the cases. We are certainly interested in that evidence.

Mr Byrne:

Do you think that there would be fewer routine adjournments if we were to introduce a stricter fee system?

Mr Lavery:

I am sure that there are legitimate reasons for some adjournments, such as a witness not being ready and so forth. A stricter fee system will certainly remove any slackness or perverse incentives to string a case out.

Mr Byrne:

We cannot have perverse incentives.

Paragraph 3.8 of the report points out that barristers regularly submitted brief fees for their costs without any supporting documentation. That was allowed to happen due to the loose drafting of the 2005 rules. I am glad to see that the rules changed in October 2009 to stop that practice, but why did it take four years to close that obvious loophole? Quite simply, barristers could reach for a small piece of paper and write out a fee, and it seemed to be accepted.

Mr Lavery:

I think the problem with the very high cost cases was twofold: one, there were more of them than we thought there would be, as we discussed; and, two, their cost was disguised until the end of 2008 or the beginning of 2009. You heard me mention earlier that very few of the cases had been assessed for payment by June 2008. Once we realised that there was a very high cost problem associated with those cases, we moved to consult on alternative arrangements. We looked at contracting, as I discussed with Mr Girvan, but we decided instead that we would tighten up the criteria for very high cost cases. One of the changes that we introduced in 2009 was to prevent barristers simply marking a brief fee. As you know, a brief fee is how barristers, by custom and practice, mark their professional fees. However, we think that it is more appropriate to have greater transparency if the payment is from public money. That is why we effectively did away with it in 2009. Now we are looking at issuing a direction to the taxing master to try to get more transparency into the remaining cases that pre-date the 2009 change.

Mr Byrne:

Are there still cases in the system that might be processed under the very high cost case system? Have you an estimate of what the total cost will be? It seems to me that a set limit would concentrate minds.

Mr Perry:

At the minute, I think the estimate is that there are 93 cases in the system under the 2005 rules. They have an estimated value of about £5·5 million. There are 199 cases under the 2009 rules, with an estimated value of between £16 million and £17 million.

Mr Andrews:

Ten of those cases have not concluded at trial stage, so that is the number of cases that are active or before the court.

Mr McLaughlin:

Thank you very much and good afternoon. On the certification of the very high cost cases, was it necessary to satisfy separately the estimated length of the case and the necessity for those cases to go to trial? Were those two separate requirements or criteria for awarding the certificate?

Mr Perry:

I will ask Paul to talk about the process.

Mr McLaughlin:

Did cases only have to satisfy one requirement, or was it necessary for them to satisfy both?

Mr Andrews:

The statutory test that was set out required someone to indicate that a case was likely to go to trial and that, if it went to trial, the duration of the trial was likely to exceed 25 days. That was effectively where England and Wales started when they first attempted contracting in 2001.

The difficulty that the commission faced when it was considering those applications was that the test was entirely subjective. Experienced barristers told the commission that, in all their

experience, they would always find that a particular type of case would go to trial, which would satisfy the test of whether it was likely to go to trial. They also told the commission that, from their experience, it was inevitable that such a trial would last for 25 days. That subjectivity was an unsatisfactory position in the argument for the test.

There was concern about whether the number of cases that were certified was appropriate, and, as a result, we tried to bring in some form of independent scrutiny to ensure that the commission was not being overly lax in the application of the test. Through the Courts Service, we invited a retired prosecutor with considerable expertise in those types of cases to look at the individual cases that were being assessed. That exercise concluded that the grant of certificates was appropriate in the circumstances.

In 2009, a very subtle but important change was made to the test, which meant that cases had to go to trial and had to exceed 25 days in duration. As you will see from the report, that change significantly reduced the number of grants that were issued, for the simple reason that the commission could now treat it as a more objective test. When we receive an application, we look to see whether the court has listed the case for trial — in other words that it is content that, in all probability, the matter will have to be determined by the court. If the court lists the case for trial, it will also list it for a period of time, and the commission will look to see whether that period exceeds 25 days. Only if it receives objective verification from the court that that is the case will the commission certify cases under the 2009 rules. As you will know from what my colleagues have said we are spared having to make that decision, with effect from April of this year, as it is not a criterion that applies for remuneration purposes.

Mr McLaughlin:

Would it be accurate to say that you, yourself, had a direct responsibility for developing the legal aid policy for those very high cost cases throughout the period in question?

Mr Andrews:

I was involved during that time.

Mr McLaughlin:

Therefore, you were involved in creating the subjective criteria that have caused so much difficulty. Paragraph 3.13 provides us with the astonishing statistic that only one in 10 VHCCs ever make it to trial or last in excess of 25 days. So, the test was not only subjective, it was ineffective in demonstrating value for money, given that public money was being spent.

Mr Andrews:

I do not demur from the observation that the test proved to be ineffective.

Mr McLaughlin:

In the development of the policy, was consideration given to processing the certification for the very high costs cases after cases are held, when you could establish completely objectively whether the conditions and criteria had been met?

Mr Andrews:

If my colleagues are content for me to continue, I will answer. That was considered, but it was concluded that that would be a step too far, for some of the reasons that David outlined earlier. In an ideal world, you would only want to see cases that lasted over 25 days certified as very high-cost cases. However, there was a desire not to create an impediment to prolong a case to get to that outcome. If there was a discussion by the defence team to identify that the proper charge which their client would plead guilty to was a lesser charge, but that had not been the charge preferred by the Public Prosecution Service, and that progressed towards the point of trial, effectively a considerable body of work would have gone into the preparation of the case, and, potentially, almost the persuasion of the PPS that the wrong charge had been prepared against their client. In that sense, we formed the view that, while it might be a desirable outcome, it might create a perverse penalty for those who had disposed of the case at a lesser offence than the prosecution had been determined to bring in the first instance.

Mr McLaughlin:

That is an interesting explanation and one that has some merit, but, if we look at the statistics, we find that, in practice, 90% of the cases did not meet the criteria but were nonetheless paid for.

Mr Andrews:

That is the outcome of the test. I go back to the language of the English test in 2001: if the case proceeds to trial, that the trial would be likely to last for 25 days or longer. England and Wales take the view that they might wish to bring a case into the discipline of the very high cost system, if they are concerned that it might develop unexpectedly during its course, so that they have early oversight of it. However, I acknowledge the strength of your point.

Mr McLaughlin:

In circumstances where a lesser charge resulted in the case being dispensed with more quickly than anticipated, you could argue that justice was served and that the Public Prosecution Service had questions to answer as to the level of charges it brought. I realise that it is a matter of swings and roundabouts. However, the public is concerned about these matters, and this statistic will be seen as the manifest failure of a formula that had been arrived at and negotiated primarily by practitioners and beneficiaries of a system that was broken before it even started. I suspect that, in the court of public opinion, people might think that a lesser charge had been applied than should have been brought in that regard.

Let us examine other deficiencies that developed in the system. I am concerned that lessons are learned, and I hear some reassurance that that is the case. We are always told that the wheels of justice grind slowly. Paragraph 3.17 points out that the Commission did not have the "authority to require" the taxing master to provide a breakdown the amounts that he or she approved or give any explanations for the decisions made. Does that effectively mean that claims were being paid without being properly substantiated by the Commission? Did it accept what it was told?

Mr Andrews:

We had a certificate from the taxing master, which, under the rules, was the authority which the Commission had to pay the bill, so the Commission had no role in formally scrutinising or approving payment. It was assessed by the independent judicial officer, as David described in an earlier answer.

Mr McLaughlin:

Yes, and that creates a very unusual anomaly in that accounting officers for the Department could not actually account. They had a certificate from the taxing master.

Mr Andrews:

The propriety and regularity of the expenditure from an accounting officer point of view was based on the fact that, under the statute, the taxing master had directed a payment in the sum of acts, and that is what the commission executed.

Mr McLaughlin:

Yes, but I would venture the opinion that that is a very unsatisfactory arrangement because even in a retrospective report such as the Audit Office or, indeed, this Committee would carry out, we cannot get those answers either.

Mr Andrews:

That is why the commission welcomes the 2011 rules that effectively remove that form of assessment of a case and make it a very objective assessment, which the commission can perform within its own locus.

Mr Perry:

As a Department, we would accept that that arrangement is archaic and, as I said, not fit for purpose.

Mr McLaughlin:

OK. So, we have a situation whereby the commission has no statutory power. Did you ever ask the taxing master to give an explanation, and what was the response?

Mr Andrews:

The direct answer to your question is no.

Mr McLaughlin:

You did not ask either?

Mr Andrews:

No.

Mr McLaughlin:

Would you like to be a builder in this circumstance?

Mr Copeland:

I surely would.

Mr McLaughlin:

There are a number of cases that, to use your expression, will be washed out of the system in the coming years. Will that be years? Have we any idea how long that will take and what can you do to control costs in those remaining and ongoing cases?

Mr Andrews:

If I may just continue with the answers: in respect of the cases that are determined by the taxing master under the 2005 rules, I think Nick said that 93 of those cases were still to be dealt with. Of those, 10 have yet to be concluded before the courts. David alluded to the possibility of a ministerial direction being prepared as to how the taxing master may address himself to the determination of those cases. We are happy to work with colleagues in developing that.

With regard to the 2009 rules, about 199 claims are outstanding. Those are a very different type of assessment, because they can be assessed only on contemporaneous records of the actual hours that were worked, whether by a solicitor or barrister. The short way of putting that is that it removes the brief fee from the scenario altogether. It has prescribed rates that the commission, by virtue of how it certifies a case, assigns to it. There are classifications of those cases.

We would expect the 2005 rules cases probably to wash out through the system by the end of the next financial year. Obviously, because there are 10 cases yet to be disposed of by the courts, there will be a tail there. In respect of the 199 cases, about 54 of those claims have yet to be determined by the courts. Depending on the court listing, I suspect that washing through those

cases will take to the end of the next financial year. However, that is us trying to anticipate the disposal of the cases by the courts.

Mr McLaughlin:

OK, I will leave it at that. Thanks very much for your help.

Mr S Anderson:

I see from paragraph 3.18 that, yet again, if the legal profession is not satisfied with the level of fees assessed as reasonable by the taxing master, it can appeal. The success rate has been relatively high, and subsequent increases have averaged over 50%. So far, that has cost the taxpayer an additional £2·5 million. However, since 2009, the Court Service has been able to challenge the appeals and has done so in 41 cases, of which 28 were withdrawn. Does that not seriously suggest that a large proportion of those claims were, to say the least, spurious in the first place, and why did it take four years before arrangements were put in place to mount that challenge?

Mr Perry:

The effectiveness of the system by which the Department can intervene would suggest that some practitioners do not have full confidence in the appeals they are making. So, it has been a very valuable power and one that the Department will continue to use while those cases continue in the system.

The reason for the delay in making that change was that it took a little while for the deficiencies of the 2005 rules to become clear, as David explained. However, once they did become clear, the tightened criteria and arrangements were included in the 2009 rules.

Mr S Anderson:

I think that the word "spurious" should be highlighted in some way. Case study 2 on page 33 of the report states that a barrister claimed £832,255. The taxing master assessed a reasonable fee as being £411,250, and the barrister was quite willing to accept that assessment in the end. Is that a spurious one? How many in the system were like that?

Mr Lavery:

I have looked into that case study because it is obviously very striking. It refers to the trial arising from the murder of Michael McIlveen in Ballymena in May 2006. You need to understand that two complete trials are included in those figures. Seven defendants were charged with various offences, including murder, arising out of that incident. The first trial ran from 8 September 2008 until it had to be aborted on 23 October 2008 because of evidential difficulties. A second trial began in the same case on 10 November 2008, and the verdict was reached on 25 February 2009. Sentencing took place on 1 May 2009. We talked earlier about cases that did not make it past 25 days. The trial in case study 2 was before the courts for 86 days over a period of 18 weeks. It is almost as if two cases are being presented as one there.

One could argue the contrary point: a much higher claim was submitted than the fees allowed by the taxing master and that meant that the taxing master was doing his job. He substantially reduced the claim put in by that QC. You can see that there was an interim payment of slightly more than the amount the taxing master allowed, which was then recouped from the QC concerned.

I am not trying to justify the unjustifiable, but it is important to note that that was a particularly lengthy case that involved two separate trials, which lasted a total of 86 days over 18 weeks.

Mr S Anderson:

It may have been an exceptional case, but, at the end of the day, the amount claimed to the amount paid is still the bottom line.

Mr Lavery:

Absolutely. It speaks for itself.

Mr S Anderson:

It speaks for itself, and it speaks volumes when the barrister is prepared to take it. We will leave that one. I just wonder how many of those are in the system.

What was the outcome of the second batch of cases referred to in paragraph 3.23 of the report?

Mr Perry:
I believe that those cases are being heard this week, so there is no outcome as yet.

Mr S Anderson:
I presume that it costs a great deal of time and money for appeals to be heard. Have you ever considered introducing a fee for that service?

Mr Andrews:
When we made the 2009 rules, there was some interest in seeing whether a fee could be introduced for appeals going through at that time. The legal advice, which was taken outside the jurisdiction rather than within it, concluded that there was no statutory power to introduce a fee for the appeal. So, it was considered, but it was not possible to introduce the fee at that time. It is something that we are keeping under review in how we move forward with the new arrangements.

However, as colleagues have outlined, such appeals as there will be under the 2011 rules are effectively appeals on matters of interpretation: did the commission pay the individual the right fee or the wrong fee? It is not a question of, "We do not think that we got enough money to recompense us for the work on the case." Therefore, there is a fundamental change in the nature of appeals moving forward, and it should be because the commission got it wrong that an appeal is successful.

Mr S Anderson:
So, it will be under review with the possibility of a fee.

Mr Andrews:
If I am paying for the appeal indirectly, I would like somebody else to help me.

The Chairperson:

Will you give us an update on the cases that are being held this week, so that we have that information for our report?

Mr Perry:

Yes, certainly.

Mr S Anderson:

You touched on this issue with my colleagues, but paragraph 3.25 states that new rules were introduced in April this year that effectively abolish very high cost cases. You touched on the figure for the Magistrate's Court, but how long will it take to get these cases through the system?

Mr Andrews:

I will go back to the answer to Mr McLaughlin's question. From the current profile of the cases, we expect that it will probably be about two years before they wash through the system. There are a number of cases that have not yet been before the courts, so it will depend to a certain degree on court scheduling and the disposal of those cases.

Mr S Anderson:

Do you have any idea of the total estimated cost of those cases?

Mr Andrews:

Nick suggested that the finite number of cases that we have referred to will cost in the region of £22 million. That is our current estimate.

Mr S Anderson:

My colleague touched on the fact that most people will see this as members of the legal profession more or less deciding for themselves how much time they will spend on any particular case. That being the case, they could maybe write their own cheques. If there is more money at the end of the line, it will encourage them to string out any case that they are involved in. Why would they close down a case when the longer it went on, the more money went into their bank accounts. I think that that is everyone's observation.

Mr Copeland:

Paragraph 4.3 indicates that the commission has needed additional funding, or a certain amount of money — depending on how you put it — every year since it was established in 2003. No other public sector body has been as bad at managing its budget, assuming that the budget was correct in the first place. Even though criminal legal aid is a demand-led service, and we accept that, why has the commission's budget forecasting been so far off the mark and, at the very least, not reflected past expenditure patterns? It seems that budget overrun was almost built into the system.

Mr Andrews:

I will start the answer to that question, and other colleagues can help me or not as they feel appropriate. I think that there are two issues here. First, the commission recognises that, historically, its forecasting has not been sufficiently robust, and the report recognises that considerable efforts have been made to improve that. We are continuing to invest a lot of time and effort into that area. However, the other side of that story is the point that David raised. The budget was set by Treasury because of its practice of aligning expenditure to thresholds that reflected where it wanted to have the figures sitting and then accepting, eventually when there was evidence, that there was not sufficient money allocated to pay the funds for cases that were in the system. So, the Legal Services Commission fully acknowledges that it has been through a journey but that that journey is not finished in our forecasting. That is something that is given top priority.

I will touch on one other aspect of your question. You asked why it was so wrong. There are difficulties with forecasting in a demand-led system with significant levels of increases in volume and significant changes in the types of cases. You could have significant increases in the more complex cases, which then increase your costs. These things are not static as the Audit Office report recommends, and, therefore, you cannot rely on historical trends because your pattern is continually moving. That created an inbred difficulty for proper forecasting.

The advantage of having standardised fees, as David outlined in response to other questions, is that it heightens the degree of predictability that surrounds an individual case. At this point,

under the 2011 rules, it is not very difficult for a solicitor to sit down at the beginning of the case and have a pretty fair idea of what the case will cost at the end. Again, the commission's forecasting will be assisted by that, and we are moving to deal with more real-time measurements of average costs and life cycles of cases and with concurrent information about the development of the volume and profile of cases before the court. So, we acknowledge the past and are grateful for the Audit Office's recognition of the work that is going on at present, and will continue to go on, to improve our forecasting.

Mr Copeland:

Before I ask a question to the Acting Treasury Officer of Accounts, I want to comment on something you said about complex cases and expert witnesses. Does a request for legal aid include amounts for an expert witness appearing on behalf of the defence?

Mr Andrews:

It can do and frequently does.

Mr Copeland:

Is there a set scale of charges for that or is it adjudicated in the same way as what the solicitors and barristers derive?

Mr Andrews:

There are two ways that that can happen. Some fees are set fees for low-line and regular things such as medical notes or attendances at hospitals that prove the actuality of an injury or something like that. They are standard fees that are payable. Then there are more complicated types of work, where the approach is on an hourly rate. That is recognised, for example, by the Crown Prosecution Service in England and Wales. It pays for cases and other sister jurisdictions pay for cases, and it is then a matter of trying to assess the number of hours that are required for that piece of work. Currently, with sister jurisdictions across these islands, we are trying to look at having a coherent approach to experts and their costs because you often find that the experts move across the jurisdictions. A common approach is desirable because, after all, we are all public authorities and pay money from the public purse.

Mr Copeland:

It is worth bearing in mind that paying particular attention to the costs of legal aid with relationship to the legal profession may not be the sum and total that requires to be looked at. In other words, other areas could stand some examination.

Mr Andrews:

We fully accept that point.

Mr Copeland:

May I ask the Acting Treasury Officer of Accounts a question? It seems that the Treasury has been very kind in the past when the commission found itself bereft of funds. Is it your assessment that the Department of Finance and Personnel (DFP) would be as kind in the future?

Mr Michael Daly (Acting Treasury Officer of Accounts):

The arrangements that are in place at the moment have been since devolution. All the policing and justice functions, including legal aid, have been devolved to the Executive, and that budget is now set. I will add a couple of points to that. The budget has been ring-fenced by the Executive, and that has been agreed by all Ministers. The Department of Justice will now manage within that fixed budget over the next four years, including dealing with legal aid. That is important because the Executive wanted to protect those functions that were already devolved so that if any issues arose with those functions they would not have to go to the other functions.

That said, the Justice Minister and the Department have an awful lot of flexibility. While the original package that was associated with and accompanied devolution included elements for legal aid, it included elements to soften the transition in other areas so that they would not be impacted upon. There was the more recent injection of almost £200 million. As well as that, in dealing with the Executive in that ring-fenced scenario, the Justice Minister has greater flexibility to move money around within his budget, without having to bring it back to the Executive. So, it is not just DFP but the Executive that are satisfied that a good arrangement is in place and that the Department of Justice can manage it.

Mr Copeland:

And, by implication, if the commission lives within its budget this year, as opposed to its performance in previous years, might that be the subject of some celebration?

Mr Daly:

It is for the Department to live within its overall budget. How it does that is a matter for it.

Mr Perry:

From a departmental perspective, we are not expecting any relief from DFP for the reasons that Michael explained, and it will certainly be a matter for rejoicing when we have fixed it. In the meantime, as we get down to profile over the next couple of years, the Department will have to continue to assist the commission.

Mr Copeland:

I shall progress as quickly as possible to paragraph 4.7, which indicates that, even if the commission achieves the predicted efficiency savings over the next few years, forecast expenditure still exceeds the budget. What more can be done to ensure that the commission lives within its overall budget and does not start to fight a war that is already lost?

Mr Perry:

That is a very good question. The commission has been set an additional target to achieve savings of £5 million per annum by 2014-15 in order to get the budget back down to profile. However, in the meantime, the Department will have to assist. We have a projected in-year pressure of around £14 million, which the Department will have to deal with. In the monitoring rounds, we are in the process of identifying funding to cover that. We have £4·5 million of easements we have identified in other parts of the Justice budget to put towards that. As Michael said, we were also allowed to carry forward some moneys from last year to this year which can be put towards that purpose. We will brief the Justice Committee on that in the next couple of weeks. So there will be a period when the commission will continue to have to be bailed out.

Mr Copeland:

This question is for the permanent secretary. Does he have an opinion on the shortfall, and, if

extra funding is required, will it be found by wielding the knife — for want of a better phrase — elsewhere?

Mr Perry:

Because we are ring-fenced, we have additional flexibility to move funding from one spending area to another, and we intend to use that flexibility to meet those shortfalls. It is a demand-led budget, and it could be that we will face significant pressure, but we think that we will be able to manage this year. We will look at the situation over the next two years. If hardy comes to hardy and we face an uncontrollable position, we will be forced to look at dramatic options, such as taking areas of civil legal aid out of scope. However, we are not in that position yet. We are looking at longer-term reform in order to get the budget aligned in the next two or three years. In the meantime, the rest of the Department will attempt to cover any shortfalls.

Mr Copeland:

Do we have per capita figures for the relative numbers of those engaged in the legal profession in Northern Ireland and in England and Wales, Scotland and Ireland? Could those figures be acquired?

Mr Perry:

I am sure that we could produce such statistics.

Mr Lavery:

I do not have them to hand.

Mr Copeland:

It would be good to have sight of those.

Lastly — you will be glad to hear — paragraph 4.9 of the report and paragraphs 10 to 14 of the Comptroller and Auditor General's report on the LCS's 2008-09 accounts indicate that one of the reasons that the commission's accounts have been qualified by the C&AG every year is that there has been insufficient evidence — a curiously legal term — to prove that legal aid has not been claimed fraudulently. What additional measures have you identified to prevent and detect

fraud, and how long will it be before they are in place?

Mr Andrews:

The commission and I, as its accounting officer, recognise the importance of the issue. The criminal legal aid issue has moved on very significantly. I will briefly outline the mechanisms in place and about to be put in place for criminal legal aid, and then I will comment more generally. As my colleagues said, at the outset of dealing with an application for criminal legal aid, the judiciary is required to assess the financial eligibility of the applicant and then to consider the merits of the case.

As regards financial eligibility, a significant proportion of those applying for criminal legal aid are in receipt of benefits, and those benefits are effectively their passport to being granted criminal legal aid. Arrangements are currently in place whereby a real-time check is performed on the morning of the court appearance to establish that the individual is indeed in receipt of the benefits claimed. At last week's Justice Committee, another colleague and I discussed that issue and how we could bring that function in-house. Furthermore, the Department is bringing forward proposals to the Justice Committee in due course to introduce a hard means test that will deal with people who are not on benefits to establish their entitlement to criminal legal aid. Again, that will provide an important safeguard.

Two important controls are currently in place for actual claims for funding. The court records automatically inform the commission that a legal aid certificate has been granted, so we have real-time verification of the establishment of a case and the granting of a certificate by the court, and when we receive the bill we can verify it against that.

I think that the most important development is the introduction of wholesale standard fees for the Magistrate's Court, and now the Crown Court, under the 2011 rules, so there is no opportunity for anyone to claim a fee for anything other than what is prescribed in the rules that the commission then applies. If there is any cause of ambiguity or doubt, we have access to the court record to satisfy ourselves about which is the right fee to be applied.

That is a broad outline of the mechanisms that are in place and will be put in place for criminal

legal aid. In all fairness, the report does not limit its comment to criminal legal aid. It also includes comment on civil legal aid. The commission has a number of initiatives, again, to deal with the claiming of entitlement and to look for updated verification of people's continued entitlement, and measures that we will take on board from the report, as they may impact on the civil legal aid scheme, which is not the subject of our discussion today.

I would like the qualification to be removed next year. I doubt that colleagues from the Audit Office will be quite persuaded by our discussions with them. I hope that, by that stage, they will be almost persuaded; although, from my point of view, almost will be but to fail. I think that we are probably a number of years away from having an evidence base that the C&AG would be content to stand over in respect of the qualification. It is not a matter of us resting on our laurels. We want the qualification removed.

Mr Copeland:

I want to make one last point. There is a flip side to justice. There is the defence and the prosecution, and each side requires legal expertise. Is there a relationship between the earnings and amounts paid on the defence side of the coin and those that are discharged on the prosecution side of the coin? What is the relationship between those two sets of costs?

Mr Lavery:

Throughout Britain and Ireland, there has traditionally been a differential, with defence costs being slightly higher than prosecution costs. You would find that in England and Wales, Scotland, and the South. Perhaps that is because, among other factors, prosecution counsel tend to be retained by the prosecution authorities and, therefore, have regularity and predictability of work. The Public Prosecution Service has published the cost of prosecution fees here, and those costs are strikingly low when compared with defence costs. I suppose that you have to factor into that calculation the fact that the Public Prosecution Service is about the biggest legal practice in the country. It has over 170 professional legal staff working in support of the prosecution counsel. So, the total cost is a result of a big factory of justice.

Mr Copeland:

It is a big factory of law, perhaps.

Mr Lavery:

Yes; good point. We are committed to working with the Public Prosecution Service (PPS) to align, to a greater extent, prosecution and defence costs. The Chief Inspector of Criminal Justice published a report on that earlier this year. We are already in discussion with the PPS about greater alignment.

Ms J McCann:

Some of my questions have already been answered, but I still have a number to ask. Paragraph 5.3 states that the legal aid reforms are some six years behind schedule. Why has it taken so long to implement that reform programme? Has anyone estimated the costs of the failure to implement it?

Mr Perry:

We acknowledge that it has taken a long time to get the reforms in place. As you said, we covered some of the issues earlier in the discussion. The report contains some criticism of the commission. We acknowledge that the commission was simply given too much to do when it was set up and, as a result, struggled to deliver on the civil side of reform. On the criminal side, there have been three big pushes to introduce reform: in 2005, in 2009 and now in 2011. It has taken longer than we would wish, but we think that the framework is now approaching the right place.

Ms J McCann:

Do you have an estimate of the cost of failing to do it?

Mr Perry:

I am not sure that I could put a precise figure on that. As regards aligning the budget, we expect to get down to a budget line of £75 million by 2014-15; that is the trajectory that we are on. One could argue that, if the changes had been brought in earlier, we would have progressed further towards that target, but I do not have a figure to put on it.

Ms J McCann:

Can you give an assurance that the criminal legal aid reforms will be implemented fully by 2013?

Mr Perry:

I give that assurance with the proviso that some aspects of it are subject to Assembly approval.

Ms J McCann:

You can give us that assurance then?

Mr Perry:

Yes, subject to.

Ms J McCann:

You have touched on the old cases that remain. The new Crown Court remuneration regulations, which were introduced in April this year, will cut fees by more than £18 million a year. Due to the number of those old cases, when do you expect that level of savings to be realised?

Mr Perry:

We expect to get down to the £75 million budget by 2014-15. As we said, there will still be a pressure on the criminal legal aid budget over the next couple of years.

Ms J McCann:

What concessions were made to the legal profession to get it to end its recent strike? What impact will those concessions have on the £18 million cash savings?

Mr Lavery:

As you know, the first thing that happened was that the Law Society and the Bar both indicated that they would not work under the remuneration arrangements that were introduced in April.

Ms J McCann:

We know the history of it. It was just that one point —

Mr Lavery:

The Minister agreed to have discussions to see whether there were anomalies in the rules that were introduced. I led those discussions during the summer. On 14 August, we tabled our response to the points that had been put to us by the Bar and the Law Society. We identified two areas in which fees needed to be re-categorised. However, we project the adjustments that we have made to be cost neutral. In other words, those adjustments will not have any effect on the £18 million projected savings. What went on during the summer was partly about helping the legal profession to understand that standard fees mean standard fees and that you do not get bolt-ons, top-ups and extras. There were no concessions that will have any significant impact on the figures that Nick has touched on.

Ms J McCann:

What were the concessions?

Mr Lavery:

There are cases in which, as you know, applications are made for the recovery of the proceeds of crime or confiscation. Those were not adequately catered for, so we have identified a proposed fee for those. The other area was sexual offence cases. There has been a lot of controversy in the past year about the effectiveness of sentencing in sexual offence cases. We have re-categorised certain application fees as public protection fees, but our modelling is that there will be no impact on the savings.

Ms J McCann:

You spoke about the impact on the legal profession, with some smaller firms maybe being affected. Do you foresee some larger firms from outside the North coming to practise here?

Mr Lavery:

The Department would, I think, welcome competition in the market because competition tends to drive down costs. However, we have not seen any great appetite for that yet. The firms that have come in the past couple of years — and you have seen various announcements about jobs — have tended to be off-shoring the jobs. The jobs that they have put into Northern Ireland have tended not to be legal jobs but more IT and back-office-type jobs.

However, we would welcome greater diversity and choice in the legal services market. There was speculation at the time of the strike that some firms from England may wish to enter the market here. In order to do so, if they are solicitors, they have to secure accreditation with the Law Society, and that was a matter of continuing discussion when the strike came to an end. I am not sure whether the firms that expressed an interest will pursue that, but we would be happy to facilitate that if they want to.

Ms J McCann:

Paragraph 5.5 refers to two important articles in the Access to Justice Order 2003 that relate specifically to the commission's duty to secure value for money. Mr Andrews, you told the Audit Office that — and I just want to make sure that this is a direct quote — that:

> "there is no statutory requirement for the Commission to assess the quality of criminal legal services".

As accounting officer, however, you have to maximise value for money because it is money out of the public purse. In the light of that duty, what arrangements have you established to ensure that the public money that you are responsible for is spent wisely?

Mr Andrews:

I acknowledge that the quote is from me. I think that it refers to the fact that the provisions that are specifically referred to in the report are uncommenced provisions in the 2003 rules. So, I was just making a technical point, perhaps you may say a boring one.

There are two issues about where we are with value for money and where we need to go. The first is whether the new remuneration arrangements reflect the principles of value for money. Those principles are set out in the legislation and are part of the framework of the 2011 rules, as they are of the 2009 rules for the Magistrate's Court. So, in a sense, a piece of work has been done by colleagues who developed those rules to put the remuneration arrangements on a value-for-money basis. Not only are they are doing that, but we are working with them to review the 2009 Magistrate's Court rules to ensure that those rules remain appropriate and, if necessary, to make adjustments to them. In so doing, the value-for-money test, which is set in the legislation for those fees, will have to be fully considered as new proposals emerge. The same approach will apply to the 2011 rules and 2013 rules. So, there is on statute a rolling programme of reviewing those remuneration arrangements.

The second issue is the provision of the service itself. That is a difficulty, because you have effectively a private sector provider that has a direct relationship with the client, and the Legal Services Commission has effectively an indirect relationship with the client. To address that, as indicated in the report, we have developed a registration scheme, which is currently voluntary. Some 95% of solicitors who do criminal legal aid work and legal aid work generally have subscribed to that. We are currently working through the structure of that voluntary scheme with the Law Society in particular, and we propose to pilot test it against solicitors' firms and records in the course of the next year before putting it on a statutory basis. It is important that we ensure that it works and that the scheme is valid and viable before we prescribe it.

The final aspect of the work that then becomes very important is to assess the face-to-face advice that is given or the representation made on behalf of the applicant in a court forum. We are discussing that with the Law Society and the Bar, because, effectively, there are a number of ways to do that, but you need someone who is competent to comment on the quality of the advice that is given. Someone may be convicted of a criminal offence but get very good advice because they have pleaded out to a lesser offence, or someone might not get the settlement in their child protection that they are looking for because they get bad advice. Therefore, we are in discussions with the Law Society and the Bar about an arrangement that would involve a peer review mechanism at some level to provide an assurance of the level of advice and representation provided.

To be absolutely clear, the Commission is very firm that anyone who provides publicly funded legal services has to be caught in the net of the registration scheme and quality assurance scheme; no one sits outside it.

Ms J McCann:
I have one final question. Why have these articles not been enacted, and when will they be enacted?

Mr Andrews:
These particular articles have not been enacted because they are part of a wider framework of

legislation around civil legal services and criminal defence services. In essence, what have been indirectly implemented are the value-for-money provisions in respect of remuneration only. We need to bring forward the registration scheme that will give us the statutory basis to move forward with quality assurance. As part of that mechanism, colleagues in the Department will take a power that will in the interim allow us to enter practitioners' offices to secure files should we have concerns. At the moment, we have a facility to require files to be submitted to us, and we do that from time to time as it appears appropriate, but we do not have a power to go into an office to take a file if we have particular concerns as to the urgency of something. That is being addressed as part of another legislative vehicle.

Ms J McCann:

Do you have an approximate time by when you think they will be enacted?

Mr Andrews:

We hope that the voluntary registration scheme would be put on to a statutory basis within 12 to 18 months, depending on the success rate of the pilot scheme.

Mr Byrne:

Paragraph 5.10 of the report states that the Audit Office found numerous instances of inadequate financial and management information held by the Commission. Indeed, the Commission's accounts have been qualified every year for many years due to the poor information used to calculate amounts to be paid at the year end. What steps are being taken to improve the Commission's management information?

Mr Andrews:

I will take that as two points. First, regarding information generally, and the calculation of provisions specifically, the Commission accepts that management information is an issue for us. We have a rather outdated IT system, which does not provide us with an array —

Mr Byrne:

So the machines are wrong, not the people?

Mr Andrews:

Oftentimes, the machine does not provide you with the information that you want, so that when we eventually end up answering members' questions —

Mr Byrne:

Garbage in and garbage out.

Mr Andrews:

— we have to do manual file searches, so that is effectively what we often do. We have a programme of work at the minute, which is identifying what our management information requirements are for the future. We have a new management information tool, which we expect to be in place by the end of the current financial year. It is part of a general upgrade of the IT system that is in place.

As I said in previous answers, the Audit Office has identified deficiencies in our collection of information that can be addressed by manually extracting and maintaining that information, and we are already doing that. That is a very high priority for the commission, because we can make ourselves much more efficient if we make the information available.

In respect of the qualification of the accounts and the provisions, I am again grateful to the Comptroller and Auditor General (C&AG) for including a recognition of the extensive work that has gone into improving our work in that area. This year has seen a further improvement in the assessment of the provisions that we have calculated. We continue to provide additional information, and, as I said to Mr Copeland, we look forward to removing the qualification for value for money. Given the amount of work and the evidence base that is already available for the C&AG in the current audit, I hope that we will be in a position to remove the qualification for provisions in a shorter timescale.

Mr Byrne:

Paragraph 5.12 shows that members of the legal profession have been involved in the process for determining fees and other areas of criminal legal aid. For example, the commission's board includes four members of the legal profession; three quarters of the appropriate authority are

either solicitors or barristers; and the criminal fees advisory committee is made up entirely of solicitors and barristers. Will you tell us why that has been necessary and assure us that it is no longer happening?

Mr Andrews:

I will take those in the order in which you approached them. I do not accept that there is an issue of conflicts of interests with the three legally qualified members of the board of commissioners. Part of the statutory criteria for the commission is that its members must have knowledge and experience of the delivery of civil and/or criminal legal aid and the work of the courts. As is the case in England and Wales, Scotland and the Republic of Ireland, there are legally qualified people on the panel. Those members are subject to public appointment. They are neither nominated by nor do they speak for their profession. They are wholly independent members of the commission who happen to have a legal background. The legal members of the commission play no part in any aspect of the commission's work in the area of criminal legal aid, other than providing the guidance and challenge function that any commissioner would. It is important to make a distinction between those members of the commission who are legally qualified. They serve on the commission in much the same way as medically qualified people may serve on the panels of heath trusts.

In many ways, the appropriate authority is a throwback to arrangements that were put in place in 1992. It has not sat since March of this year, and an instrument has been prepared and will be made in the course of the next month to transfer its residual powers to the commission. We perhaps alluded to those arrangements in a previous answer. They will mean that any of the old cases that are yet to be assessed will be assessed directly by the Legal Service Commission, and the appropriate authority will play no part in that assessment.

The criminal fees advisory committee has not sat since March 2010, and it has been stood down. With effect from today, there is no body outside of the commission which determines fees for criminal legal aid, save where the statutory function rests with the taxing master. We have about a dozen cases on which we cannot adjudicate until the new legislation is made. We will dispose of those cases when the new instrument is made in the next month.

The commission recognises the point about conflict of interest, as have our colleagues in the Department. That was moved forward with the introduction of the 2011 rules and the new provision to effectively abolish the appropriate authority.

Mr Byrne:
Does that mean that the taxing master is effectively in charge of the system?

Mr Andrews:
No. Very few cases actually go to the taxing master. The vast majority of cases are dealt with by the Legal Services Commission.

Mr Byrne:
Are you satisfied that the current arrangements provide appropriate governance of the Legal Services Commission?

Mr Perry:
Yes, I am. I hesitate because, as I have said, we are in the process of changing some of those arrangements. As I mentioned earlier, during the next few weeks, we will be creating a new access to justice directorate in the Department, which David will head. It will merge the Courts and Tribunals Service's current policy responsibilities with those of the core Department. Therefore, sponsorship of the Legal Services Commission will shift from the Courts and Tribunals Service to the Department of Justice. That change is appropriate under devolution. That will strengthen the governance arrangements.

Mr Byrne:
Do you expect greater discipline in managing financial costs?

Mr Perry:
We are already seeing greater discipline in managing financial costs in the commission. A great deal of work is being done to improve its effectiveness operationally, and, for the wider reasons that we have discussed, the Department is ring-fenced. There has to be better budgetary discipline to avoid other programmes being damaged.

Mr Byrne:

Given that all the others are legal people and, obviously, never want to break the code of confidence in each other as legal experts, do you, as the permanent secretary, agree that there is ample evidence to legitimately state that there has been blatant abuse of the legal aid system in Northern Ireland over many years?

Mr Perry:

I would not, perhaps, go as far as to describe it —

Mr Byrne:

How far would you go?

Mr Perry:

— as blatant abuse. I would, certainly, describe it as, perhaps, playing pretty fast and loose with public money and, where there has been a loophole, exploiting it. That is my perspective. Since devolution, we have built on work that was done previously. We have closed those loopholes quite effectively.

Mr Byrne:

Thanks.

Finally, I want to put a question to the acting treasury officer of accounts. What advice and guidance have you issued to criminal justice bodies on that issue? Have you specific comments to make on the issue?

Mr Daly:

Which particular issue?

Mr Byrne:

What guidance have you issued to the Department, the commission and the Courts and Tribunals Service on the management of conflicts of interest?

Mr Daly:

With regard to conflict of interest, there is already a substantial body of guidance and good practice in place. On managing public money, our document and the Treasury's document entitled 'Regulatory, Propriety and Value for Money' are both given to accounting officers on their appointment. In addition, we have issued specific guidance for civil servants. You will be aware of the staff handbook and code of ethics, by which all civil servants are required to abide. There is also a model code of practice that is issued for staff who work in non-departmental public bodies, which we expect to be applied. There is also guidance for reports in non-departmental public bodies. As far as the Department of Finance and Personnel (DFP) is concerned, the guidance is comprehensive and clear. It is for accounting officers to manage any conflicts of interest.

Mr Byrne:

Has the system been defective until now?

Mr Daly:

I cannot assess what happened in the Department of Justice either before or since devolution. DFP's position is that we put out the guiding principles and we expect accounting officers to manage with them.

The Chairperson:

I do not think that any other members have questions. I will finish off with one brief question. I ask you to make your answer brief. It is certainly the first time that I have heard the comment, "fast and loose with public money" in the Public Accounts Committee. Looking to the future, what changes can be made in the short term to make a difference in the system?

Mr Perry:

The fundamental step change is the introduction of the 2011 rules and the abolition of very high cost cases, as well as other measures that we will be taking through over the next few months, subject to Assembly agreement, such as changes to counsel, the recovery of defence cost orders and means-testing. They are important changes in process. The major change is one of political

energy. The Minister of Justice has the issue firmly in his sights. We have just been through a difficult summer with the profession. The world has changed. Therefore, it is partly about getting the framework right in going forward and also about conditioning expectations.

The Chairperson:

All of that will enhance the legal system entirely. The ordinary person in the street needs to be able come forward with an issue and not be put off. All of that has to be managed correctly. We have discussed savings. The comment was made that people had been "fast and loose with public money". How the system has worked for many years seems to be wrong. That cannot be allowed to affect the poor person either. Many issues have been covered. We have sought other information. We may write for further information. Thanks for your attendance.