Northern Ireland
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COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Legal Aid: Proposals for Primary and Subordinate Legislation

20 May 2010

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Lord Morrow (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Jonathan Bell
Mr Jeffrey Donaldson
Mr Tom Elliott
Mrs Dolores Kelly
Mr Alban Maginness
Mr David McNarry
Ms Carál Ní Chuilín

Witnesses:
Mr Robert Crawford) Northern Ireland Courts and Tribunals Service
Mr John Halliday)
Mr David Lavery)
Ms Angela Ritchie)

The Chairperson (Lord Morrow):

We will now receive a briefing on the proposed reform of legal aid in Northern Ireland. With us today are David Lavery, who is director of the Northern Ireland Courts and Tribunals Service; Robert Crawford, who is head of the public legal services division in the Northern Ireland Courts and Tribunals Service; John Halliday, who is a grade 7 civil servant in the public legal services division; and Angela Ritchie, who is also a grade 7 civil servant in that division. You are all welcome. Mr Lavery, you do not have to introduce yourself again, because you gave evidence to

the Committee at a previous session. However, you may wish to introduce the rest of your team.

Mr David Lavery (Northern Ireland Courts and Tribunals Service):
Thank you. Mr Robert Crawford heads the public legal services division and has responsibility for legal aid. He joined the Courts and Tribunals Service from the Northern Ireland Office earlier this year to take over that area of policy. Ms Angela Ritchie was a solicitor in a private practice until she joined the legal department of the then Court Service in 2004. She is now working on legal aid reform. Mr John Halliday is a career Court Service civil servant, who is also working on legal aid policy and reform.

I will make some introductory remarks, and Mr Crawford will then deal with the detail of some of the proposed reforms. Our objective today is to provide the Committee with an introductory briefing on the legal aid system in Northern Ireland and on the reform programme that is under way. In advance of this afternoon's meeting, the Courts and Tribunals Service provided the Committee with an introductory briefing paper.

The legal aid system in Northern Ireland, which was established in 1965, is the means through which people secure access to justice that they would not otherwise be able to afford. The current legal aid system covers almost the entire field of legal services, including criminal, civil and family cases. In a typical year, more than 80,000 people get help through the legal aid system in Northern Ireland.

Until November 2003, the administration of legal aid in Northern Ireland was the responsibility of the Law Society of Northern Ireland, which, as the Committee will know, is the solicitors' professional body. The administration of the legal aid system is now the responsibility of the Northern Ireland Legal Services Commission, which is sponsored by the Northern Ireland Courts and Tribunals Service.

The intention is that the Courts and Tribunals Service will retain responsibility for legal aid in the Department of Justice for the current business year. From the beginning of next year, it is expected that responsibility for legal aid will move to the core Department of Justice. Arguably, that is a more appropriate home for legal aid policy, given that it will lessen the emphasis on legal aid being simply about court cases. Repositioning responsibility for legal aid as part of the core Department of Justice will send an important signal that publicly funded legal services should be

about other forms of legal redress as well as going to court.

Legal aid is sometimes termed a demand-led service. That means that demand for the service grows continually and often unpredictably. That has an inevitable impact on the legal aid budget. Expenditure on legal aid in Northern Ireland has grown significantly in the past decade from £38 million in 2000-01 to £103 million in 2009-2010. That growth in expenditure has regularly outstripped the available legal aid budget, which has recently been running at £65 million a year. The result has been that additional funding has been required regularly to top up the legal aid budget.

As part of the devolution funding package that the Prime Minister announced in October 2009, the legal aid budget was increased from £65 million to £85 million through to 2012-13. From 2013-14, efficiencies are expected to reduce the legal aid budget in Northern Ireland to £79 million. The devolution funding package also provided access to an additional £39 million to meet additional pressures during 2009-2010 and 2010-11. That additional funding was made available to allow sufficient time to introduce the necessary reforms to reduce the cost of the legal aid system. The Legal Services Commission forecasted that, this year, legal aid expenditure in Northern Ireland will be £104 million. That means that, in order to reach our target of £79 million by 2013, the legal aid bill needs to be reduced by a quarter.

The Courts and Tribunals Service has been working on a comprehensive set of reform proposals with the objective of aligning legal aid expenditure with the available budget. In September 2009, we introduced two important reforms. First, we introduced a new system of standard fees for criminal cases in Magistrate's Courts. Secondly, we introduced reduced fees for what are called very high cost criminal cases in the Crown Court. The Committee will be aware that the reduction in the hourly rate for preparation in very high cost criminal cases, which we introduced in September 2009, has recently attracted public comment.

The Justice Minister has agreed that we should proceed with further reforms to reduce the cost of legal aid, and legislation will be required to achieve that. The Committee will be invited to consider the individual reform proposals in the normal way. In a moment, my colleague Robert Crawford will take the Committee through the detail of the reform programme.

I will finish by looking slightly further ahead. There would be benefit in establishing a review

of the Northern Ireland legal aid system. A root-and-branch review would provide the opportunity to reposition publicly funded legal services in Northern Ireland in a way that better meets the requirements of devolution. Indeed, instead of simply copying policies from England, devolution gives us the opportunity to decide what sort of legal aid scheme is appropriate for Northern Ireland, and we look forward to working with the Committee on that important aspect of public policy.

With the Committee's permission, Robert Crawford will now outline the principal reform proposals.

Mr Robert Crawford (Northern Ireland Courts and Tribunals Service):
First, I will pick up on a subject that was raised by the Committee in response to an earlier presentation, namely, looking at areas other than England and Wales. I assure the Committee that we look much wider than England and Wales. However, for courts, that is the closest jurisdiction to Northern Ireland. Therefore, for legal aid purposes, it is the most appropriate for us to compare ourselves with.

Criminal legal aid means-testing is one part of the proposed justice Bill that was mentioned. The principle of means-testing is out to consultation, which will end next week, and a number of representations, from quite a wide variety of stakeholders, have been made to us. Before the justice Bill passes through the Assembly and we bring forward subordinate legislation to set the level of the means test, we will have plenty of time to look at how means-testing will work in Northern Ireland.

The means test for criminal legal aid financial eligibility will be fixed. Depending on eligibility in Northern Ireland, the level at which the means test is set will determine how many people are eligible for criminal legal aid. There are a number of differences between Northern Ireland, other areas of the United Kingdom, Ireland and the wider world. For example, the eligibility rate for civil legal aid — these figures are a couple of years old — is 44% in Northern Ireland and 36·7% in England and Wales. Scotland acted recently to increase eligibility, so the figure there is 75%. In Northern Ireland, because we do not have a fixed test for criminal work, the figure is 80%. In England and Wales, it is 50%.

Similarly, the Committee will be familiar with differing levels of economic inactivity in

Northern Ireland. As part of the process, we look at those figures. In addition, there are differing levels of passport benefits, such as disability benefit eligibility, which is one of the eligibility tests for most civil legal aid. To pick up on one aspect of research that we carried out some years ago, the relationship between deprivation and eligibility is quite pronounced. In the 10% most deprived areas, approximately 28% of people charged with indictable offences are eligible for legal aid. In the 10% least deprived areas, eligibility is just 3%, so there is a correlation.

The point that I want to draw out from that is that, looking at those areas and taking account of the representations that we receive, as David said, access to justice is critical. In all the approaches that we take, we want to ensure that people who need access to legal representation or assistance, in whatever form, are not deprived of it because of a mistake in adjusting policy. I emphasised that point because, earlier, the Committee seemed to be quite interested in the topic.

I will now run through some of the areas that we are going to tackle. I emphasise that many of the reforms, particularly the ones that we hope to take forward quickly, are related to cost. According to research that the Ministry of Justice carried out a couple of years ago, out of 60 countries, the costs in Northern Ireland were the highest per head of population. Although I may be wrong on that precise point, Northern Ireland is certainly among the most expensive, as are all the UK countries. On the league table, we are in an expensive area.

As David said, measures have been taken. The transitional rates that were mentioned in the press were changed last September. We introduced new Magistrate's Court standard fees, which will have led to a bit of a reduction. They were based largely on the Scottish experience. We also tightened the assessment of very high cost cases, and there is a new statutory right for the Courts and Tribunals Service to intervene where practitioners seek a redetermination of the rate that has been given. We have intervened in 35 such cases and drawn the attention of the taxing master to another 25 cases in which we believe that determinations were not carried out in accordance with the new rules.

In the 2005 rules, we thought that we had specified that preparation work should be paid for according to hours worked and that those hours should be recorded. There was judicial comment on the subject in a case as long ago as 1993 and, by 2005, we thought that we had captured the problem. However, in practice, since the 2005 rules were introduced, in 90 cases — about a third of the 262 claims that defendants paid — we have no information about preparatory hours. That

is why we tightened the rules in 2009. I mentioned the topic because it illustrates how we administer the system. Information about those actions will not come to the Committee because they have already been carried out.

As regards what is happening in the coming months, the proposal on the graduated fees scheme is out for consultation. That is the system of standard fees for Crown Court proceedings that is used in England and Wales, and we use an equivalent system of standard fees here under the 2005 rules. However, when we reviewed those rules in 2007, we discovered that our system was up to 50% more expensive than the equivalent system in England and Wales. Further review suggested that there was no good reason why we should not move to the system used in England and Wales rather than attempt to tweak the 2005 rules. Therefore, we issued a consultation paper in September 2009 that proposed that as the way forward. The consultation period formally closed at the end of February. However, we are still in a discussion with the Law Society and the Bar Council about that proposal. We hope to be in a position to bring the conclusion of that consultation, together with other advice, to the Minister and the Committee as soon as possible in the coming weeks.

The next item that I wish to raise is the assignment of two counsel in criminal legal aid cases. A review, which was carried out by the then Court Service, identified that there were significant differences between here and England and Wales. Indictable offences are probably the most direct comparison. We found that two counsel or more were engaged in only 5% of cases in England and Wales involving indictable offences at the Crown Court, whereas, in Northern Ireland, two counsel or more were engaged in 58% of such cases. Clearly, having more counsel is more expensive, and we felt that we had to look at how to change that. We have proposed moving to broadly the same system as in England and Wales, and we put that out for consultation. The consultation is now complete, and we are in a position to bring forward proposals to the Minister and the Committee. In fact, it would have been just possible to do that before the devolution of policing and justice powers took place. However, we felt that it was better to present the whole package of reforms to the Assembly. I do not have much more to say on that point. We made a number of small changes to the England and Wales system in our proposal to take account of representations made to us. We will present that in more detail to the Committee when we bring the proposal back.

I mentioned the criminal legal aid fixed means test, which will be provided for in the Bill.

There is a test for eligibility for criminal legal aid in Northern Ireland. However, it is not paid to a particular figure, unlike civil legal aid, where there are three tests for £1,000, £3,000 and £8,000 in capital respectively. One of the things that we wished to do is to rationalise the civil legal aid tests. We are consulting on whether and how we could impose a fixed means test for criminal legal aid. In the meantime, we are looking at including what is called a convicted offender order in the Bill. The point of the order is to recover costs. When a defendant or criminal, who is obviously wealthy but has been given legal aid, is convicted, the order can be made to recover the cost of legal aid from that person, who would not have been financially eligible for that assistance in normal circumstances. That is a cost-cutting measure. The Committee will have the opportunity to look at that in the detail.

I have a number of points to make, so I will skip through them in a speedy fashion. If the Committee has any particular questions, it can raise them later. I wish to talk at some length about very high cost cases. There has been some media comment on that area. When the 2005 rules were introduced, we created a category called remuneration for very high cost cases. That meant that rather than standard basic fees with enhancements, which is the normal standard remuneration approach, remuneration was made on the basis of an hourly rate for preparatory work, which can be quite extensive in some lengthy cases, attendance in court; dispersements; costs; and so on. At the time the rules were made, we anticipated, based on the experience in England and Wales, that there would be about five very high cost cases a year. In fact, we have had, on average, around 50 to 55 such cases. To date, under the 2005 rules, the cost of the 262 defendants that we have paid out to is £54·1 million.

Those cases accounted for £28 million of the £100-odd million spent last year. Only a very tiny proportion of defendants are involved in such cases. However, I must stress that the cases are very complex and that a great deal of work goes into them, so it is right that the remuneration should reflect that. Nevertheless, compared with England and Wales, we are considerably more expensive as regards the average cost for each case and the way that remuneration is evaluated.

The rates of legal aid have already been changed, and the rules on assessment have also been tightened up. The next change that we may propose is a change to the number of very high cost cases. There is no consultation document on that as yet, but one may be brought forward shortly, and we have consulted with both the Bar Council and the Law Society on that matter. England and Wales apply a threshold to very high cost cases, with very high cost case certification being given to solicitors when a case lasts over 40 days and to barristers when a case lasts over 60 days.

That is the length of case that attracts the high level of preparatory work remuneration. In Northern Ireland, up to now, the threshold has been 25 days, and we have consulted with legal practitioners to ascertain whether that threshold should be raised or some other model used. It is in that area that we believe the highest level of savings can be made.

I will mention a couple of other changes that might be particularly relevant at this time, because we may bring forward consultations on them in the next few months. One change that may be made is in the area of two counsel civil legal aid. I will not say too much about that except to say that the Legal Services Commission will consult on the matter. It hopes to bring out a consultation paper in the autumn. The issues will, essentially, be similar to those around two counsel criminal legal aid, and there will also be a change to allow the assignment of two counsel in fewer cases so that costs can be reduced. The full details of that are not yet known, but a paper will go out for consultation in the next few months.

The Legal Services Commission also consulted some time ago on the funding code, which is a new mechanism for allocating priorities across civil legal aid. That will allow a Minister to set priorities. For example, it would be open to a Minister to say that eligibility for legal aid will be made easier in certain classes of cases. One area that the commission is carefully examining is domestic violence cases. The funding code proposal has been out for consultation, and that has now been completed. As time passes, the commission may want to consult on the matter for a further period, but, either way, that proposal will come forward in the coming year. It is not a big savings measure, which is why we have not put too much detail on it in our paper.

In the longer term, changes may also be made to civil legal aid fees, and there are some standard fees that apply in that area. The commission will look at family matters in the autumn, and it is likely that some proposals will go out for consultation then. The commission will be examining the whole area of standard fees over the next couple of years.

We have brought forward some legislation to clarify the position on statutory charges. We have put a further piece of subordinate legislation out to consultation, and we will bring that to the Committee in due course. Let me explain how a statutory charge would operate. If, for example, an individual were to engage in proceedings that resulted in the recovery or retention of substantial financial assets, whether they be property or money, it would be clear that they would be able to fund the cost of their legal action, and a statutory charge would be applied during the

action to ensure that those costs could be recovered if they were successful. In effect, they would be given legal aid to take the case forward, but, if they succeeded in gaining the assets, they would be required to pay back the cost of the legal aid. That system is already in place, and the new subordinate legislation will narrow the exemptions, particularly in matrimonial proceedings, which are considerably less tight in recovering assets than we would want them to be. The proposals will come back to the Committee for consideration in due course.

That was very much a canter through the proposals, and I understand if Committee members are feeling a little rushed. The proposals will come back in detail, but we welcome any questions, and I hope that we will be able to answer some of them.

The Chairperson:

Thank you very much, Mr Crawford, for that overview. A couple of things came to mind as you were speaking. You said that the legal aid bill had jumped from £30 million.

Mr Lavery:

It rose from £38 million to £103 million.

The Chairperson:

You may have answered my next question already, and I may have missed your answer. Have the administrative costs risen or decreased?

Mr Crawford:

In the same period, administrative costs rose from £2·7 million to £7·4 million, approximately. Thus, the administrative costs have increased significantly. Part of that is due to the fact that when the Legal Services Commission was formed, it had no capability or capacity to take on the policy research work related to civil legal aid, and it now has that capability. Along with the commission, we are considering closely where savings might be made. David may also wish to comment on that.

The Chairperson:

The legal aid bill increased by 300% and the administrative costs rose by a similar proportion.

Mr Crawford:

Yes, and we can identify some reasons for that.

The Chairperson:

Do you wish to comment on that, Mr Lavery?

Mr Lavery:

Not hugely; the facts speak for themselves.

The Chairperson:

You mentioned the bill of over £100 million, and you said that a small number of cases accounted for around £28 million of that. Is there any ability to make good some of the money from the big cases, even at a later stage? The public feel that some criminals are rather well heeled and have considerable assets that they should not be allowed to retain, yet they draw from the public purse through the legal aid system. Will the new proposals address that?

Mr Crawford:

Two measures would address that. One is convicted defendant recovery orders, which would allow recovery of a defendant's legal aid costs after the event if he or she were convicted and found to have substantial assets. The other measure is the proposed introduction of a financial eligibility test for criminal legal aid. The financial eligibility test may be pitched so that it moves up and down depending on the level of access to justice that it is necessary to reflect. The order proposal is rather more directed at the very wealthy defendant who manages to get legal aid but, after the event, is considered not to be an appropriate recipient of it. Perhaps my explanation of that is a little blunt, but those two measures will have the impact to which you referred.

The Chairperson:

I am interested in figures that are not factored into what you have said today. What amount of money might be sitting in the slipstreams waiting for procedures to catch up with events? That involves people who have been drawing on the system and with whom the procedures have not caught up. What amount of money is likely to be redeemed as a result of that? I am thinking particularly of the high-profile cases that have cost around £28 million. How much of that £28 million do you estimate it is possible to redeem somewhere down the line?

Mr Crawford:

Currently, 25 cases are waiting for payment, the estimated cost of which is £5·5 million. That figure is based on the 2005 rules. The rates were changed in 2009, and, as I suggested, the assessment of how cases are paid also changed then. The average amount of remuneration for each case will reduce significantly for cases that were certified from 28 September 2009 because of the new rates and the tightening of the rules on assessment.

Mr Lavery:

There is a lead time before a reform takes effect. The changes to the very high cost cases, which Mr Crawford described, came into operation in September 2009. That change was for cases that were awarded legal aid from that date, so many cases that had been awarded legal aid prior to 28 September were in the pipeline already, and they were awarded legal aid on the basis of the remuneration that was in place then. We do not have the authority to change that retrospectively.

It takes a number of months for new cases that were awarded legal aid since September 2009 to come through. Some of the repercussions of that are starting to be seen in public. There have been reports of a number of cases in which counsel have indicated that they will return papers on the basis that they will not accept the fees that have been available for very high cost criminal cases since last September. That is clearly the prerogative of individual counsel, but the public might find it somewhat difficult to understand why counsel would not accept fees that are acceptable for equivalent work in England and Wales, for example.

There is a lead time before the reforms kick in. We cannot recoup the £28 million that has been paid out because it has been earned and assessed. Those are payments to which the legal representatives are entitled, but we can arrest that type of growth. We will see a significant reduction in the cost of very high cost cases as a result of the new fees that we introduced in September 2009.

Mr Crawford:

We also introduced a provision that allows the court service to intervene when cases have been assessed at the old rates and practitioners seek to appeal the award and increase their remuneration. The court service now has a right to intervene and make representations. The representations on the 35 cases so far are that rates should be applied strictly on the basis of hours worked rather than marking a brief fee and submitting it to the taxing master. We have drawn the

taxing master's attention to 25 cases in which we believe that approach should have been adopted, and we are talking to him about how to deal with those. We have also closed the door on any return on the appeals side. Therefore, the tail of cases coming through, which David referred to, should start to drop off quite steeply.

The Chairperson:

How far back do those 25 cases date?

Mr Crawford:

We would need to research that, because some could date back years. There is no standard or average length of time, and it can take some time for actual claims to come through even after a case has been completed. I would be happy to research the figures and give them to the Committee.

The Chairperson:

I take Mr Lavery's point that if the lawyers have done their work and earned their money, they are entitled to be paid. I understand that you would not go back and tell them that there is something wrong. However, I am talking about the criminal who claimed that he was a poor man but, once the court case has finished, is all of a sudden quite wealthy and well heeled. How far back can you go to redeem a situation like that retrospectively?

Mr Lavery:

There is a principle against retrospectivity. Mr Crawford referred to the provision to recover costs when it is disclosed in the course of a case that a defendant did have means. Unfortunately, that only takes effect from the date that it goes on to the statute book.

Mr Crawford:

Primary legislation such as the justice Bill or some other suitable vehicle will be required to take it through.

The Chairperson:

Are you totally satisfied that what is being proposed to reform legal aid will be infinitely better than what has happened heretofore and that some of the issues that we have talked about today will be consigned to history?

Mr Crawford:

Yes, and I can say that with some confidence because, as the new head of the division, my objective is to reduce the cost to £79 million in 2013-14. Although we need to improve the work on figures and forecasting, I am confident that it can be done. That is the test of success on the financial side. I emphasise that in a lot of other reform work, which we have not set out in detail today, there will be a big issue about how we ensure that access to justice is as good in Northern Ireland as it is in any other part of the world.

Mr Bell:

That last statement is very encouraging.

The figures for expenditure on legal aid show a sizeable jump from £69 million in 2006-07 to £83 million in 2008-09. In that period, the population of Northern Ireland increased from 1·741 million to 1·775 million, which is an increase of less than 1%. The legal aid bill, however, jumped by £14 million. Before becoming an MLA, I served on a district policing partnership (DPP), and, as other members of the Committee will say, DPPs were being told constantly that crime was being reduced. My question could be the result of naivety on my part, but given that 61% of the total legal aid budget is spent on criminal legal aid, that crime has reduced and that the population has risen by less than 1%, how can a jump of £14 million, or nearly 20%, be explained?

Mr Crawford:

First, eligibility for criminal legal aid does not follow crime figures. We believe that the number of people who are eligible for criminal legal aid has increased because of the recession and the economic downturn of recent years. That point is supported by the fact that the number of people who were given certificates to be assisted with criminal legal aid rose from 30,000 last year to 33,000 this year.

Secondly, the period that you mentioned saw the payments for very high cost cases coming through. The payments for very high cost cases under the 2005 rules were £90,000 in 2005-6, £1·28 million in 2006-07, £6·48 million in 2007-08, £17·45 million in 2008-09 and £28·4 million in 2009-2010. The increase in payments for very high cost cases is the largest proportional contributor to the overall cost increases.

It should also be noted that there had been a payments backlog in the system for a while and that those increases, particularly the increase in 2009-2010, reflected our catching up with that backlog. More resources were put into making the payments; another taxing master was assigned to do that. Therefore, the gradient of the increase in payments is smoother than it looks in that we know that much catching up was done in 2009-2010.

Mr Bell:

I know Churchill's old phrase that there are lies, damned lies and statistics, but, according to the figures, although eligibility for legal aid has increased by only 10% and crime has gone down, expenditure on legal aid has increased by 20%. The public will find that hard to understand. There is a perception that there is a gravy train.

Mr Lavery:

It is not all about cost growth, but volume growth was an element in the figures. In the 10 years between 1996 and 2006, the number of Crown Court prosecutions increased by around a third. That goes some way to explaining growth in that period, but, as Mr Crawford said, the introduction of the new legal aid remuneration structure, which took place in 2005 and started to come on stream in the following year, is the single biggest factor. That created an exceptional category called very high cost cases and that has been the single biggest cost driver in the legal aid budget since 2006.

There are a number of factors. First, the Legal Services Commission, which certifies cases as very high cost cases — in other words, it controls the numbers; it is the gatekeeper — certified a number of cases that was far in excess of our modelling and far higher than what had been expected based on the experience of England of Wales. As Mr Crawford said, far more cases qualified as very high cost cases than we had anticipated.

The fees paid for those cases are substantially higher than the standard fees paid for cases that are not very high cost. They are just in a different place and are partly based on a system of ex post facto assessment. In other words, when a case is over, the legal representatives claim the fees to which they assert they are entitled, and an assessment is undertaken by a judicial officer called the taxing master. Therefore, there can be no predictability about the cost of a very high cost criminal case. It is very difficult for us and the commission to model and say what the next

five cases, for example, will cost. We can only extrapolate from previous cases.

There has been a practice not to adhere to the regime that was meant to be introduced in 2005, which was to be largely based on claiming for the number of hours' work done by way of preparation and the number of days spent in court on the case itself. Quite often, instead of submitting a time-based bill, counsel still adhere to the custom and practice of marking a brief fee. A brief fee is a composite amount indicating, in many instances, the pre-trial preparatory work and conduct up to the first day of the trial. As Mr Crawford said, we have intervened in a number of assessments to try to address that, because, under the 2005 rule regime, that is not meant to happen; costs are meant to be time-based.

Arguably, it should be acknowledged that the solicitors working on very high cost criminal cases have, generally speaking, adhered to the principle of billing for the hours of work done, because that is the way that solicitors charge for their time. Traditionally, however, barristers tend to mark a brief fee rather than bill for specific time spent. Counsel have been generally slower to adjust to the new remuneration structure, and, unfortunately, we have been paying the price for that.

Another factor is the greater incidence of using two counsel. Typically in Northern Ireland, around 58% of Crown Court cases have senior and junior counsel as well as a solicitor representing the defendant. In England, the figure is closer to 5%, which is much lower. We have a reform proposal to address that, which we will be bringing to the Committee. We are not trying to stop people accessing a QC or senior counsel in cases that merit that. However, the decision to award a legal aid certificate for senior counsel is one better made by a Crown Court judge when the case comes for trial. At that stage, a Crown Court judge can, for example, see whether the PPS has instructed senior counsel to prosecute the case, in which case, there is an equality of arms issue. At the minute, that decision is made by the magistrate when a case is sent from the Magistrate's Court to be committed for trial at the Crown Court. We feel that that is far too early in the process to make the decision. The much greater incidence of senior and junior counsel in very high cost cases and in the Crown Court generally is another cost driver that we need to address.

It may simply be that, in future, the legal aid system in Northern Ireland will, for the most part, pay for people to get a competent solicitor and competent junior counsel in the generality of

cases. Senior counsel should be reserved for the exceptional and most complex cases, as appears to happen in legally aided cases now.

The Chairperson:

Who established the criteria for very high cost cases? At the end of the day, categorising cases might help to explain the cost, but it does not change the legal cost. It does not change the total at the bottom of the page. Who brought in the idea of high cost cases?

Mr Lavery:

The legislation introduced by the Lord Chancellor in 2005 was meant to change the remuneration system in the Crown Court and base it primarily on standard fees. It also provided for a category of exceptionality, which exists in England. As often happens, we have replicated a regime that operated hitherto in England and Wales. It gave the role of gatekeeper to the Legal Services Commission.

The Chairperson:

You lifted that regime from England and Wales?

Mr Lavery:

Effectively, yes.

The Chairperson:

Are our costs the highest?

Mr Lavery:

Yes.

The Chairperson:

I do not know whether you used the words “in Europe”, but we have the highest costs, followed by England and Wales. Was the system in England and Wales the best example to go for?

Mr Lavery:

Up to 12 April, the Northern Ireland legal aid system was the responsibility of the Lord Chancellor, who is also the Minister for the legal aid system in England and Wales. It is not

hugely surprising that, if the same Minister is responsible for the legal aid system in England, Wales and Northern Ireland, his expectation might be that, in similar legal systems, a similar legal aid system would be appropriate. However, I said earlier that I feel that one of the benefits of devolution is that we now have scope to develop opportunities and not simply replicate provisions from England and Wales that have been designed for a particular legal system and legal services environment. That is why I was suggesting that it is likely that the Minister will feel that a review of the legal aid system is appropriate to reboot the computer — to use a clumsy analogy — and decide what system is right for here.

The Chairperson:

It might not be hugely surprising that that will be done, but it is hugely surprising that our system is the costliest.

Mr Bell:

The 2007-08 figures show that the per capita spend for England and Wales was £37 and that the spend for Northern Ireland was £41, yet, within 12 months, we have jumped from £38 a head in England and Wales to £46 a head in Northern Ireland. That is a 100% increase in 12 months. Did England and Wales not suffer the same recession? Arguably, they have suffered it worse than we have.

Mr Lavery:

The spend per capita is arithmetically correct, but a lot of that spend was due to the release of a large backlog of very high cost cases that were in the system, which Mr Crawford referred to. When the 2005 rules were introduced and began to come on stream in 2006, there was a delay in assessing the very high cost cases, largely for reasons of capacity in the Taxing Office. Very few of those cases were assessed.

The Committee might recall that, just over a year ago, there was almost a strike by legal practitioners in Northern Ireland, not because they were not getting rates of fees that they thought were appropriate, which is possibly what they are going to do now, but rather because their fees were not being paid because of the backlog. Representations were made to the then Lord Chancellor about that difficulty, and, with the agreement of the Lord Chief Justice, an additional taxing master was appointed and a taxing team was set up to clear the backlog of cases.

Such was the difficulty that some legal representatives were saying to us that they had to clear their tax liabilities in January but had an immediate cash flow problem. Therefore, the Lord Chancellor also approved an interim payment arrangement that immediately released money to those lawyers who wanted to participate in the scheme — obviously, most of them did. Some 60% of the amount that they were claiming for a case was paid upfront by way of an interim payment. The bill that they submitted was then assessed by the taxing master. If any additional fee was owing to the legal representative, it was then paid, or if the taxing master assessed that the appropriate fee was below 60% of the amount originally claimed, as happened in a number of cases, that had to be recouped. The interim payment scheme allowed for that.

That is the circumstance in which a splurge of very high cost cases was released into the system in the past year, and that has caused a great spike in average costs for purely arithmetic reasons.

That is why the cost of very high cost cases has gone up from £6 million in 2007-08 to £28 million last year. That was a huge splurge. A lot of those cases came through in the past 12 months instead of being spread evenly over the past three years.

One point worth making is that spend on legal aid in England per head of population is, as you said, roughly £38. When the additional legal aid budget that the Prime Minister agreed as part of the devolution settlement tapers to £79 million, which, as I said earlier, will happen in 2013, legal aid spend per head of population in Northern Ireland will be £40, whereas in England it is £38·55. It is important to note that the then Prime Minister and the Treasury agreed that there was a justification for slightly higher spend per head of population on publicly funded legal services in Northern Ireland than in England. That has much to do with Mr Crawford's points about the much higher proportion of households on benefits in Northern Ireland and the higher incidence of economic inactivity. Weighting is built in to reflect that, but it is not enough to justify the difference between £38 and £46.

Mr Bell:

It is about a 10% difference; it is not as much as 20%.

Mr Lavery:

That is absolutely right. We feel that —

Mr Bell:

Is that of the £14 million?

Mr Lavery:

Yes.

Mr Bell:

You made the point about the idea that people could charge what they like for preparatory hours. The public expect the taxing master to check those hours. Was that not done in the past?

Mr Lavery:

The taxing master has assiduously dealt with very high cost criminal cases. He has even done modelling with the support of some of our staff and some staff from the Legal Services Commission. He has done modelling to ensure that we do not have a phenomenon whereby people claim so many hours for one case when they are also working on two or three other cases. There are only so many hours in the day, and people are paid for each hour only once. I, therefore, reassure the Committee that the taxing master has been quite assiduous in his approach to that.

Mr Crawford:

I wish to make one point about the timescale in which the problem became apparent. Given the long lead-in time on lengthy very high cost cases — I provided figures a short while ago to illustrate that — it only started to become apparent some time in 2007-08 that the 2005 rules were not working in the way in which we had expected. The small number of cases meant that it was not immediately clear whether we had simply got a small number of very high cost cases that were being assessed properly, in which case the remuneration was right, or whether we had a bigger, more widespread problem. When the problem was identified, it was fixed by closing off the assessment issue.

Some other controls in England and Wales, which we do not have here, have made it easier to apply that there. The Court Service expected that, under the 2005 rules, legal aid fees would be paid on the basis of hours put in by the legal profession, attendance at court, and so on. In practice, we are now able to say that, in one third of those cases, none of our figures was put in. However, the taxing master, working against a backlog of cases, some of which were sitting for

quite a while, did his best to try to turn that around and give what he felt was fair remuneration.

We believe that our drafting of the 2005 rules could have been tighter, given that the wording used was "shall have regard to". I think that one of my colleagues has that legislation with him today. The wording was something like "may only be assessed according to". I stress that, even today, we are still trying to catch up with and understand exactly what went wrong. However, the lack of figure work and data for hours worked have made it difficult to find out exactly where that problem arose.

Mr Donaldson:

Mr Lavery, in your opening remarks you referred to the review of legal services in Northern Ireland. Latterly, you mentioned that again and pointed out that, as a result of a review that was initiated by the Lord Chancellor, the Legal Services Commission in England and Wales has been repositioned to become an integral part or agency of the Ministry of Justice. Do we need a review to tell us that that should be the outcome in Northern Ireland? From what you said, I get the impression that you are pretty clear about where you see the process going. Therefore, I am left wondering why a review is necessary. However, in fairness, in response to a question from my colleague, you talked about the possibility of using other models that are used in other jurisdictions. Now that we have devolution, we are freer to look at those models than has been the case hitherto. Nevertheless, I still wonder whether a review means a delay.

Secondly, are cost savings from the way that legal aid is administered likely to result from drawing the Legal Services Commission into the Department of Justice? What is the benefit of bringing legal aid into the Department rather than leaving it where it is?

Mr Lavery:

You are quite right to point out that a review took place in England — the briefing paper mentioned that. There is a Legal Services Commission in England as there is in Northern Ireland, and the review in England was driven by particular issues to do with the operation of the Legal Services Commission there. It was almost a review of the Legal Services Commission rather than of legal aid. It resulted in the recommendation and the swift change that, instead of being a non-departmental public body, the Legal Services Commission in England will be made an agency of the Ministry of Justice, which may well result in administrative savings.

With that sort of change, it is important to ensure that the decision to grant legal aid is not interfered with. If a Government Department were to run the legal aid system, the public would want to have confidence that the granting of legal aid was an independent decision, especially if someone was making a claim against the Government.

The devolution of justice and policing appears to have brought the opportunity to review not only the Legal Services Commission but the legal aid system and what we call publicly funded legal services. A few years ago, a fundamental examination of the Legal Services Commission took place and, as a result, quite a lot of improvements were made.

I have to acknowledge, however, that there has been an upward drift in the administrative costs of legal aid. We touched on that in an earlier exchange, and we want those costs to come down because they have to come out the legal aid budget. The budget of £79 million for 2013 not only has to cover fees for legal aid cases but the running costs of the type of administration that we have at that point. If, in 2013, running the Legal Services Commission were to cost £7 million a year, it is self-evident that only £72 million would be left for paying for people to get access to justice.

I am keen for a review of legal aid, including a review of the mechanism for delivering it. That would include a review of the commission, but the review should be much broader than that. That is consistent with the point that I made at the beginning about moving responsibility for legal aid into the core Department of Justice. The problem with giving responsibility for legal aid to the Court Service, which is what happened in 1982, is that it tends to suggest that legal aid is all about court cases and litigation.

Some imaginative models that allow people to get access to justice and redress for legal difficulties that do not necessarily involve going to court are already in place. For example, the Legal Services Commission in Northern Ireland has awarded a very effective contract to the Law Centre to do with legal advice on immigration. A person who wanted legal advice on immigration law in Northern Ireland would be directed to the Law Centre, which has expertise in the field. The contract is much more cost-effective for dealing with acts of assistance, which is a clumsy term that means the number of people who are helped. If the equivalent were delivered through more conventional channels, such as private practitioners, it would be significantly more expensive. That seems to be quite an imaginative solution and, perhaps, a mixed model could be

used that involved the advice centre much more centrally in the early stages of any legal dispute, particularly civil disputes on issues such as housing.

Almost for the first time in a generation, we have an opportunity to decide how we spend this £80 million a year that the legal aid system is likely to cost. Arguably, too much of that money goes on too few very expensive cases that help only the parties involved in those immediate cases. The money could be spent much more effectively to help more people than we can reach through the existing model. I hope that that gives you some sense of our position.

Mr Donaldson:

It does. Thank you for that. I need to be clear: Mr Crawford, in his canter earlier, took us through a long list of changes that have already occurred and those that will be in the proposed justice Bill. I am left wondering whether much of what we are already dealing with can be dealt with through legislative reviews etc.

We cannot prejudge the outcome of any review, but I struggle to understand. A repositioning of the Legal Services Commission seems to command a consensus of sorts. If we can deal with many of those other issues in the ways that Mr Crawford outlined, what will the review achieve? You mentioned some things that could be looked at. The Law Centre does an excellent job, and I agree with you that it is a model that might be looked at. Is the review going to be a bit more radical than the kind of thing we have heard about hitherto, which amounts to a degree of tinkering? That is not a criticism, because I know that there are limitations on what you can do. However, are we talking about something more radical than just playing around?

Mr Lavery:

I hope that my team does more than tinker. A fairly fundamental programme of reform is involved. However, that is necessarily restrained by the architecture of the legal aid system. The legislation basically says that, if someone is eligible, they can go to a lawyer in private practice, just as though they were privately funding their own case, and the taxpayer will pay the fees. Escaping those parameters into a more diverse way of helping people get access to justice will require new primary legislation.

It is desirable to do something from an independent perspective, just as Professor George Bain did when considering legal services in Northern Ireland. In trying to deal with the system as it

works now, we are almost too close to the coalface. It is an inevitable outcome of any review that a diverse market for legal services will emerge. That is bound to be more cost-effective, and there will be areas of excellence, such as the Law Centre provides for immigration, where, frankly, people get better advice than is available elsewhere. If I had that type of legal dispute, I would go to the Law Centre. I have recommended it to others, and it is widely acknowledged that the Law Centre is the market leader. Furthermore, it works very cost-effectively.

We recently put a free advice service into the High Court because one of the problems of the recession is the number of people who have fallen behind in the payments on their mortgages and who were being pursued for repossession of their houses. We put in place an arrangement with the Housing Rights Service charity to provide a free legal clinic at the High Court on the days when those cases are being heard. It is remarkable how many people turn up without taking any legal advice. I guess it is because when a problem arises, people tend to ignore it, and that includes denying everything until arriving at the door of the court. The clinic has had a huge impact. The figures published last week show that the number of mortgage repossessions has gone down dramatically because of intervention. It acts almost as a triage, does not cost very much and is delivered through a charity. However, it is arguably a much more effective remedy for people than some of the other models that have been in place for 25 years or more.

Mr Donaldson:

Do you anticipate the remit of any review having the capacity to look at models in jurisdictions beyond the UK?

Mr Lavery:

The criminal justice review in Northern Ireland, with which you will be familiar, was a good model, because it looked at a lot of international models before it made recommendations. Something similar would be desirable because, as the Chairperson pointed out, figures published by the European Council show that the publicly funded legal aid systems in Britain and Ireland probably cost more than anywhere in Europe and perhaps further afield. That is because they are based on the simple and classic model of giving people taxpayers' money to go to lawyers in private practice. I would like the review to be much more wide-ranging before any recommendations are made.

Mr McNarry:

You are all very welcome. I am interested in a couple of areas. Your submission states:

"A range of reforms are being pursued in order to reduce the cost of legal aid and to align future expenditure with the budget recently announced by the Prime Minister."

I take it that that means the previous Prime Minister?

Mr Lavery:

It does, indeed.

Mr McNarry:

That is OK; I was getting a bit worried in case I had missed something.

I looked at your projections, the interesting initial forecast, the revised forecast and your budget. If you can reconcile some of the numbers in the forecasts with your budget, good luck to you. How damaging do you anticipate the bad news, which we are all expecting, to be for your budget and how will it impact on those projections between now and 2014?

Mr Lavery:

You quite rightly point out that our submission should refer to "the then Prime Minister". As the Committee knows, as part of the devolution funding settlement, a significant proportion of money has been put into the Northern Ireland legal aid budget. The then Government and Treasury, with input from the First Minister and deputy First Minister, decided that the problem would not be solved by throwing money at it in perpetuity. They gave us enough money to have enough time to solve the problems; therefore, they gave us quite a lot of money for 2009-2010 and 2010-11.

Most of that money will be spent by the end of the current financial year. That is the additional £39 million that I referred to in my introductory remarks, which is there to buy out the legacy cases that are still in the system. The real work starts in the financial year 2011-12, because we have to get legal aid expenditure aligned with a budget of £85 million.

As Committee members can see from the figures that we provided, going on our current forecast, we could miss that by about £5 million without some of the additional reforms that Mr

Crawford mentioned. The clear and explicit statement in the Prime Minister's letter of 21 October to the First Minister and deputy First Minister was that efficiencies are expected to bring the legal aid expenditure in Northern Ireland down to £79 million by 2013.

From our present trajectory, we are about £18 million out of line with what that provides for, which is why Mr Crawford listed so many reforms. Although everyone's heads went light when he listed them, they will all be necessary to get that deficit down.

Mr McNarry:

I am very glad that this is being recorded for Hansard, because none of that has registered with me. I will have to read the Hansard report after the meeting.

Mr Lavery:

It is a huge challenge. There is also general recognition within the legal profession that there is no prospect of any increase in the legal aid budget in Northern Ireland beyond that agreed by the then Prime Minister. Putting more money into the legal aid budget in Northern Ireland will be at the cost of other essential services, such as education, housing or social services. We all recognise the reality that we are dealing with.

Mr McNarry:

I am more concerned when I hear the Chairman referring to wealthy criminals, and somewhere along the line, up comes the subject of wealthy lawyers. I am not looking at anyone in particular.

The Chairperson:

I made no reference to wealthy lawyers.

Mr McNarry:

Wealthy criminals. The mind boggles as to how we can look after the people who need the service.

However, I am anxious about budgets, and I hope that you will keep in touch with us on that subject. Your Department is new to the Assembly, and on all other Committees there is intense scrutiny of budgetary competency. That will apply to your Department as well and I know that you would expect that.

I picked up on the idea of a review when you mentioned it in your opening remarks. You have discussed that idea with some of the other members. Are you saying that it is the Minister's intention to initiate a review?

Mr Lavery:

Yes, —

Mr McNarry:

Just let me finish. Committees do not get involved in reviews except to scrutinise outcomes. Is it too soon to think that, although the Minister may want to initiate a review of what we are talking about, this Committee may be conducting an inquiry somewhere down the line?

Mr Lavery:

Strange as it may seem, we welcome the scrutiny from the Committee. The then Court Service, which has been responsible for legal aid in Northern Ireland since 1982, has been rather unsupervised and has not been scrutinised. We were nominally under the scrutiny of the Justice Committee at Westminster, but I never darkened its door in the nine years that I have been head of the Court Service.

Legal aid is an important area of public policy, it involves a lot of money and, as I said earlier, it helps 80,000 people a year. However, the system has faced challenges in three fundamental principles: cost control, budgetary predictability and value for money. I do not think that we can tick any of those boxes this afternoon. I am suggesting that a review is certainly necessary and desirable. I hesitate to encourage the thought that an inquiry is necessary; that is for others to judge. We suggested to the Minister that there is an opportunity now to conduct a review so that the incoming Minister, whoever that may be after the next Assembly election, has a set of wide-ranging proposals based on comparative international and other analysis. It is almost, as I said, like rebooting a computer.

Mr McNarry:

The idea of an inquiry is part of what I am coming to as a final observation. I have been reading the press cuttings that we have been given, and I know that we should not always believe everything that we read in the papers. I am alarmed, as, I believe, are most of my Strangford

constituents, that a number of barristers have withdrawn from court cases recently, arguing that fees of approximately £150 an hour are not enough. I would hate to think that we could not get consultants for our hospitals because we do not allow them to play with the Health Service in the way that they want to play with it. Whose damned service is this that lawyers would make such statements? It is because I was alarmed that the idea of an inquiry came into my mind. I see that they are talking about a reduction in the high costs only from £180 to £150. My question is for guidance. Is this where we sit with a Department of Justice within the competency of the Assembly for elected members to determine the hourly rate for legal aid payment made to lawyers? It seems to me that we have to be asked somewhere down the line.

Mr Lavery:

Yes, absolutely. It is given statutory expression. The rate that has been debated in the media this past week was enacted at Westminster by Jack Straw, the Lord Chancellor at the time. The next change to that rate will be enacted by the Assembly. That is why the world has changed, as I tried to explain to the people with whom I am in this difficult conversation about what people will work for.

You touched on an interesting comparison with the hospital consultants. Whatever you think about the adequacy of that system of governance —

Mr McNarry:

I have an admiration for lawyers, in case I need them, but I have a greater admiration for hospital consultants, in case I need them.

Mr Lavery:

I stand to be corrected, but I think that I am right in saying that a National Health Service consultant working 37·5 hours a week would have difficulty earning more than £175,000 a year, including a merit award.

Mr McNarry:

That is terrible.

Mr Lavery:

There are other initiatives, including waiting list initiatives. However, the information that I have

is that they receive a basic salary of £100,000 and £75,000 for what used to be called a merit award. The figures might not be 100% right, but they are more right than wrong. The figures published by the Legal Services Commission for 2007-08, show that 26 barristers in Northern Ireland earned in excess of £250,000 from the legal aid system. Some earned £750,000.

Mr McNarry:

I will end with this. Your team has given us tremendous answers, and that is why the Hansard report will be important to us. If they were not earning that sort of money, or if legal aid was not providing it to them, where would they go to work to get that money?

Mr Lavery:

I suppose that we have a mixed economy here, as there is for any consultant, and I suppose that some people do legal aid work exclusively. However, it is a generalist Bar and people are entitled to earn as much as they will be paid, other than when the money is paid by the taxpayer.

Mr McNarry:

I agree with that.

Mr Lavery:

Some of the remarks that have been made in public in the past couple of weeks and published in the local newspapers with regard to the comparator with the hospital consultant, dentist or schoolteacher, for instance, are not as inappropriate as has been suggested.

Mr Elliott:

Thank you, your evidence has been very interesting. I will be brief. The part of your presentation about the reduction of fees states:

"This resulted in both the Bar Council and the Law Society passing resolutions that the rates do not provide reasonable remuneration and that solicitors should not take on work, whilst counsel may decline to accept work, at those rates."

The briefing goes on to state:

"We believe that the negative reaction from both the Bar and the Law Society is not related solely to the change in rates."

Those two statements do not match up, unless there is an explanation.

Mr Crawford:

Will I come in on that?

Mr Lavery:

Please do, because I do not know the answer.

Mr Crawford:

I want to make a couple of clarifications. First, the headline rate of £152·50 that has been trailed in papers was the rate that was quoted to the Minister in an interview. It is fair to say that that is a very rare rate that would be incurred in very high cost cases. Most trials are category-two trials. That may not be a much lower system, but the highest rate for that comes down to £119. I say that to clarify that there is a skill rate. We gave the Committee a table to illustrate those rates. It is only fair to make that point.

Our understanding is that the opposition is not only about the rates.

I want to draw out one effect that we have discussed this afternoon, without suggesting that anyone in the legal profession has said this to us, which is the fact that, in many cases, remuneration is not paid solely on the basis of the hourly rate. In 2009, we tightened up that system of remuneration to exclude payment on the basis of a brief fee. That matter is for the legal profession to comment on rather than us.

In the paper, we want to put across that the hourly rate is in itself a headline rate. We have used it as a comparator because we were making a reduction based on where we were previously. However, the effect of what we did in 2009 is not just about the hourly rate; it is also about saying that, in future, remuneration will be based only on hours that are worked and claimed for, not where hours have not been claimed for and a brief fee has been submitted, which has happened in one third of the cases that we have seen. The principle is not new. It was raised in a court case in 1993 when Lord Justice McDermott said that that is the process that should apply. We thought that we had it tight in the 2005 rules: we had not, and that is why it was fixed in 2009.

Mr McCartney:

In your presentation, you said that consultation has ended, although you are still in discussions

with the Bar Council and the Law Society. When do you expect those discussions to end? How much will the gap narrow as a result? We expect to hear from both bodies in due course.

Mr Lavery:

I think that both the Bar Council and the Law Society expect to meet the Minister of Justice during the first week of June. That is probably a natural end point to what has been a consultative dialogue with the two professional bodies.

Mr McCartney:

In 2009-2010, £28·4 million was spent on very high cost criminal cases. What was the total cost for the other category, and how many cases did that involve?

Mr Crawford:

When you say the other category, do you mean civil cases?

Mr McCartney:

Is there is a category for very low cost criminal cases? *[Laughter.]*

Mr Crawford:

In 2009-2010, the figure for very high cost criminal cases was £28·4 million. The Magistrate's Court, which has a standard fee rate, not an hourly rate, has costs of £14·8 million. The Crown Court, which, again, has standard fees, has costs of £16·3 million. The Appeal Court has fairly minimal costs of £500,000. That brings the total for criminal cases to £60 million.

As regards civil legal aid, the rate for legal advice and assistance, which is generally the green form scheme, is around £88 per application. That cost is £3·5 million. The cost for advice by way of representation is £1·8 million. Descriptions of those costs are outlined in our paper to the Committee.

The cost for cases that are brought to court under the Children (Northern Ireland) Order 1995 is £5·5 million. The cost for full civil legal aid is £26·1 million across all matters. Civil legal aid does not have the same very high costs as criminal cases, and many more cases are involved. We can provide figures if they are not in the paper.

Mr McCartney:

Initially, it was projected that there would be about five very high cost cases each year. There ended up being between 50 and 55. We will come back to that issue.

How many cases did the £16·3 million involve?

Mr Crawford:

You mean the £16·3 million in Crown Court fees? I thought that we had provided figures in the paperwork.

Mr McCartney:

I am talking about the actual number of cases. If the figure is available, can you tell me how many of those cases involved two counsel?

Mr Crawford:

We would have to do some research to get that particular breakdown.

Mr McCartney:

Did the higher percentage of cases involve two counsel?

Mr Crawford:

The highest possible percentage of cases involving two counsel would be the very high cost cases, simply due to their nature, their complexity and how they qualified for that status. The next highest percentage is, effectively, that of Crown Court cases.

Mr McCartney:

That is the £16·3 million. How many of those cases involved two counsel?

Mr Crawford:

We would need to research that. I am not sure whether we have that information.

Mr McCartney:

I know that it is not policy, but I remain unconvinced about the way in which it is decided whether there should be senior counsel on a case and about how the Public Prosecution Service

(PPS) conducts itself. If it wants to lessen the standard, it can do so.

Mr Crawford:

One of the proposed criteria for having two counsel is if either a senior counsel or two counsel are allocated by the prosecution.

Mr McCartney:

But if the PPS decides not to allow two counsel, it is deciding the standard of justice.

Mr Crawford:

Again, the proposal paper outlines other criteria that can apply. It has been out for consultation and is available to the Committee.

Mr McCartney:

I want to compare the figures, because the £16·3 million for the Crown Court involves hundreds and hundreds of cases, I assume.

Mr Crawford:

Yes; in fact, the numbers are in their thousands rather than hundreds.

Mr McCartney:

Do a large number of the cases involve two counsel?

Mr Crawford:

We need to check the figures, but, yes, a significant number would.

Mr McCartney:

The focus is on the very high cost criminal cases, so the headlines will, therefore, state that all lawyers are paid high fees. However, if thousands of cases are included in the £16·3 million, the fees are not necessarily that big.

Mr Crawford:

I do not have a breakdown of figures for cases with two counsel, but I will give a breakdown of the certificates granted in 2009-2010. The figure for criminal cases was 33,355; for advice and

assistance in both civil and criminal cases, 34,080, of which 17,000 would be criminal; for assistance by way of representation (ABWOR), 3,600; for Children Order work, 6,481; and for full civil cases, 8,357. Those figures have gone up and down a bit. The biggest change over the previous year is probably on the criminal side. Against those figures, we will try to provide a breakdown of how many cases had two counsel. We will give full details of the representation.

Mr McCartney:

I have two reasons for asking the question. The second reason is that, if it was projected that there would be five cases and, in the end, there were 55, there is clearly a gap in the process. David has already said that he has never been scrutinised by any Committee. Who should have spotted that the projection was wrong, and who should have corrected it?

Mr Crawford:

We should be able to provide the figures, although there may be some imperfections in them.

Mr A Maginness:

I declare an interest as I am a barrister. I welcome today's discussion, which has been helpful. However, I am trying to understand the aim of your policy on legal aid. Is the aim to reduce cost or is it to establish access to justice? It seems that the latter is the paramount interest in policy determination. I am reassured that you are taking the view that you are not going to transfer, lock, stock and barrel, the position in Britain to here. You will be aware that, no later than last year, the PAC slated the Legal Services Commission in Britain for its costs, its failure to be efficient and its decision to reduce equality of legal representation in the Crown Court in England. Taking that experience into account, one would be reluctant to endorse any transfer. Therefore, I am reassured that that will not happen.

What stage have you reached in your negotiations with the legal profession, and has the legal profession been prepared to attempt to meet the cost factor that you have highlighted? Have reasonable proposals on those cost factors been put forward? It seems that, at this point, the Department's aim is to try to establish a situation whereby it is within budget and within the £85 million or the £79 million in later years. Have there been proposals that would bridge that gap?

Mr Lavery:

With regard to your first point, the objective of the legal aid system in Northern Ireland is to

provide access to justice. I would assert today that there is nothing in the reform proposals that Mr Crawford took the Committee through that would imperil that principle. We have not once suggested restricting the scope of the legal aid scheme, for example.

Mr A Maginness:

Your figures indicate that there has been a 46% drop in the number of civil cases receiving legal aid over the past decade or so. Therefore, it seems that the ordinary man in the street or the ordinary worker in the factory who needs to go to court for a personal injuries claim, for example, is less likely to go to court and obtain legal assistance.

Mr Lavery:

I will let Mr Crawford deal with some of those points after I complete my answer. I have already asserted that I do not consider that we are doing anything that would undermine the principle of access to justice. Our primary objective at the moment is to align legal aid expenditure with the available budget. That is clear and transparent from the discussion that has taken place over the past hour. The discussions with the two legal professional bodies have been conducted on the basis of that overall objective. Mr Crawford has led the discussions, which we call the consultative dialogue, and he will say something about that in a moment.

You mentioned the criticism of the performance of the Legal Services Commission in England. As I indicated to Mr Donaldson, Sir Ian Magee's review of the Legal Services Commission in England was driven by factors specific to that body that I do not think apply to the Northern Ireland Legal Services Commission. Hopefully, it will be of some reassurance to the Committee that not only is the Legal Services Commission here audited externally by the Northern Ireland Audit Office but it comes under the remit of the Criminal Justice Inspection Northern Ireland. That body will conduct a review or inspection of the Legal Services Commission in Northern Ireland as part of this year's inspection programme. There will be some sort of external scrutiny, and the outcome of that will be brought to the Committee's attention. That may be helpful in clarifying the state of play.

If I may, I will now ask Mr Crawford, who has led some of the negotiations with professional bodies, to speak about that.

Mr Crawford:

I will deal with the statistics and then ask Angela to comment. Last year, the number of cases receiving full civil legal aid increased from 7,142 to 8,357. The number of cases relating to the Children Order that received full civil legal aid increased from 5,517 to 6,481. Advice by way of representation dropped by only 14 cases to 3,600 cases. The big drop came in advice and assistance, namely the green form scheme, which is probably what Mr Maginness is referring to. That is one of the areas on which the Legal Services Commission wants to work in the immediate future. Angela may want to give a bit more of a flavour of what has happened in that regard.

Ms Angela Ritchie (Northern Ireland Courts and Tribunals Service):

I will turn first to the queries regarding eligibility. A large number of people in Northern Ireland are in receipt of passport benefits such as income support and jobseeker's allowance. That has been the case historically, and it is the case currently. We have consistently had more people financially eligible for civil legal aid, and, therefore, it is surprising that there is a reduction in civil business over the corresponding period.

There is a complicating feature behind the eligibility figures. There are three different types of civil legal aid for everything from first advice, assistance or quick discussion of a problem with a solicitor right through to a case that ends up in a High Court. We are happy to say that, along with the Legal Services Commission, which is leading on the reform of civil legal aid, we are trying to take forward a work programme that will harmonise the three different tests, which involve the green form scheme, ABWOR and the Children Order, into one. That would create consistent eligibility across the schemes, and it would help us to learn more and understand eligibility better. So much could be achieved from a social justice perspective if we could get that right. Why would we want more people to be eligible for the most expensive types of legal aid — the final civil legal aid scheme — than are eligible for earlier advice and assistance? That would be a worthwhile thing to examine, and we are seeking to address that with colleagues in the commission.

Alban, you asked why there has been a decline in business over the past decade. We suspect that the eligibility rules may play a part, but, in truth, we do not fully understand it. That phenomenon also appears to have occurred in Scotland, too, as they have also experienced a steep decline in business, although Scotland has radically reviewed its eligibility rules recently to help people through the economic downturn. There has been a big push from within government there

to expand the number of people who can access the civil legal aid scheme. The estimate is that almost three quarters of the population might be eligible, which is a significant step above where we would be, notwithstanding our high levels of eligibility.

Encouragingly, the Legal Services Commission piloted an important survey on legal needs a number of years ago, and we are happy to report that the commission now wishes to refresh that exercise. Hopefully, at the end of that exercise we will better understand the trends that lead to an increase in justiciable problems but a decrease in the number of certificates or acts of assistance.

Mr Crawford:

We have agreed to fund the refreshment of that study, and we hope that it will begin shortly.

Mr A Maginness:

There is a perception that access to legal aid for civil actions is extremely limited, and that is reflected in the fact that there has been a reduction of 46% in the number of civil cases receiving legal aid. If we are to provide justice for people on the civil side, we must have a system that is not so prohibitive and onerous that it prevents ordinary people from accessing it.

Yesterday, I was in the house of an ordinary working man who had lost his finger at work. There is a perception that someone like him would be unable to take action under the civil legal aid scheme. That man works and is not on benefits such as incapacity benefit, yet, because of the criteria, he may be prevented form obtaining legal aid. We must have a system that will assist people to get justice from our courts. That would be money well spent.

There is no reason why a civil legal aid fund for cases involving personal injuries and similar issues should not be able to pay for itself. Very rarely is the civil legal aid fund called on to pay up. Invariably, cases are settled or won, and very few cases are lost at a cost to the fund.

Mr Crawford:

There have been very productive and constructive conversations between the Legal Services Commission and the legal profession about establishing a single civil legal aid fund. The Legal Services Commission is, I think, still hopeful of bringing forward some form of voluntary approach or pilot scheme in the coming months. That would be followed by the appropriate legislation to bring such a scheme into statute. Mention has just been made of how the fund

would work. It would pay for itself. Money would be paid into a fund that would pay for cases that were not won, so no one would be denied legal representation to take those kinds of cases forward.

You asked about progress on discussions with the legal profession, the Law Society and the Bar Council. In my view, we have not received proposals that would meet the cost requirements that we have been set to meet by way of bringing in reforms. To explain further, I think that what has been put to us is more expensive than what we have at the moment. However, I will not say anything further because those discussions are being held on a without prejudice basis. I am quite happy to ask the professions if they would like to table their proposals to the Committee. We would be quite happy to table our costings to allow the Committee to form its own view, but I think that the details should be a matter for them rather than us.

Mr A Maginness:

Are those negotiations continuing?

Mr Crawford:

They are. Meetings with the Bar Council have been arranged for next week, and we have sought to have a meeting with the Law Society before both bodies meet the Minister the following week so that we are absolutely clear that we have carried out as much consultation and discussion as possible. The discussions have been ongoing since December, when the consultations on the threshold for very high cost criminal cases and the graduated fee schemes were under way. That was part of the context. The consultations were extended to the end of February to facilitate continuance of the discussions. The consultation on the graduated fee schemes formally ended in February, but we have continued in consultation to see if we can establish any better approach, particularly on the very high cost criminal cases, with which we know there is a problem. I think that that has been collectively acknowledged.

The Chairperson:

I am sure that everyone is agreed that the subject has had a fair hearing. We will bring the session to a close. There will be more meetings, and, if members are in agreement, we will ask the Clerk to schedule briefings on different elements of the proposals, particularly those that may be included in the Bill.

Mr Elliott:

It might be useful for the Committee to have a summary of the consultation responses from the Law Society and others.

Mr Crawford:

I think that those are already available. We will have to update the Committee on the consultations that are either just completed or just coming to a close, but we will see that the Committee has those responses.

The Chairperson:

Thank you for coming today.