COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011

26 May 2011

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Colum Eastwood
Mr Seán Lynch
Ms Jennifer McCann
Mr Alban Maginness
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr David Ford	)	Minister for Justice
Mr Robert Crawford	)	Northern Ireland Courts and Tribunals Service
Mr David Lavery	)	

The Chairperson:
During the previous mandate, the Committee was briefed by the Department on proposals to reduce the remuneration levels for defence representatives in Crown Court cases. The Committee was also briefed during the last mandate by representatives of the Bar Council and Law Society regarding their objections to the Department's proposals.

They submitted a joint alternative proposal about how the fees could be reduced. That was

considered and rejected by the Minister, who then set out his proposed way forward in an SL1. The Committee wrote back asking for the reasons for rejecting the joint proposal to be outlined and discussed with the Law Society and Bar Council.

A statutory rule was laid by the Department of Justice on 23 March which introduced lower rates of remuneration for solicitors and barristers providing defence services in Crown Court cases. That rule is subject to negative resolution. Since the statutory rule outlining the Department's proposal was submitted to the Committee, the draft rules have been amended, and details of those changes are outlined at paragraph 5 of the paper.

The Department also highlighted a number of omissions and typographical errors in the laid statutory rule, but the report of the Examiner of Statutory Rules said that the nature and extent of those errors were, in his view, minor in the context of the regulations, and, as a whole, were of a nature such that they should be treated as printing errors and corrected accordingly in the final printed version. The Examiner has not raised any other issues with regard to the technical aspects of the statutory rule.

Obviously, since the rule came into operation on 13 April, a number of solicitors have withdrawn their services, otherwise known as having "come off record", in cases that would attract the new lower rates.

Also in members' packs, there is a letter from the Human Rights Commission about concerns that have been raised about the withdrawal of services. In addition, the Law Society and the Bar Council have written to outline a number of concerns and issues about the statutory rule. Those letters were circulated via members' packs, under tabled items, and they were e-mailed yesterday. They were late in coming, so we will spend some time looking at the concerns expressed.

We have the Minister and his officials, Mr Lavery and Mr Crawford. You are very welcome to the table, along with the Minister. Hopefully, you will be able to explain to us where we are today. The session will be recorded by Hansard. In previous meetings, we went into private session for some discussions. If members wish to do that at some point, we can. We will leave that for members to consider. I shall hand over to the Minister and his officials.

Mr Ford (The Minister of Justice):

Thank you very much, Chair. I am afraid that what I say will, to some extent, be repetitious for those who sat through lengthy discussions on the subject in the previous mandate, but I think that it is important for new members of the Committee that we go through in a fair amount of detail the issues surrounding legal aid. Thank you for the opportunity to address it in detail.

As you said, I am accompanied by David Lavery, the head of the Courts and Tribunals Service, and Robert Crawford, whose title I have just forgotten but who has primary responsibility for this particular area. Sorry, Robert.

I consider there to be two very important aspects to legal aid reform. The first is to ensure that we get value for money to assist the Department in living within its total budget, and the second is to ensure that we provide the right level of help to those who need it and to support efforts to deliver faster, fairer justice for all.

If we simply look at the current financial pressures, in the past 10 years, legal aid costs have risen dramatically, from £38 million to £102 million in the year just ended. The cost of legal aid is significantly higher per capita — 20% higher — than the legal aid system in England and Wales, which, in itself, is one of the most generous in the world. We simply do not have the funds to sustain that level of expenditure. The budget for the Legal Services Commission for 2011-12 is £83·6 million, and the budget forecast is £105·5 million. The budget will reduce to £75 million by 2014-15, the end of the current budget period. So, even with the recent changes to Crown Court remuneration that were introduced in the statutory rule, based on the current forecast, in this spending review period, we are still facing a pressure of something like £31 million, including, potentially, £22 million in this financial year. That is partly due to the delay in getting the new Crown Court rules in place — I delayed as long as possible in the hope of getting agreement from the legal profession — and partly due to an increase in the number of cases in the courts. For example, last year, the number of Crown Court cases increased by 21%.

The budget figure of £75 million for 2014-15 is based on the Barnett formula, and I believe that there is no reason to be more generous with public money for legal aid than for other public services. Therefore, cuts in legal aid funding are essential to protect other front line public services. We have already made significant progress with the introduction, on 13 April, of the new rules for Crown Court remuneration, which, when the savings are fully realised in 2013-14,

will save £18 million a year.

The Committee was briefed previously on further reforms to criminal legal aid, including the use of new powers in the Justice Act (Northern Ireland) 2011 to recover defence costs from wealthy defendants. There are options there, but we need to do more to address the forecast £31 million pressure. Significant further savings will be needed.

I also refer you to the access to justice review, which was mentioned a few minutes ago. I want to help to improve the legal aid system to ensure that appropriate help and support goes in the best way to those who need it. That may mean doing things rather differently in future. The Legal Services Commission already has a reform programme, and I will receive the report on the access to justice review in July. The review will make comprehensive recommendations on the way forward on legal aid, particularly civil legal aid, which we will need to consider very carefully. I hope to be in a position to respond to that in the autumn.

If we look back to the key issue today — the new Crown Court rules — you will all be aware, as the Chair has just said, that they are opposed by the legal profession, and that has taken two forms: the Solicitors' Criminal Bar Association is threatening judicial review proceedings and solicitors are withdrawing from some Crown Court cases. The potential judicial review is currently at pre-action protocol stage, and an application for leave has not yet been made. That basically concerns the point that the Chair highlighted, which is the inconsistencies in some of the rules as they were finally printed. The printed version with corrections has, as has been said, the approval of the Examiner of Statutory Rules acting on behalf of the Assembly. He has cited that in many cases they were merely pure typos. The other point was the leaving out of some figures in the table — the table that appeared when the Committee was previously consulted. The Law Society is seeking to argue that the rules were not properly made, but I do not believe that that is the case. If the judicial review proceeding commence, the Department will be contesting them.

I also think it is deeply regrettable that some solicitors have chosen to withdraw from Crown Court cases that will be remunerated at the new rates. I believe that the new rates are fair. They are certainly somewhat more generous than would apply anywhere else, and the new fee arrangements are the bespoke scheme that was argued for by solicitors and barristers, based on The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005. Developing that bespoke scheme was specifically at the request of the Bar Council and the Law Society rather

than the original proposal from the Courts and Tribunals Service, which would have saved a further £3 million based on the England and Wales system. I accepted many of the points that were made by the professions in doing that, but I cannot pay them the amount of money that they are seeking to be paid.

There were many consultations. There were public consultations and detailed meetings with both branches of the legal profession at different times, and the rules were made after that and after that very intensive discussion. I believe that the right way to deal with concerns about the fees is to have a thorough review of the new arrangements when enough cases have gone through the system under the new arrangements to allow that to be carried out, and that has been offered to the profession.

The Chair has already mentioned that the Law Society and the Bar Council put forward a joint proposal for remuneration based largely on the proposal that we eventually implemented through these rules. That proposal was rejected for a number of reasons. In particular, part of the proposal was not costed and could not be costed. It was in respect of including unserved disclosure material as part of the page count to obtain enhanced fees. Even without taking account of those unquantified additional costs, the proposal was already more costly and overly generous compared to other jurisdictions. Indeed, the Minister of Finance and Personnel, Sammy Wilson, made that point quite specifically to me in a letter dated 20 September 2010. I set out in detail the reasons for rejecting those reasons in a letter to the then Committee Chair, Lord Morrow, on 23 February, and I believe that briefing material has been supplied to members for today.

I understand that there have been various comments made in the media by representatives of the two branches of the profession suggesting that making the rules just before the dissolution of the last Assembly was some kind of attempt to pull a fast one over the Committee or the Assembly. The reality is that the rules were not rushed through. The Court Service began to review the rules of 2005 in 2007 and completed that review in 2008. The Court Service published proposals for change in 2009 and engaged in detailed discussion with the legal professions through most of 2010. As a result of that engagement, we brought forward proposals for a different way of doing things rather than adopting the England and Wales approach. Public consultation was from September to November 2010. The Law Society and the Bar Council opposed those proposals, and I delayed introducing the new arrangements in an attempt to reach

an agreement.

At a meeting with my officials on 9 March, after I had had a special meeting with them on 8 March, the society and the council made it clear that they would not move from their joint proposal, which I had made clear was not possible to implement. In the absence of any meaningful movement from them, I, therefore, went ahead to implement the proposals we had. I have already advised the Law Society and the Bar Council that I am prepared to carry out a review of the new arrangements earlier than usual to consider whether there are particular types of case for which the new fees do not provide proper remuneration, once enough cases have been concluded to allow it to be done meaningfully. I very much hope that solicitors will resume normal working so that we do not have the situation where defendants are not represented and victims of crime do not see justice delayed.

The Law Society maintains a list of solicitors willing to take on legal aid work. My officials wrote to the society to request that it provide a list of solicitors willing to take on legal aid work in the Crown Court at the new rates, but the society declined to do so. I very much regret that that was the position of the society, but, as a result, I have requested officials, who have now written to every solicitors' firm in Northern Ireland, to ask whether those firms are prepared to take on legally aided Crown Court work at the new rates. My Department will then compile a list of solicitors who are willing to take on that Crown Court work, and that list can be given to unrepresented defendants. I have taken that action because I want to help defendants without legal representation to get the help that they need and to ensure that justice for victims is not delayed. If not enough solicitors tell my Department that they are prepared to take on that Crown Court work at the new rates, I will have to consider other options.

Finally, let me stress that the rates that are set out in the new Crown Court rules are fair. They are still significantly more generous than those in England and Wales. Given the financial pressures that exist already in legal aid, the Department does not have the funds to be even more generous, even if I believed that that was justified, and I do not believe that that would be justified.

I trust that I covered a number of the issues, and we will happily take any questions that the Committee has.

The Chairperson:

Thank you, Minister. You mentioned that you have sent letters to solicitors' firms. Is the Bar providing any barristers under the new rates for those cases?

Mr Ford:

At this stage, we are talking merely about cases that involve solicitors coming off record before they go to the Crown Court, so there would not be any cases of barristers being engaged.

Mr Wells:

You pre-empted one of my questions, Minister. I shall ask a couple of questions as a new member of the Committee. The point has been made that, although you are reducing the fees that are available to solicitors and barristers, the fees for expert witnesses have not been trimmed. For instance, medical experts, forensic scientists and fingerprint experts who are brought in have a cartel through which they can charge what they like. Obviously, the solicitor cannot pass through a reduction in their fees because he or she still has to pay the same rate to such experts. Have you looked at that?

I have a couple of minor points. I may have missed the answer to the first one. Why were you not able to abolish the very high cost criminal cases (VHCCs)? That seems to be a very obvious way of making savings. Finally, what would be the impact on your budget if the proposals, this subordinate legislation, were not to go through?

Mr Ford:

You asked three questions. I will give a brief response on the expert witnesses and ask David to respond in a minute. We are looking at the cost of expert witnesses because I agree that there is a significant cost there. In an adversarial court system, the difficulty is that, in a number of cases, there are two sets of expert witnesses. You asked about VHCCs: we have abolished VHCCs. That was one of the key areas of savings, and, under the new arrangements, there are no longer very high cost cases.

Mr Wells:

In the Law Society's letter to the Committee dated 23 May, it suggests that very high cost criminal cases be abolished. The inference from that letter is that that has not been done. Was the Law Society wrong in that letter? Perhaps you have not seen it.

Mr Ford:

I have not seen the letter. Part of the problem with very high cost cases was that they were based on the situation in England and Wales, where less than 5% of cases were certified as VHCCs. In Northern Ireland, in excess of 50% of cases were VHCCs.

Your third point was on the budget implications, and I shall get my figures in quickly before I get corrected on them. I will then turn to the officials on either side of me. We have lost roughly £1·5 million a month, or £18 million a year, because of the delay in seeking to reach agreement, and we could not extend that any longer. David will talk about the point on expert witnesses.

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

Mr Wells is right; it is a cost driver that we will need to look at. The legal bill in a case is made up of three components: the solicitor's fees, the barrister's fees and disbursements. They are a significant cost driver, not only in criminal work but in some aspects of civil legal aid work, particularly children's cases. It is difficult to interfere in how someone conducts their defence because, obviously, there are human rights considerations. However, there may be issues where one would be able to mitigate or moderate the actual remuneration structure for experts. If defence lawyers were here today, they would probably say that there is a finite number of expert witnesses in any particular field and they tend to be able to dictate a particular rate to the market. My earlier point was that, unlike civil cases, in which you might think that the court could appoint an independent expert to advise it, a criminal case, being of a more adversarial nature, is an area in which one would hesitate to interfere. The issue is ensuring that we get value for money.

I am equally puzzled about the reference in the letter that you quoted. One of the selling points for the joint proposal put to us by the Law Society and the Bar was that they were volunteering the abolition of very high cost cases. That is reflected in the remuneration structure that we have introduced, and it was one of the big cost drivers. As we said in evidence to the previous iteration of this Committee, we had anticipated when introducing the 2005 rules that there would be only a very small number of genuinely exceptional cases. However, we were surprised by the extent to which cases were certified as qualifying for very high cost fees. That really took those cases off the map as far as the fee structure was concerned. Therefore, one of the critical issues that we discussed with both professional bodies and reflected in the new fee

structure was the need to contain the exceptionality aspect to the absolute irreducible minimum. They accepted and reflected that in their joint proposal. Therefore, I am a little bit puzzled how they —

Mr Wells:

I will just read you the paragraph:

> "Unfortunately, and without clear justification, the Society was informed that the proposed abolition of the VHCC Regime would not yield sufficient savings."

Mr Lavery:

I think that I understand that point. During the earlier stage of the negotiations, there was a perception in both professional bodies that all they had to do was remove the exceptional very high cost cases to get the expenditure back into balance with the budget. Although I accept that it might have been a misapprehension on their part, we have been quite open with them throughout the discussions in saying that another consideration is the fact that we were paying, even for standard cases, significantly more than in any comparable jurisdiction in Britain or Ireland. I remember at a very early meeting with them, long before devolution, explaining how much professional fees in, for example, the South of Ireland had to be reduced over the past couple of years, quite arbitrarily, at a stroke and without any consultation. I think that I understand the point better now, but VHCCs are out of the system.

You asked about the impact of failing to secure the savings. I am not sure whether Mr Crawford wants to touch on the budgetary aspect.

Mr Crawford (Northern Ireland Courts and Tribunals Service):

If I may, Minister, I will touch on all three.

The review of expert witnesses has begun. It began with the Legal Services Commission last year. My division has taken over the lead on that, because we have a bit more spare capacity, and we are working with the Legal Services Commission. We believe that it is possible to make savings in that area. To be fair to the Law Society and the Bar Council, both bodies have made the point that that is an area in which savings should be made. We believe that that is possible, and we hope that progress is sufficiently advanced to bring proposals to the Committee later in this session.

VHCCs have been abolished. I think that the point being made in that letter is that it is accurate to say that the Law Society, in its first proposal to us, recommended that VHCCs should be done away with completely. We have done that. The joint proposal from the Bar and Law Society also includes doing away with that. The point being made is that that was insufficient to make the savings that were required. Of the £18·3 million savings that the new rules make, £3 million is from cuts in standard fees, and almost £15·3 million is from the abolition of VHCCs. Some of those cases then fall into standard fee cases. They are still done, but they are paid at the standard fee rate and not the higher VHCC rate, which may explain why the £3 million from standard fee cuts is not higher. The point is that we needed cuts in both areas.

I want to pick up on the Minister's point about the Finance Minister's comments last September. The differential to which the Finance Minister referred applies, effectively, to both. We have cut the standard fee cases by 20% and 25% for barristers and solicitors respectively. Had we been bringing those into line with England and Wales, the cuts would have been 28% and 57%.

The point being made is that the Law Society would have much preferred standard fees not to be cut at all. However, we felt that that was necessary for two reasons, and the Minister certainly felt that it was necessary so as to better the differential between Northern Ireland and England and Wales and to make more savings than simply removing VHCCs would have made.

On the budget: the effect of not making the rules would be £18·3 million savings not being made each year.

Mr Wells:
So you have built it into your budget that this will go ahead.

Mr Crawford:
Yes; it is going ahead in the sense that the rules have been made. I accept that, should the rules be annulled, the effect would be that the £18·3 million savings needed to get legal aid closer to being within budget — we will not get within budget even with that — would not be made. The actual deficit over the four-year period would be £49 million instead of £31 million.

Mr McCartney:

Thank you very much. We went through the best part of this issue in the previous Committee, so I do not want to dwell on it too much. To date, how many cases have been affected by solicitors going off record?

Mr Ford:

The current figures are that, from 13 April to 25 May, 63 firms went off record in 114 cases with 142 defendants. Eight firms stayed fully on record in eight cases with nine defendants. Seventeen firms remain on record, but no Crown Court certificate has been issued in 21 cases involving 25 defendants.

Mr McCartney:

So there is a high percentage —

Mr Ford:

There is a high percentage currently off record; yes.

Mr McCartney:

Was that factored into your thinking? Was the impact of a high percentage of legal firms withdrawing their services part of the advice given when you were making the decision?

Mr Ford:

No; the decision was taken around the decision that needed to be taken to get within budget. At that stage, no one could have predicted which firms would go off record and which would remain on record. The key issue for me now, as I outlined earlier, is to ensure that we seek information from individual firms as to whether they are prepared to take on Crown Court legal aid work and then, to ensure that access to justice is maintained, to see what the other options are if we do not find sufficient people prepared to do it.

Mr McCartney:

I understand that part of it, but my specific question is: when you were briefed and advised, were you given any advice of what the impact would be as regards the percentage of firms that might withdraw their services?

Mr Ford:

No, I was not. I do not actually think that it would have been possible to do that.

Mr McCartney:

Did someone say to you that when this decision was made, it might be that the legal profession will be up in arms and will pull away and that you would be left with the figures that you are now quoting? Or did the advisers say that there might be an unintended consequence but that they did not know what it would be?

Mr Ford:

We were aware that some of those with whom discussions were taking place were not happy with what was being proposed, but no one could be sure whether people would actually come off record.

Mr McCartney:

I understand that. So no advice was given to you at all. Nothing was put in front of you outlining the potential consequence of taking that decision. Did people just say that we have to do this, so we will do it?

Mr Ford:

There was no advice saying that there would be specific consequences in the numbers that you are talking about. There was clearly advice that there might be consequences.

Mr McCartney:

We have had presentations from the two professional bodies and from your officials. I know that you have not seen today's letter, but the Law Society states that it has:

> "consistently raised concerns regarding the level of confidence which can be placed in financial projections with respect to legal aid. Mr Jim Daniell, the Independent Reviewer of Access to Justice, is aware of this issue."

Do you expect Jim Daniell's review to comment on the type of financial advice that you have been given?

Mr Ford:

I would not particularly expect him, at this stage, to discuss the financial advice given in this particular case for these particular rules. The access to justice review is wider-ranging than that.

Mr McCartney:

I do not say this in a prejudicial way, but there is no independent view of the accuracy of both sets of figures that are being presented to the Committee and to you. No one is stepping in and saying that it is either an accurate or inaccurate statement. The Department is obviously —

Mr Ford:

The people who advised me on that were the Courts and Tribunals Service led by Robert's team. I can go only on the advice that they give me.

Mr McCartney:

There was no independent view on it.

Mr Ford:

There was not seen to be any requirement to go to an external adviser.

Mr McCartney:

That is fine.

Mr Weir:

They could not afford the expert witness. *[Laughter.]*

Mr Crawford:

I will add a couple of points to that, if I may. We acknowledged to the previous Committee that there was a problem with the Legal Services Commission's forecasts. It has not yet produced what is called provisions accounting, so it is impossible for it to be accurate about how much work is in progress at the moment. Without that information it cannot produce accurate forecasts. That is an ongoing problem that the Legal Services Commission hopes to resolve later this year.

I will move on to what is being done on the costing of the current rules that we have made and the comparisons with England and Wales and so forth. The Courts and Tribunals Service took all the cases that it could where there was good information on VHCCs and standard fee cases, and it ran them through a completely separate formula to make those comparisons. We believe that the comparisons and the savings that were calculated in the proposal — they were done by the Courts

and Tribunals Service — are accurate. We have less confidence about the forecasts for future years, because of the problem that I have articulated. The Legal Services Commission does not have the best possible arrangements for estimating that. That will be commented on in a forthcoming Northern Ireland Audit Office report. It may be that the Committee will want to look at that.

Mr McCartney:

The point that I was going to make is that the Bar, in a very straightforward statement, said:

> "the independent accountancy firm charged with costing the proposals, has raised serious concerns regarding the figures and methodologies being used by the Court and Tribunals Service."

That is the type of evidence that is being presented to us.

Mr Ford:

You have described it as an independent accountancy firm, but that independent accountancy firm was engaged by the Bar Council.

Mr McCartney:

I accept that. That is why I said —

Mr Ford:

They are not there as arbitrators. They are there —

Mr McCartney:

That is why I said earlier that the same charge could be made by your officials, the Bar Library and the Law Society. That is why I asked whether you had taken independent advice.

Mr Ford:

That is partly why I have said that I am prepared to carry out a review of the operation of these rules at an earlier than otherwise expected stage, just to see whether there are anomalies. We do not currently believe that there are, but we are open to carrying out an early examination.

Mr McCartney:

If the review is carried out by Goldblatt McGuigan, it will come down with one set of figures. If it carried out by your officials, it will come down with the same set of figures as before. Who is

going to do the review?

Mr Ford:

Hopefully, it will be easier for people to agree on what has happened rather than agree on what might happen.

Mr McCartney:

I will make a final point, Chairperson. During the previous Committee's last meeting, concerns were raised about the procedure. I would like the Minister to comment on that again.

Mr Ford:

Do you mean about the timing?

Mr McCartney:

Yes.

Mr Ford:

I will repeat what I said. I met the Law Society and the Bar Council jointly here on 8 March. We agreed to have a further meeting to look at the issues with them, which would be conducted by officials. On 9 March, the next day, they made it clear that the only thing they were prepared to talk about was their own joint proposal, which we had already pointed out did not satisfy us as being robust and quantifiable. On that basis, there was no further ground for discussion. Having offered to go further into detailed discussion, I felt that to be told the next day, "Here is our proposal, we have not changed our minds, we are not here to talk about anything else", indicated to me that there was no point in delaying any further. Given that every month's delay is costing us £1·5 million, I felt at that stage that there was no option but to go ahead.

The Chairperson:

I will pick up on a couple of points and then I will bring in Mr Maginness. You touched earlier on the Barnett consequentials. Did you say our legal aid budget was "in line with" or "better"?

Mr Ford:

I said that, in effect, what we get towards part of the overall departmental budget is the Barnett consequentials of the legal aid budget in England and Wales, which we know is already lower per

capita than ours and is reducing. We have to take account of that, even though we have set up our own local system to meet the needs as expressed by the Bar and the Law Society. We still have to take account of the fact that we are dealing with a finite budget, that that finite budget is affected by the Barnett consequentials of the Home Office and the Ministry of Justice for England and Wales, and that, effectively, what we spend on legal aid is money that is not available for youth justice, community safety or policing. That is the reality of living with the budget.

The Chairperson:
Given the fee structure, are solicitors and barristers here better or worse off than those in the rest of the UK?

Mr Ford:
Robert is the best person to give the detailed percentages in that regard.

Mr Crawford:
Had we applied the England and Wales approach, we would have made £3 million a year more savings in total expenditure. That was the subject of a comparison in a business case that DFP saw and approved. We should look at individual cases, because there is a difference in the systems. The system preferred in Northern Ireland under the 2005 rules, and which was the methodology carried through in the 2011 rules, pays higher up front standard fees for cases for the conclusion of a case, whereas the English system relies on enhancements for page count in evidence, and so on.

Direct comparisons are a bit awkward to make, but if you look at particular cases you find that, in most cases, numerically, the England and Wales rate is considerably higher than that in Northern Ireland. At the lower end of offences, if you look at a three-day assault or minor theft trial, it works out about double. So, for the bulk of cases, England and Wales is significantly less expensive. The rates converge only when you get into the higher, more complex trials, say murder or a particularly complicated fraud case, and that is where individual cases will be quite different and you will find that an individual case perhaps works out cheaper in Northern Ireland than in England and Wales. However, the choice made is to go with the 2005–type system, although it works out £3 million a year more expensive, more generous than in England and Wales.

Scotland is significantly cheaper again than England and Wales, so we are comparing ourselves with the most generous system that we could find anywhere.

The Chairperson:

Do such changes negatively impact on the quality of representation and access to justice that defendants will get?

Mr Ford:

There is no reason why they should impact negatively on the quality of representation. The only negative impact is on the amount paid to the solicitor and barrister.

The Chairperson:

OK.

Mr A Maginness:

I declare my membership of the Northern Ireland Bar. The mess that we are in is the result of two situations. One is the manner in which you, Minister, pushed through the rules on 23 March, at the eleventh hour of the previous Assembly. That caused serious concern, if I read the letters correctly from the Bar Council and the Law Society. I do not understand why it was necessary to do that, unless you wanted to create a fait accompli for this Assembly. Of course, once statutory rules that are to be obeyed are passed, it is more difficult to have them annulled. Therefore, there is justifiable concern and criticism in relation to that, and I think that that was done in the knowledge that this Committee had considerable concerns about the rules as they stood and the issues surrounding those rules. Hence, the mess is, in part, a result of that pre-emptive strike, and I think that you, Minister, should reflect on that very carefully indeed.

The second aspect relates to the negotiations that took place between the Bar and the Law Society and the Department. Clearly, the way in which the negotiations took place changed at some point towards their end, where, in fact, a figure of £79 million was identified as the ultimate budget figure. That then changed to £75 million. Both the Bar and the Law Society, in circulating their joint proposals prior to that, came to a point of being within budget, and they make that clear in the two letters before the Committee.

Mr Crawford is shaking his head, and he will have plenty of time to discuss that. I hope,

Chairman, that the Bar and the Law Society have an opportunity to meet the arguments put forward by the officials, because, in relation to the administration of justice, this is a very serious situation. They were within budget and made proposals that were based on figures from Goldblatt McGuigan which were shared with the Department. The Department never shared figures with the Bar, the Law Society or Goldblatt McGuigan. In fact, the Bar and the Law Society were meeting the budget that the Department had set out. The rules of the game were changed, and now we have the mess that we are in. The cuts are very substantial, and they make representation and advocacy at certain levels just unviable.

Mr Ford:

I do not accept that we are in a mess. If there is a mess as a result of the manner in which we handled the matter, as Mr Maginness suggests, perhaps I should apologise for the fact that we spent virtually all of last year seeking to negotiate arrangements and having a full process of consultation. Maybe it would not have been a mess if the Department had just pushed something through without seeking to reach agreement. That seems to be the implication of what is being said. Every effort was made by the Department, in public consultation and in discussion with the Law Society and the Bar Council, to reach agreement. The arrangements were changed from what was basically the England and Wales system to a system that was requested by lawyers in Northern Ireland. However, what could not be agreed was to pay them the amount that they wanted.

On the issue of the budget allowance, I said previously that there were specific elements in the joint proposal that were uncosted and were not possible to cost, which the Department could not accept when faced with the financial challenges that we face. The point has been made previously — indeed, in response to your references to Barnett consequentials — that not every member may know that we were faced with a specific in-year cut last year because of the Barnett consequentials of changes in England and Wales. We were faced with a decreasing budget as we went through the process. That was the reality in which we were living. So, I reject any suggestion that this is because we were trying to pull a fast one and to ram things through. The reality is that we discussed it for probably longer than we ought to have done in an effort to reach agreement.

Mr A Maginness:

If it was not a rushed job, which I think that it was —

Mr Ford:

Sorry; I do not see how from 2008 to 2011 it is somehow a rushed job.

Mr A Maginness:

Well, I am suggesting to you that it was a rushed job to push it through on 23 March, when you knew that there were serious difficulties in relation to it with the two professions. Evidence of that is the fact that you got the rules wrong. There were errors in the rules: typographical errors and errors in relation to figures. They may not be of any great consequence, but it shows evidence of acting in haste.

Mr Ford:

Let me repeat the point about the typographical errors. One of them, I believe, was the absence of a semicolon; the other was the issue of a subheading that had no bearing on the consequence of it. The issue that was of any substance whatsoever was, I think, three figures missing in a table. The table was complete and accurate when it was presented to the Committee. My Department, in an open question, asked the Examiner of Statutory Rules what needed to be done. It was not a question about whether we needed to do anything or whether it was all right; it was an open question that asked him to advise us of what we needed to do. The response from the Examiner of Statutory Rules, acting on behalf of the Assembly, was that they were typographical errors that did not need formal correction. I think that we approached him in an entirely open way. I have seen the correspondence that went across, and, on that basis, I do not accept that there was any mistake because Mr Nabney's responsibility is to safeguard the legislation and the interests of the Assembly. If he said that we were OK, I think that we should accept that the Department made a minor typographical error — full stop.

Mr A Maginness:

I have one last point. Why did the Minister have to rush through the rules on 23 March without waiting for this Assembly and this new Committee to deal with them? I do not understand why, at the tail end, virtually at midnight, the rules were rushed through. Would it not have been better to have waited to have the matter thoroughly rehearsed among the members of this Committee and the new Assembly and the matter dealt with in a less hasty manner than it has been, thus creating the mess that you are now in?

Mr Ford:

Having been discussing the issue almost since I became Minister in April last year, the reality is that by laying the rules at the end of March, rather than at the end of May, we have saved £3 million of expenditure that is urgently needed for other aspects of the Department's work. The fact that I said that I would come here with officials in the Committee's first week, not just to do the general overview but to sit and discuss this particular issue in detail with the two most senior departmental officials involved, is an indication that we are quite prepared to engage in discussion. Indeed, that is what we have been doing for the past half hour or so.

We are prepared to be open, and we have been completely clear about what we have felt to be necessary. We have explained what we have done, and I do not see how a process that has taken three years can conceivably be described as rushing things, even by the unfortunately slow standards of government in this place.

Ms J McCann:

As I am new to this, I am not going to concentrate on the wider issue. There is a letter here from the Human Rights Commission, and the Committee on the Administration of Justice has also expressed a view that the proposals will impact on young male defendants, smaller businesses and Catholic lawyers. The equality impact assessment also says that. Given that you said that so much of the legal profession is now off-record, are you content that you will be able to ensure that those practical arrangements will be in place for people, particularly those who will need legal aid? Are you confident that you will be able to put that in place for people?

Mr Ford:

I cannot say that I am confident that we will put anything in particular in place. What I can say is that we are making every effort to do that. That is why, when the Law Society refused to find out for us — as it had been doing previously — which lawyers were prepared to operate legal aid under the new rules, I asked officials to take action and write to every individual firm so that we could maintain a list of those who were prepared to do it. We are prepared to look at other options to ensure that there is a defence service available if insufficient numbers of solicitors' firms are willing to respond positively. I will not go into the detail of that, but I can assure members of the Committee that access to justice is an important issue and that we are doing all we can to maintain access to justice.

Mr Dickson:

I am new to this, and, having heard the Minister's extensive and detailed description of where we are with the new fees, I would find it very difficult to describe that as being rushed through by any person's standards. Minister, you indicated that you are prepared to review the outcome and consequences of the decisions within an appropriate timescale. I am keen to ensure that that review also reflects the England and Wales figures for us, because clearly that is the target that we need to be moving towards. Do you agree that you could include in that review the appropriate steps that will be taken to further drive down the costs to bring us to a UK standard?

Mr Ford:

I take the point about the review. Normally, we would be expected to review something like that after about two years. The issue is that we can do it as soon as we get a reasonable number of cases through. I am not sure that I entirely agree with you that we want to move to the England and Wales situation. I notice that at least one member of the previous Committee was nodding as I said that. There are issues about access to justice with the current arrangements in England and Wales as opposed to the cost of legal aid.

Part of the access to justice review that Jim Daniell is doing — I apologise; I keep referring to different things at different times — is to see that we find the best possible way of providing access to justice. Cost-cutting is one aspect, but ensuring that we maintain access to justice is important. I have some concerns about *[Inaudible.]* England and Wales, but there will certainly be clear cost read-across comparisons with England and Wales, which we may look at in the review. As I have said before, I am committed to carrying out that review as soon as we have enough cases to be able to justifiably do it.

Mr Dickson:

Does the Minister agree that access to justice does not always mean access to the most expensive parts of justice and that there may be other, more appropriate courts for people to use to access justice fairly?

Mr Ford:

That is the blunt reality. Some members of this Committee will have heard me say that, as a former social worker, I remain to be convinced that adversarial court systems are necessarily the best for dealing with things like family cases. That is a discussion for another day, when we get

to that point, if that is OK with you.

Mr Lavery:

The benefit of devolution, as I said to the previous Committee, is that we do not have to slavishly follow the English system any longer. We have done that in Northern Ireland throughout my professional career. In England and Wales, the legal aid system will, frankly, be butchered over the next few years by very savage cuts in the scope of the civil legal aid system, substantial reductions and further reductions well beyond anything contemplated here in criminal legal aid. The benefit of devolution is that we know that we have a budget of about £75 million or thereabouts, and we want to work with the Assembly to decide how best to spend that money to give people access to justice. That is why the Minister asked Mr Daniell to do a fundamental review of the legal aid system.

We cannot simply sustain a system that has enriched a small number of lawyers in this country. I do not doubt that it is a big adjustment for them to make. The last year for which figures are published showed that seven solicitors' firms in Northern Ireland earned more than £1 million from legal aid and a further 24 earned more than £500,000 from it. For that same year, two barristers individually earned more than £1 million from legal aid, a further 15 earned more than £500,000 from it and a further 25 earned more than more than £250,000 from it. That is just their income from legal aid; they are perfectly entitled to do privately funded work as well. The legal aid system is here to help people to get access to justice, not to enrich any particular professional group.

The Chairperson:

Thank you. After hearing those figures, I wonder why Mr Weir, who is next to speak, ever came into politics. *[Laughter.]*

Mr Weir:

No one seemed to be offering me £15 million. I could start a bidding war.

I declare a sort of an interest. Since I have been a member of the Assembly, I have been a non-practising member of the Bar Council. I have not taken on any cases. Fortunately, I do not have to pay the same level of fees as practising members, but that is another matter.

I do not want to send Alban to a darkened room in shock, but it strikes me that the level of legal aid that has been paid in Northern Ireland is ultimately unsustainable. We should all remember that, during the discussions on the devolution of policing and justice, the quid pro quo reached with the Government was that there would be a certain amount of additional initial money to help to bridge the gap, but that was given on the basis that there had to be a reduction.

Mr A Maginness:
To £79 million?

Mr Weir:
Let us remember that, at the time, we had a more generous Labour Government. Obviously, the Conservative/Lib Dem/Ulster Unionist Government in place at the moment — far be it from me to point-score in that regard —

Mr Ford:
He is not here.

Mr Weir:
Let us be honest. From a public finance point of view, we are in a fairly tough financial turn down. Lawyers must take their share of the burden. If some lawyers' incomes are down from £15 million to a little bit less, then so be it.

To my mind, there are two key issues. The overall pot of money is going to be limited. With the best will in the world, from what has been said, if the joint proposals of the Bar Council and Law Society are bought into, that will ultimately mean a level of expenditure that cannot be sustained. Also, people rightly raise the issue of access to justice. You have given assurance that there would be a review of the system to see how it operates and what adjustments need to be made. What would be the timescale and format of any review? I ask because it may provide some reassurance.

Mention had been made, from a purely financial point of view, of comparisons made with England, Wales and Scotland. We are in a situation where there is additional money here or, at least, the fee rates are higher, particularly at the lower end, compared to those in England and Wales, and the gap is even greater with Scotland. I am sure some of my colleagues across the

table may be keener than me to push an all-Ireland agenda, but for the sake of completeness of comparisons, how does our level of fees compare with that in the Republic of Ireland, for example?

Mr Ford:

In answer to your first question about the timescale of the review, I cannot tell you how many months that would take because there would have to be enough cases to make a review worth doing. I have made it clear that the normal review would have taken place in a couple of years' time, and I am quite prepared to see that expedited as far as possible if there are particular issues to be highlighted.

Mr Weir:

I think that people would want an assurance that, if this is the route we are going down, any review would not be long-fingered. The key is to ensure that there is proper access to justice but within the constraints of the budget.

Mr Ford:

At this point, I will look sideways and ask whether any of my colleagues have a particular thought as to when that might be.

Mr Crawford:

Normally, it would be two years. We would have wanted one year's worth of data to make the review meaningful, but we could probably aim to do a review once we have six months' worth of data from cases being worked. Ideally, we would see them through a complete life cycle. That is around one year in a Crown Court, but that will not be possible if we are going to do a quick review.

The issue is to identify those cases in which the Law Society and the Bar indicated that there may be issues. One of those issues occurs when there is disclosure material and there is a need to keep going back to the PPS. We have started discussions about that with the PPS, and the Law Society and the Bar have provided us with around a dozen cases from the past three or four years where we acknowledge that there might be issues that are worth looking at. However, until we see cases come through under the new rules, we cannot really do that.

We want to have a bit of experience of the new rules to see whether the problem increases or particular issues arise under the experience of those rules that would previously have been different. That is the point. If things were proceeding normally and the current withdrawal of service was not there, we would have envisaged perhaps commencing the review around Christmas.

There is an agreement that the current system seems to work reasonably well with the Magistrate's Court. In setting the format of the review, we will go out to stakeholders — the Human Rights Commission, the Equality Commission, the CAJ and all those who we believe would have a particular interest in this area — to ask for their views. That will enable us to identify areas that we may look at during the review, and come up with some tentative proposals before we go out to public consultation. That is how the review will work, it will be consultative.

It is a statutory review in that there is a requirement on the Department to carry it out, but that is how we will progress with it. We want to get stakeholders' views to help identify areas that we think should be looked at before bringing firm proposals out for consultation. That will take a bit of time, but, if cases are being worked, we should be able to start that by Christmas, because we would have around six months' worth of cases. They would not be through the system, but they would be in the system, so we would at least have some feel for how long they were likely to last and what issues were arising as a result.

Mr Lavery:
We all think of a review as having a start date and an end date, but we can have an ongoing process of review. I imagine that may address some of the issues that we have been discussing. We had a fairly good and constructive dialogue with both professional bodies over the past year or so. I hope we can return to that sort of dialogue and that that could form part of any review process.

Mr Weir:
What are the comparative figures for the Republic?

Mr Ford:
I will pass over to Robert in a second. What I know from an informal conversation with my opposite number on my way to Lansdowne Road on Tuesday evening, which I should probably

forget —

Mr McCartney:
Why?

Mr Weir:
If you had only listened to some of the Northern Ireland fans who boycotted the game.

Mr Ford:
I probably should have, but anyway.

The current levels of legal aid in the Republic are significantly lower than ours, and I understand that they are about to be cut further.

Mr Crawford:
We published some figures in a PQ some time ago, and we quoted those in the initial briefing to the Committee. A ballpark figure was in the high 30s for England, Wales and Northern Ireland; I think we even touched 40 at one point. The equivalent in the Republic of Ireland was around €16. It is significantly lower.

Mr Weir:
So, it is less than half? I do not want to commit you to exact figures.

Mr Crawford:
I think it was in euros and not in pounds, but it certainly was significant. However, there is a different structure there, and a lot more of their services are provided directed by publicly employed service. If the Committee wishes, and would find it helpful, we can provide an overview of the four jurisdictions, because Scotland has a different approach as well.

Mr McCartney:
Will the review build in aspects around the quality of service? Some barristers may seek work elsewhere and that might affect the quality of appeals. Will that be part of your review?

Mr Lavery:

The Lord Chief Justice's office would be the best place to assess that because it will see at first hand whether there is a dip in quality.

Mr Ford:

The reality seems to be more that barristers from outside are seeking work here rather than the other way around.

Mr S Anderson:

I thank the Minister and his team for providing the background to the issue of legal aid expenditure. You talked about the very high cost cases. Claims were submitted and paid without the supporting records to validate hours. I do not know how that was allowed to happen if there were good accounting procedures in place. I hope that that is not happening now and that it will not happen in the future. With good accounting procedures in place maybe we will see substantial savings, which is the ultimate aim. Does the Minister have any comments on that?

Mr Ford:

After 14 months in the post I can probably still get away with the excuse that I do not know what happened in the past, but I am pretty confident that that is not happening now. Claims are being properly substantiated before they are paid.

Mr Lavery:

This is part of the legal culture. Barristers mark a brief fee. That has been the tradition in the profession for years. It is a fixed amount that reflects the preparation of the case up to and including the first day in court. Thereafter, there would be a refresher fee for second and subsequent days. However, because the remuneration arrangement does not support that, that was not going to be sustainable, and we are now emphasising the need for proper accounting procedures as you describe them.

Mr S Anderson:

I am pleased to hear that.

Mr Crawford:

In September 2009, the Court Service brought forward regulations to prohibit the use of brief fees

in high cost cases. Subsequently, if any claims were put in with a brief fee, the taxing master has said that they could not be paid. There is still an issue around cases that are in the system, and there are issues on civil legal aid where it is still much more common, but those are issues that we hope to address following the Northern Ireland Audit Office report, which comes out at the end of June. It will have a number of recommendations in that area. I am not allowed to give a trailer for that report, but we will want to look at that. We have already agreed that an independent audit will be done with the Legal Services Commission reading across into civil legal aid.

Since that legislation was introduced in September 2009, we have had the power to challenge appeals in relation to cases that go to the taxing master. We recovered £1 million in overpayments last year. More cases will be addressed in the next few weeks, and we hope to bring that up to about £3 million in total. Therefore, I can give some reassurance that we are trying to get a grip on governance arrangements. We would have liked to have addressed them earlier, but we are now trying to do that.

The Chairperson:
Thank you.