Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Legal Aid Dispute:
Bar Council

28 June 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 Stewart Dickson
Mr Colum Eastwood
Mr Seán Lynch
Ms Jennifer McCann
Mr Basil McCrea
Mr Alban Maginness
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr Michael Duffy	)	Bar Council
Mr Mark Mulholland	)	
Ms Karen Hamill	)	Goldblatt McGuigan

The Chairperson:

I welcome Mark Mulholland, Karen Hamill, who is from Goldblatt McGuigan, and Michael Duffy. The session will be recorded by Hansard, and the report will be published on the website. I invite you, Mr Mulholland, to update us on where the Bar Council stands on the ongoing legal aid dispute.

Mr Mark Mulholland (Bar Council):

I thank the Committee for affording us the opportunity to speak to you all today. I recognise a

number of faces from previous visits, and there are a few new faces. We formally wish you every success in your new role, Chair. Since the devolution of justice in Northern Ireland, the Bar Council has welcomed the opportunity to engage in the legislative process, and we feel that our view on the input to that process through the Committee for Justice is vital to our work. On that basis, we are very keen to speak to you today about where we are.

I hope that the briefing paper reached members yesterday and that you have had an opportunity to consider that. We have read through the Hansard transcripts from previous Committee meetings, and it may be of assistance if we address some of the Committee's questions from previous sessions about the new rules concerning legal aid in the Crown Court.

From our perspective, the key issue is ensuring that the high standards that we currently enjoy in Northern Ireland and that serve the administration of justice through both branches of the profession are maintained and that we provide a system within which the most able and experienced lawyers continue to serve the public, not only through criminal legal aid work but in all publicly funded work. As the Committee and the Bar Council are bitterly aware, we have reached an impasse on that, and I can say, on behalf of the Bar Council and the Law Society, that we are very anxious to find a satisfactory resolution.

When we read through the Hansard transcript, we noted a number of what we consider recent inaccuracies that have been presented to the Committee. With your leave, Chair, I would be very grateful if I may touch on a few of those.

Both the Bar Council and the Law Society have worked tirelessly, particularly over the past 18 months, with the Courts and Tribunals Service to identify and produce cost savings in relation to the criminal legal aid budget. We have done so quite candidly and in a very open fashion and have brought before the Courts and Tribunals Service what we have seen as readily identifiable areas where cost savings could be made. We offered those up without any reservation. That was done with the strict and sole purpose of the criminal legal aid budget being brought in line with the intended 2013-14 objective. With that in mind, it was to ensure that the overall public funding of legal aid would come within budget. Those Committee members who have heard my dulcet tones before will know that we did that on four occasions. Every time an objective was set in respect of the budgetary figure, we moved to meet that figure.

We started with a figure of £5 million. Then it was £8 million. We produced a joint proposal of £16·67 million of savings, which, in effect, meant a 53% cut in the level of remuneration across the board for both branches of the profession and a 68% cut at the highest end of fees, particularly those for the Bar. Unfortunately, that was rejected, and every further reduction in legal aid that we seemed to offer up simply reduced the level of administrative savings that needed to be found in the Department and government agencies. That is why, we feel, that we have reached the current position.

A explanation afforded to the Committee recently by the Courts and Tribunals Service regarding the impasse — if we call it that — on the joint proposal figure of the Bar Council and the Law Society, when asked why it could not accept that proposal, was that part of the proposal could not be costed. It is somewhat unfortunate that that was not brought to our attention during the discussions and that the first time we learned that that was one of the underlying concerns was when we read it in the Hansard report. One of the very last offers we made was: if there is a difficulty — an anomaly or an impasse — let us sit down with no one but accountants around the table and let them do the number crunching; if there is a difficulty with our figures or a problem with our scheme, let us move forward and work that out. Unfortunately, that offer was rejected, and, in the last days of the previous Assembly, the matter was moved forward.

We are here because we are still open and are keen to resolve the matter. We are keen to ensure that the quality of representation for the public is maintained and that the current situation is brought to an end as quickly as possible.

One of the fallback positions that has been stated in evidence to the Committee is that the system in Northern Ireland is more generous than in England and Wales and that legal aid in Northern Ireland is more expensive, pro rata, than in England and Wales. I will make the following observations, and I will quote directly from the Hansard report of 26 May when the Courts and Tribunals Service addressed the Committee. It was said to the Committee that:

"Direct comparisons are a bit awkward to make … the England and Wales rate is considerably higher than that in Northern Ireland. … more complex trials, say murder or a particularly complicated fraud case … you will find that an individual case perhaps works out cheaper in Northern Ireland than in England and Wales."

Whatever about that and whatever about the basis on which the Courts and Tribunals Service said it, that has been our point. The cuts and the stripping away of cuts to such an extent that the scheme is now unworkable has brought us within a system which means that, in many instances,

lawyers here will receive less remuneration than in England and Wales. The knock-on effect of that is this: when one looks to England and Wales, one sees that the type of lawyers who are doing that type of work in the Crown Court are classically only two or three years out. They are not 18 years at the Bar — as I am — or 20-plus years at the Bar — as Mr Duffy is. We have now reached that situation in England and Wales. We have said to the Courts and Tribunals Service, time and time again, to go across and look at the system of justice that is being administered there. We have said not to take our word for it, but to take the word of the Lord Chief Justice of England and Wales, who recently said:

"I find it deeply alarming that people want to do family or crime but cannot find a pupillage. Equally troublesome, to me, is to appreciate that such good quality criminal sets up and down the country are in real difficulty."

The "people" are lawyers, and the "criminal sets" are criminal sets of chambers or barristers.

Last year, the Chairman of the Bar Council of England and Wales went as far as to say:

"I regret to say – because doing publicly funded work is a noble cause – that the Bar will need to diversify away from legal aid work."

If that is the system that we are being pushed and driven to in Northern Ireland because of the levels of remuneration, it perhaps rhetorically is understandable why both branches of the legal profession feel that we have to — *[Interruption.]*

Mr Weir:

I think that could be contempt of court. *[Laughter.]*

Mr Mulholland:

I will see whether I can find you a lawyer.

When comparators are made with England and Wales, it is against that backdrop. Similarly, I read that the comparator produced to the Committee was that, pro rata, the legal aid bill in Northern Ireland is more expensive than in England and Wales. I am not sure where that came from. Jack Straw, when Lord Chancellor, said:

"In England and Wales … We spend £38 per head of population on legal aid. … However the scale of the difference in legal aid spending between here and abroad is compelling. In Scotland and Northern Ireland the figure is around £31."

That was said in a talk delivered in 2009. So, wherever these comparators come from, we would be happy to look at them and to challenge them. It is not that we are asking you to take our word on this — for example, that was Jack Straw. More recently, that has been followed up by Ken Clarke.

An assertion was made before the Committee that there would have been a further £3 million of savings had the Courts and Tribunals Service implemented the graduated fee scheme that applies in England and Wales. Ms Hamill will address the Committee on that if necessary, but we would be happy for that figure to be produced and explained to us because we fail to see where it comes from. It is that simple.

No doubt, you will have noticed instances in the media of making comparators between what lawyers are paid here and in England and Wales. The examples they did not give are these: a three-day common assault case in Northern Ireland is run in the Magistrate's Court, not the Crown Court, and costs three times less than the equivalent case in a Crown Court in England and Wales. A 15-day murder trial costs a third less in Northern Ireland on these fees than it does in England and Wales. A 10-day proceeds of crime confiscation hearing for senior counsel, taking an average of 45 hours to prepare, costs 10 times more in England and Wales than in Northern Ireland.

Yet a stage has been reached in England and Wales where the Public Accounts Committee, the Judges' Council, the Attorney General and numerous other justice groups have raised their concerns as to the quality of representation being afforded in the same Crown Courts in which we work in Northern Ireland. To coin the phrase "Yellow Pack justice", which has come to the fore — Mr MacDermott, I believe, is taking a patent out on that — is, unfortunately, where we seem to be going. That is why the legal professions have raised these issues and concerns. It is not that they have been raised at this stage; they have been raised time and time again over the last number of months and years. It has now reached the stage that the extent of fee cuts is so severe that the system that has been produced by the Courts and Tribunals Service is simply unworkable.

I know that the figures and statistics can be used in any shape or form or argued in whatever direction you want — Mark Twain comes to mind. However, a fundamental issue we must take grave exception to is that the Committee was told that part of the problem with very high cost cases was that they were based on the situation in England and Wales, where fewer than 5% of cases were certified as very high cost (VHC), and that, in Northern Ireland, in excess of 50% of cases were VHC. That is fundamentally incorrect.

In Northern Ireland, over the past five years, approximately 55 to 60 cases have been certified

as VHC per annum. That was out of an average of 2,000 cases passing through the Crown Court. That is an average of 3% of cases in Northern Ireland. Those 3% were the cases that gave rise to the headlines in the newspapers. Those were the cases that the Bar Council and the Law Society set about ensuring would come to an end so that the budget could be maintained, there could be accountability and predictability, and everyone could move forward in a transparent fashion. Before a case would start, the lawyer would know precisely what the case would pay, and the government would know precisely what it would cost.

That was our scheme. It was the Bar Council that moved forward and said, "Let's abolish VHC cases and produce instead a grid. Here is our grid. You will see that it is 68% less in many instances than the fees you have previously paid out under hourly rates. They still have that in England and Wales. Let's do away with all of that."

That is the backdrop that has given rise to the current debacle in which we all find ourselves.

The Chairperson:
You have just one minute more, Mark, because members have questions.

Mr Mulholland:
You will be glad to know that I am about to leave it at that.

I apologise for the long-winded way of answering the question. We are very open and willing to talk. As you know, a meeting has been scheduled for this evening with Mr Perry and Mr Lavery. The Bar Council and the Law Society will be in attendance. Our door has always been open, it remains open and it will continue to remain open.

It was said to the Committee that it was our joint proposal or nothing, and that we had nothing more to offer. That is simply incorrect. It was our joint proposal. If that does not work, we are prepared to look at what else will work because we want to move forward and resolve the issue. That is where we are.

The Chairperson:
Is that within the budget that the Minister indicated is available?

Mr Mulholland:

We say that the scheme that we have proposed comes within the budget that is available. If that has to be reworked to come within budget, there has to be a clear understanding of what the budget is. The budget, as we understood it to be, was the Hillsborough budget, which was the budget less the administrative savings of more than £4 million that were to come out of the Minister's Department. Those have changed and decreased. So, when one asks what the budget is, it is within what should be aligned in the entire legal aid budget. Goldblatt McGuigan said that not only did our proposals come within the criminal legal aid budget but that our cost-cutting exercise would ensure that the Minister did not have to look anywhere else for any other savings in the legal aid budget.

We are keen and happy to take any questions that we can.

Mr Wells:

Mr David McIlveen, one of our Members, asked a very interesting question about the top pay of your members. Top earner number one, in four years, earned £3·445 million. In 2008-09, he earned £1·235 million. Could the same guy get by on £2·7 million? Could he survive and could he provide the same level of legal advice for a measly £2·7 million, which he is now providing for £3·44 million?

Mr Mulholland:

I know that you refer to figures of £2·7 million as being measly with a degree of facetiousness —

Mr Wells:

I could live on that, Mr Mulholland; could you?

Mr Mulholland:

I could more than live on that. But I will make two points. As we have always said, the scheme that we produced would ensure that there would be no more figures of £1 million a year. Those would be a thing of the past. Secondly, those were cases going back for a number of years; it was not a single year of income. You will find that they went as far back as six years ago, where there had been a backlog in payments and a culmination of outstanding payments to counsel. It must be viewed in that context. It is against that backdrop that those figures were marked and paid. It is because of the fact that we wanted to ensure that there could be certainty about the budget that

those were the very types of figures that would never surface again. That is why we came forward with the scheme that we did.

Mr Wells:

Let us look at one of the more lowly paid of your members. Fifteenth on the list had to scrimp and save on £1·429 million a year. In his top year, he received £665,000. That is from his legal aid money; that is not from his private practice. A man could not survive on that sort of money simply from legal aid; he has to do a bit of private practice to supplement his meagre income. Could that gentleman survive on £700,000 a year?

Mr Mulholland:

With the greatest of respect, I think that you will find that the £600,000 is, for most if not all of those types of practitioners, their sole or principal means of income, and anything —

Mr Wells:

Could they live on it? Can they survive on £700,000?

Mr Mulholland:

I do not think that you need me to answer that question.

Mr Wells:

Right. The point is that these cats are not fat — they are obese. The going has been very good for your profession over the past 15 years. You have made fabulous money entirely at the taxpayers' expense. You are being asked by the Minister — who I support, and I think the community supports as well — to take a small and realistic cut in your fees, having laid up vast treasures over the past decade, to meet the budget. How can I tell someone in the fish factory in Kilkeel, who earns £8 an hour and works in freezing conditions, that someone is justified in earning over £1 million at the taxpayers' expense through legal aid?

Mr Mulholland:

We are not looking a scheme in which anyone will earn over £1 million a year. In fact, we are ensuring that that will not happen again. We are ensuring that, whatever the fee level is, cuts — I repeat the figure — of up to 68% in levels of fee earning are what we have proposed. If you break down any of the cases and the work involved in preparing them by either the barrister or

solicitor, you will find that with the levels that the Minister is suggesting, in many instances, they would be paid £8 an hour or less.

Whatever the fee level is set at, it has to be viewed in the context that the bedrock of the system of justice, which is a crucial part of the administration of justice, requires experienced and well-qualified representatives, as does the top of any field of any profession, to ensure that the best can be produced.

The Bar Council has said that it will look at 53% cuts across the board in fees and 68% at the top end. That is to ensure that the high levels of remuneration that you cited will never arise again.

Mr Wells:

Even at 68%, QC number one is still earning £1·7 million.

Mr Mulholland:

Not in any given year.

Mr Wells:

No, over a four-year period.

Can he provide a high level of legal advice and representation for that sort of figure? Surely, anyone would be prepared to work for £1·7 million over a four-year period. What lifestyle do these people want to live that they demand the right to earn £3 million over four years and say that they cannot live on £1·7 million?

Mr Mulholland:

No one is demanding that.

Mr Wells:

Taking your figure and reducing it by 68% still leaves QC number one with £1·7 million. He can produce a very good level of service for that money. That is an utterly indefensible amount of money for anybody to be earning courtesy of the taxpayer.

Mr Mulholland:

If you look at the other end of the spectrum, and I am sure you have, you will find that a greater percentage earn less than £60,000 per annum.

Mr Wells:

I am struggling to find any QC in Northern Ireland who earns less than £60,000 a year. I am sorry, Mr Mulholland.

Mr Mulholland:

If you look at the top 100 earners — the QCs who are acknowledged as being at the top of their profession — a limited number earn six-figure sums. If you look beyond that to the profession generally, you find that the significant majority earn less than £50,000 to £60,000 a year.

Mr Wells:

From legal aid work.

Mr Mulholland:

From legal aid work.

Mr Wells:

Yes, but of course they will have private work as well.

Mr Mulholland:

Not necessarily.

Mr Wells:

If they want to, they can diversify.

In 2005-06 — this is Dr McDonnell's question — the legal aid budget was £58 million a year. By 2009-2010, it had grown to £96·9 million. Can you see why the Minister, exercising due diligence, decided that that was running rapidly out of control and had to be brought under some form of tighter budgetary control?

Mr Mulholland:

I would like to give credit to the Minister for the due diligence. However, before he took office, the Bar Council identified this problem to the Courts and Tribunals Service and suggested the very means by which it could be taken under control: tighten up the criteria for high cost cases immediately. That was bandied about for two years before anything was done. I have to commend the Minister for addressing the issue when he did take office, but it was a problem that the Bar Council had already raised of its own volition and identified to the Courts and Tribunals Service.

Mr Wells:

I know that they have withdrawn from legal aid cases at the moment, but do you think that the Minister's cap on the legal aid budget will, in the long term, lead to your members withdrawing completely from what most people would see as an extremely lucrative profession?

Mr Mulholland:

The Bar Council has not, does not and will not seek, on a collective basis, to tell any member not to work. You will find that each barrister is self-employed and makes the decision about whether to work at those rates or otherwise. We have no control over that; it is a matter for each individual member. It is for each individual member to decide whether they can afford to work at the fee levels under the Minister's scheme.

Mr Wells:

Whether they can afford to live on £700,000 a year?

Mr Mulholland:

With the greatest of respect, you will find that that is not the situation if you apply the current fees structure.

Mr Wells:

Drop it by 68%: can they not afford to live on £280,000 a year? Let us live in the real world, Mr Mulholland. What do you think the average person who earns £24,000 a year working in a factory thinks of someone trying to tell us that they will not continue to provide representation for £280,000 a year? Do you not feel, as part of society and as a member of a sector dependent on the public exchequer, that you should have to bear the same brunt of cuts as the health sector, the

housing sector, the transport sector and every other field? Do you not feel an obligation to take your proportion of the pain?

Mr Mulholland:

In fact, in many instances, we have gone further. Let me say however, that we should not lose sight of who the victim is in all this: the public. This is about ensuring that proper representation is afforded to the public and that we do not end up saying, as the Public Accounts Committee in England and Wales did, that the fees cuts have been so drastic that the quality of representation has been diluted.

Mr Wells:

If the same people are providing the same advice similarly for a king's ransom, I cannot see how on earth the quality of representation would be diluted, unless they are going to work a lot less for £280,000 than they were prepared to work for £500,000 a year. It is the same people — the same QCs and the same barristers. So, are you saying that, because their salary has been shrunk to a king's ransom, they will not work as hard or as diligently on behalf of their clients?

Mr Mulholland:

If you look to the Bar Council in England and Wales, you will find that the chairman said last year that, even though legal aid is a noble cause, it is regrettable that the Bar must look elsewhere for work, that is, outside the publicly funded legal aid scheme. That means commercial and civil work. With that, you take out the most talented people, who would otherwise represent the public. We do not want to go there. That is the very reason why we have the current impasse with the Minister, and we want to ensure that that does not happen.

The Chairperson:

There seems to be a sense of pride in the "Yellow Pack justice" comment that some in your profession made to warn that that will happen. That implies that they will not work the way that they have been working because they are not getting the same money. Surely, the Bar, which represents the profession, would have to step in if a barrister was not doing his job?

Mr Mulholland:

The Bar most certainly would step in, but we cannot force people to work. In the same way, we do not tell people not to work. The phrase "Yellow Pack justice" emanated in relation to firms of

solicitors and those who would or would not, or do or do not, do this work in England and Wales. Again, the Public Accounts Committee observed that, with overheads and various other outlays, the most able firms can no longer afford to continue to work in the sector. They have moved out and been replaced by those who are less able. That is where the "Yellow Pack justice" remark emanated from. If you want a good-quality legal service, with lawyers working at the top end of it, the concern is that it will simply not follow if you bring in Yellow Pack justice.

The Chairperson:

What are the administrative costs of being a barrister, such as the cost of an office on the high street, secretarial support and so on?

Mr Mulholland:

I can speak only for myself. I am a member of the Bar Library, for which I pay significant fees and which we built out of our own funds and with no public funding. Outside of the Library, I have a secretary who is a full-time employee. I also rent an office for her. Like any business, mine has a number of outgoings. So you tend to find that, when one has taken account of VAT, tax and significant outgoings, a substantive part of what we are paid is needed to cover the overheads of running our businesses.

The Chairperson:

The point that I want to draw out is that, given the figures that Mr Wells quoted concerning the barrister who earned the most amount of money — I do not know who that is — it would appear that, typically, a barrister has a clerical assistant to write up reports, whereas a firm of solicitors has an office on the high street and, I would have thought, greater overheads. Is that fair?

Mr Mulholland:

In some instances, it is fair in cases where a solicitor's firm has a number of employees. Normally, individual barristers have at least one employee. However, we also employ over 40 members of staff in the Bar Library, all of which we contribute to and pay for.

Mr Dickson:

I apologise for being a few moments late. Given that the fees have passed into statute, why exactly are you here? They are the fees, so, although I wish you well in further discussions with the Department this evening, what is there to discuss? The fees are the fees. They have been

determined. The Assembly does not have the power to reverse that decision, or, were we to decide to do that, it would at least be a long and complex process. Why do you not simply get on and work with the fees that you have been given and take up the Minister's clear and unequivocal offer of an early review? Indeed, as people in receipt of public funds, it is interesting that you are now at the front of the queue in any review. All public sector decisions come with opportunities for review. You have been given a very early opportunity for review, so all the arguments that you have made, all the quotes that you have given to us this morning and all the work that Goldblatt McGuigan has done can be tested yet again when you are given the opportunity for review.

Really, your arguments no longer stand up unless they can be attested by the new figures that you have been given. I will go back to the original question, which, quite simply, is: why are you here? The fees have passed into statute. Use them, try them out and prove us wrong, if we are wrong. However, hopefully, the Department will prove that the fees are right when set aside your concerns about the anomalies.

Mr Mulholland:

I can answer that in two ways, Mr Dickson. First, we are here because we value the input of the Justice Committee. As I said in my introductory remarks, given that we are part of the justice system in Northern Ireland, we hold great store by the voice of the Justice Committee.

Mr Dickson:

We have made our decision, though.

Mr Mulholland:

I appreciate that. The Minister has been back on several occasions since that decision was made. Surely it is only proper, right and fair that both perspectives are made known to the Committee so that a fully informed decision can be taken, if one is required, in due course. Even if no further decision is required, at the very least, Committee members should be fully apprised of the ongoing argument.

Secondly, Lord Bach, who is now in opposition, has accepted criticism of the reforms that were reduced to writing in legislation in England and Wales during his time in office and has now acknowledged:

"Labour got some things wrong in government and we will use our time in opposition to rethink the legal aid system and where it should go".

What we are trying to do, and what we have sought to do, is circumvent the possibility of that very scenario arising here, so that, before matters are passed into law, the anomalies that the Minister has now identified and acknowledged before the Committee can be addressed proactively as opposed to retrospectively. We certainly welcome where this is going, given the meeting with the Minister. It is not as though we have leapfrogged to the top of any queue. The Minister now appears to acknowledge that there are anomalies, that there is diversification and that the shortcomings that we brought expressly to the attention of his representatives before this passed into law need to be addressed. That is a long-winded way of saying that we feel that the Justice Committee should be an integral part of the administration of justice in Northern Ireland. This is an integral part of that. So, that is why we have come before the Committee.

Mr Dickson:

I have to say briefly that the regulations have passed into law. They are there, and we encourage you to use them.

On a slightly different matter but one that is wholly related to this, what are your views on the creation of a public defence service in Northern Ireland?

Mr Mulholland:

A public defence service would not serve the public well. Again, you do not need to take my word for that. If you look to America and to the calibre of those who —

Mr Dickson:

Could we not just look to the rest of the United Kingdom?

Mr Mulholland:

I have read about the public defence system in the rest of the United Kingdom, but I am not sure where it operates to any great effect.

Mr Weir:

I should declare an interest as a non-practising member of the Bar, although that means that I

have not received any fees in legal aid.

Mark, I just want you to clarify a couple of points. First, when we were talking about the figures and the range of proposals that you put forward, I think that you said that you had four sets of proposals. Was the last set based on what might be essentially described as the Hillsborough position?

Mr Mulholland:

Yes.

Mr Weir:

Post-Hillsborough, there was a change in government across the water. They introduced fairly swingeing cuts to public expenditure and then passed on a massive cut to the public budget in Northern Ireland. Do you think that that position is realistic when trying to work out a settlement, given that it does not seem to particularly take account of that change in circumstances? Does the cloth need to be cut according to a new set of circumstances and an acceptance that, overall, the bill will have to come down below what was suggested at the time of Hillsborough?

Mr Mulholland:

I understand that the Hillsborough figure was £79 million. Subject to verification by Goldblatt McGuigan, who are our independent forensic accountants, and factoring in the administrative costs that could have been made in the Department, our figure came out at £75·2 million. Is that right, Karen?

Ms Karen Hamill (Goldblatt McGuigan):

Yes. We took cognisance of the changes to the budget. As well as the changes in remuneration for legal representatives' fees, we asked the Courts and Tribunals Service to identify what other cost savings could be identified in working towards an overall budget. We were advised that a revised budget of £75·2 million was the budget that it was working towards for 2013-14. We were also advised that, in arriving at that figure, the budget assumed a level of administrative and other savings for civil legal aid totalling £4·57 million. So, in fairness to the professions and on the basis that there was recognition by the Courts and Tribunals Service that not all legal aid cuts would be derived from the reductions to legal aid fees paid to barristers and solicitors, we included the £4·57 million of savings in administration in our figures.

Mr Weir:

Presumably, the Department has not done that?

Ms Hamill:

When we presented the joint proposal that had been arrived at between the Bar Council and the Law Society, the Department subsequently amended the total savings anticipated from administrative and other savings in civil legal aid downwards from £4·57 million to £4 million. As a result of that change in the anticipated savings elsewhere, the Courts and Tribunals Service and the Minister rightly say that, on the basis of the joint proposal, they no longer come within budget.

The key premise is that, in meeting an overall budget, we, as accountants, rely on the total cost savings that are anticipated. We rely on the figures that the Northern Ireland Courts and Tribunals Service provides in identifying other areas where cuts will be made and anticipated. I do not believe that we can find fault with the way in which the joint proposal has been presented.

Mr Weir:

Financially, what do you see as the gap between your position and that of the Minister? If, as you suggest, it was a change from £4·57 million to £4 million, which is roughly speaking a change of £0·5 million, it therefore seems very strange that we got into an impasse of this nature, if there is only a £0·5 million gap between yourselves and the Minister. I would have thought that the gap was greater than that.

Ms Hamill:

Once the joint proposal was published, the Minister provided a response. The Minister published our joint proposal and its budgetary outcome against the Department's own proposal. To the extent that he published it in a letter to Lord Morrow, I am of the view that the Minister was broadly in agreement with the figures and the budgetary outcome of the joint proposal.

Mr Weir:

To be fair, that is your assessment of it. Has the Minister said that?

Ms Hamill:

I do not believe that the Minister has taken issue with the fact that £600,000 is the identified budgetary shortfall. If one were to look at the current budgetary shortfall, one would see that mention of £600,000 was made before the Justice Committee in May. I believe that there was acknowledgement of that.

Mr Weir:

Can I pick up on another point? Mark, you mentioned the comparators with England. Did I pick you up correctly when you said that the pro rata figure for England was £38 per head of population?

Mr Mulholland:

Yes. That was Jack Straw's figure.

Mr Weir:

That is £38 per head of population. We are talking about a budget of £79 million, and there are 1·7 million people in Northern Ireland. I will not go into the figures to the same level as Mr Wells, who seems to be able to quote chapter and verse on every QC in Northern Ireland. Purely off the top of my head, if you talk about £75 million, on the basis of 1·7 million people, that works out at roughly £40 to £45 per head, as opposed to £38. Yet you query how, on a pro rata basis, anyone can say that it is more expensive in Northern Ireland. I take on board what you said about particular cases, but, clearly, at the very least, the headline figure, per head of population, is higher in Northern Ireland than it is in England.

Mr Mulholland:

Not according to Jack Straw. However, let us leave Jack Straw out for a moment.

Mr Weir:

Hold on a wee second; it is £38 in England, as opposed to —

Mr Mulholland:

Thirty-one pounds is what he said for here, but let us leave that aside.

Mr Weir:

He may not have done his maths all that well. That will help.

Mr Mulholland:

Here is the difference, Peter. It is unfair to compare, because you are not comparing like with like. In places in England and Wales, such as Dorset and Cornwall, Kent and Cambridge, they do not have the dire poverty that we have here. They do not have the unemployment or the 35 years of Troubles that we have had. They do not have, in their prison population, the highest level of psychiatric offenders of anywhere in Western Europe.

We must look at it in the context of Northern Ireland. If this is the system of justice for Northern Ireland and we have devolved justice for Northern Ireland, harking back to England and Wales at every turn, pro rata or otherwise, is simply ill-founded.

Mr Weir:

This is part of the overall public budget. The various problems that there have been here are also problems in every other Department. Other Departments also have other pressures.

I have what you might describe as a more philosophical question. You said that you want the best possible justice, and I understand why you said that. Forget about the analogies of the Yellow Pack, but, if I were to use a theme, from a public expenditure point of view, why, with public justice and legal aid, should we pay for a Rolls-Royce instead of settling for a Ford Mondeo?

Mr Mulholland:

I do not think that the analogies of Mondeos, Rolls-Royces, Skodas or whatever else are of assistance. I will put it in these terms. We want a solid democratic society, and part of that is a solid justice system. Is it not right that, if convictions involve the most experienced and able prosecution and defence barristers and solicitors, those convictions can be safe, victims can be dealt with properly and feel that justice has been served, convictions can be stood over, and there can be confidence in the administration of justice?

If you start from the premise of using young law graduates with two years' experience under their belts to run what can be the biggest and most serious and complex fraud trials and rape and

murder cases, you can see that that would be a recipe for disaster. Six months ago, when a Committee member raised the issue in a question, someone from the Courts and Tribunals Service quipped, "If the most able and experienced go and do their work elsewhere, leave the professions or their solicitors businesses close down, who will do this work?"

Mr Wells:

Other solicitors.

Mr Mulholland:

The quip continued, "There is a young lady from the Bar Council who is two years out — she can do it."

Mr Weir:

Mark, surely the logical extension of the position that we must have the safest possible conviction is that the most experienced barristers possible will be involved in every single criminal case and that QCs will look after common assault cases, for example. There has to be a limit to that logic.

Mr Mulholland:

It is relative to the type of case.

Mr Weir:

For years, the structure of the Bar Council and the Bar Library has been that those at the top of the profession earn not inconsiderable amounts of money and are well off, as ably demonstrated by Mr Wells to my left. However, many barristers who come out with their degree and have done their professional training and pupillage at the lower end of the Bar struggle massively to get work.

One of the side effects of this may be to push work further down the food chain, for want of a better phrase. As someone who nibbled near the bottom of the food chain a number of years ago, I do not mean that in an insulting way. Is it necessarily a bad thing if it means that some criminal cases are done by people who are two, three or four years' out, leading to a certain redistribution of work and a trickle-down effect from the top end into lower ends of the Bar?

Mr Mulholland:

It is a bad thing if those who are asked to do cases do not have the experience to do them. I take your point about the trickle-down effect, but —

Mr Weir:

How will they gain experience if they do not do those cases in the first place?

Mr Mulholland:

They do them over a period of time. You mentioned pupillage, and they do them as junior counsel acting under senior counsel and QCs. That is how they build their experience. They do them working through the Magistrate's Court system, which deals with a number of very serious cases. That court deals with grievous bodily harm, theft, etc, all of which are left to the Crown Court in England and Wales. That is where experience is gleaned and where they cut their teeth, so to speak.

It means that, by the time that they are 15 or 20 years out as a junior counsel in the Crown Court, they have sufficient experience and the ability — earned over thousands of hours of air time on their feet, because that is what it takes — to ensure that there is not an appeal to the Court of Appeal saying, "Sorry, there was an inexperienced young barrister or solicitor who was simply out of their depth, my Lord, and took the case on when they should not have." It is a safeguard to ensure that that does not happen. It is as much, if not more so, to protect the public and the administration of justice as it is to ensure that the right people do the work.

The Chairperson:

Is it in the public interest to have a system whereby, over a three-year period, defendants' representatives received £155 million in criminal legal aid, but those on the prosecution side received £105 million? Fifty per cent of defendants' cases were represented by two counsel, compared with 11% on the prosecution side. From a public interest point of view, surely there is an imbalance whereby those who represent defendants are paid much better than those who act for the prosecution side. Would it not be better that the most capable individuals take on prosecution cases to try to get more people convicted, rather than those on the defendants' side running rings around more inexperienced individuals on the prosecution side?

Mr Mulholland:

Where do I start with that one? There are several elements to that. I know that you have the Criminal Justice Inspection (CJI) report there, which I look forward to reading myself. We should look at the title of it.

I will make some observations on a general premise. The use, or lack of use, of senior counsel by the Public Prosecution Service (PPS) to save money is, in many ways, a false economy. Cases can run for longer or cannot get on if other court time is allocated to a preceding case. There are a number of reasons why it is difficult to make comparators. I will give you one example. If I or Mr Duffy take a case on behalf of a defendant and we are instructed by a solicitor, the state is saying that it is bringing a prosecution, and the person has Mr Duffy and the solicitor to represent his or her interests. There can be a phalanx of various experts, from police officers preparing the investigative stages to in-house lawyers in the Public Prosecution Service (PPS) preparing the initial stages of briefing papers and so forth, which then go to the barrister. I have yet to read the report, but I imagine that we will find that those are not costings that are included in the overall expenditure figures. Therefore, we are not comparing like with like; we are comparing apples to oranges.

I agree fundamentally with you here; there is a grave question as to why more Queen's Counsel are not being used by the prosecution. I have to say that, in the cases that I have been involved in, they bring a greater degree of efficiency. In many instances, many elements of the work require two counsel. They have to, for example, split up or research various aspects of the case and ensure that the time spent in court is spent efficiently and expeditiously. So, there are a number of issues that have to be looked at.

The Chairperson:

It is living in a fantasy world to say that the legal aid budget is going to be increased to enable the prosecution service to fund that equality of arms. Therefore, we need to get a level playing field. What the Minister has done with this Committee's report is to try to establish that level playing field.

Mr Mulholland:

Unfortunately, those figures were released before the scheme, whether for the joint proposal that we talked about or the 2011 fee structure. I suspect that you will find that the comparators that

were made in the report are under the old-scale fees. The report goes back a number of years, covering a number of fee structures that no longer exist. If we want to compare like with like, we should compare the fees that the legal profession has raised with the Minister and see how those work when it comes to prosecution fees. Those will be significantly closer.

Mr B McCrea:

Do you think that it is right that Departments, if they think that directors need to be disqualified, should seek the highest quality of prosecution QC from the Treasury? Should they go for and get the highest quality and best possible legal representation?

Mr Mulholland:

Any Department, or, I would have thought, any particular client, who wishes their best interests to be served when an action is brought on their behalf, whether it be proceedings in that realm or otherwise, will no doubt always seek to ensure that they have retained the most able, experienced, and, by extension, the very best QC, barrister or solicitor whom they feel befits the role that they have to undertake in a particular case.

Mr B McCrea:

As a matter of interest, if the defendants were retired Presbyterian ministers over the age of 70, do you think that they would be entitled to a similar level of defence and that they should be accorded an equal amount of ability to look after their interests?

Mr Mulholland:

You will appreciate that we have to work under certain sub judice rules if cases are pending, but I will answer that in the abstract. If a case is being prosecuted with a Queen's Counsel for the prosecution, it would seem only right and proper in the insurance that the administration of justice is served and that the representative on behalf of the defendant or member of the public is well able and capable and qualified to do that job. If, by extension, that means that it should be a QC for the defence, there should be an equality of arms.

Mr B McCrea:

I was talking in the abstract myself. The point at issue here is equality of representation under the law. I think that a point needs to be made in that regard. However, I have to say that the headline figures that Mr Wells brought forward are hard to argue against. In fact, Mr Dickson asked why

you are here. I suspect that one reason is because it is useful to clarify the position if there is misinformation or if there has been a misunderstanding. Are you telling me now that the proposals that have been put forward will assure the public that there will not be excessive fees for people who heretofore might have been getting excessive fees?

Mr Mulholland:

I am very happy to put on record that that is absolutely the case. It does not serve justice, it does not serve the legal profession, and it does not serve the Minister to find that, with all the other ongoing issues that we have in Northern Ireland, the debate focuses and centres on the issue of fees. In recognition of that and with acknowledgement on the part of the Bar Council, we raised those issues two years ago, as I said, and said that we will ensure that this is brought to an end. Therefore, that is what I am telling you.

Mr B McCrea:

The final point for clarification —

Mr Mulholland:

The Court of Appeal is easier than this.

Mr B McCrea:

Yes. Mr Weir brought up the figure that was agreed under the Hillsborough agreement, and I think we established that as £79 million. That budget was thought to be ring-fenced, but, at the time, people thought that ring-fenced meant protected, rather than pro rata. However, there were consequential cuts, and the ring-fencing brought it down to around £75 million. Am I correct in that so far?

Ms Hamill:

It came to £75·2 million.

Mr B McCrea:

Is there a figure below that that we are now trying to reach?

Mr Mulholland:

That is why I said in my opening remarks that, every time we seem to reach the target, the

administrative savings that the Department would have to make seem to reduce and the surplus that occurs, and which appears to be now within the Minister's scheme, would give rise to approximately £4 million of a surplus below the £75 million.

Ms Hamill:

In essence, if one were to present the cost savings that are expected to be made on the reforms of legal representative fees, and if one is to acknowledge the identified cost savings that the Courts and Tribunals Service has advised us that it expects to make, its total expenditure forecast comes out at just under £71 million against a budget of £75·2 million. Therefore, under its scheme, there is a budgetary surplus of approximately £4·57 million.

The Chairperson:

Will this be "lastly lastly"?

Mr B McCrea:

Thank you, Chair. Yes, it will be. Just to be clear that I have got this right: £79 million was argued for and agreed, but there was agreement that we had to make cuts because of the consequentials coming from Westminster, which brings the figure down to £75·2 million. However, since then, more savings are coming out of your side, shall we say, and it appears that we are now down to a budget of £71 million.

Ms Hamill:

Yes, the effect of the Courts and Tribunals Service scheme, if implemented, would be a budgetary spend in 2013-14 of just under £71 million against a budget of £75·2 million.

Mr B McCrea:

Presumably, you feel it unfair that, having agreed £79 million, then having had to re-agree £75·2 million, you are now having difficulty at £71 million.

Ms Hamill:

Yes, the distance between the professions and the Courts and Tribunals Service is a budget surplus of £4·5 million.

Mr McCartney:

Thank you very much for your presentation. Having had the joy of being on the previous Committee, I have heard many of the arguments. At times, this does get bogged down in statistics and figures, and I am not going to pretend to know each and every one of those. What I am interested in is that we are now at an impasse. Both bodies are meeting the Minister today, and it is not our role, as a Committee, as Members or as parties, to act as third-party negotiators. We have said that throughout. We heard from the Minister last Thursday. We have to create a circumstance in which people can enter into discussions — there has always been an argument as to whether those are discussions or negotiations, but I will not go into that — to get some sort of sense as to what people are prepared to do. I am not asking you to say what you are prepared to do, nor did I ask the Minister last week, but we have to create something that breaks the impasse. At present, there is a bit of a lid on this because of the summer recess, but, come September, this will be a pressing issue that will create a backlog in the courts and whatever flows from that.

One thing that strikes me is the costing. Some people are saying that this can be costed, and other people are saying that it cannot be. I have made this observation in meetings with you and our party and in Committee: it is difficult to quantify how much disclosure will cost. That is where this sometimes falls down. Someone can very clearly say, with good faith, that this can be costed. We could then agree that it can be costed. However, in much the same way, someone on the other side can say, with good faith, that this cannot be costed. We could say that that, too, is a fair observation. It is about bridging that gap. I am not saying that you have to do that today, and I am not saying that that is going to be part of whatever discussions you have with the Minister. However, if we are to move this forward, those types of issues have to be removed.

Mr Mulholland:

Whatever about the figures of the past, we came at this very candidly and very openly on the basis that we would co-operate and work with whatever had to be worked with and within the budget that was there. That was always our intention. By reason of that, we looked at grey or uncertain areas. For example, there was an exceptionality provision in standard cases that a barrister or solicitor could seek at the end of the case. There was the fixed fee but, by reason of the added complexity of a case, a barrister or solicitor could ask for an exceptionality payment of another 30% or 40%. We scrapped that, so the fee was the fee. We scrapped hourly rates. Anything that we thought would give rise to a grey area, we scrapped. We are down to a question mark over counting disclosure in what is roughly 5% of cases that pass through the system. That

is all that it is. That is why it is unfortunate that the Courts and Tribunals Service did not seek to raise this with us in advance of coming to the Committee. That is the one grey area that it has identified and recognised as needing to be addressed.

Raymond, when I have been before the Committee previously, I have drawn analogies with murder cases that I get and the evidence in those cases. To give another example, I have a fraud case at the moment, the evidence for which is contained in one file. I need to read five million documents for that case. Should I read all those documents, which will take most if not all of the summer as well as weekends and so on, and that case resolves on day one, under the current scheme I will not be paid for reading those five million documents. I will not be paid anything that comes close to £8 an hour; it would be significantly less. I would be paid in pence per hour.

We have said time and time again that those types of cases, which are the most complex and arduous, are the very cases that, previously, you expected the top end of the profession to work on. Bringing in experience cuts court time and the number of hours of work for all of those who are involved in the case. That has to be recognised as an area that must be addressed as one where proper remuneration has to be paid. If that were to mean a ceiling on disclosure, or whatever else it might mean, that would be open to consideration.

Unfortunately, when the rug is pulled from under you without that opportunity, you can appreciate, to some degree, why there may be an element of frustration. The offer had been made for the accountants on each side to sit down at the table with no lawyers and no representatives from the Courts and Tribunals Service and to let them do the number crunching and find a solution. I am hopeful that that could possibly still be done.

Mr Dickson asked why we are here. The fact that the Minister, when he was previously before the Committee, recognised and identified what he calls anomalies will perhaps help to move the process forward, both on his behalf and on the profession's behalf.

Mr McCartney:

A case with five million documents is not an everyday event.

Mr Mulholland:

No, thankfully not.

Mr McCartney:

Given the history of the PPS, it is understandable that disclosure is very important. If it were better structured, disclosure might not be the big issue that it is at present. It is understandable that a defence team wants to look at every document that the prosecution has pored over because, in simple terms, it will say that it does not believe that every document that is relevant to the case will be submitted. If the PPS were better structured so that it would produce a document even if that were in the best interests of the defence, how would that affect disclosure?

Mr Mulholland:

Undoubtedly, that would help, but that is where the issue of experienced lawyers comes up. To take an abstract example: a young lawyer who is working in the PPS does not have the experience of a criminal trial practitioner, whether that is a solicitor or a barrister, who can readily identify the core documents and perhaps the key point in a document because of 15 or 20 years' experience working in trials. The young and inexperienced lawyer who is working in the PPS will simply not have their mind open to that because they do not have the experience. You can see where that would cause problems down the line, hence the argument that you need the very best on both sides.

Mr McCartney:

That is why I am saying that, if we are to restructure the Public Prosecution Service, why should the best of the best not be in the prosecution, as they would be anywhere else? There does not always have to be the idea that a two-year-old barrister — *[Laughter.]*

That might be a description of some. I meant a barrister of two years' experience. That issue has been coming to public attention of late. Some of the cases that are being prosecuted are poor. I do not say this in a disparaging way, but there are systems elsewhere where the brightest and the best are not always on the defence side and can be on the prosecution side.

Mr Mulholland:

The counsel that are used by the Public Prosecution Service are, in many instances, the brightest and the best, and they both defend and prosecute. You tend to find that they are not always being used. When cuts have to be made, they are made at the coalface. Therefore, in many instances, the brightest and the best are now cut out of cases.

Mr A Maginness:

Like the learned Member for North Down Mr Weir, I am also a member of the Bar. Thank you very much for coming. It is very important that you accepted the invitation to come here, and it is important that the views of the legal profession be presented as candidly and as fully as you have presented them.

On the Minister's most recent appearance at the Committee, he gave us the impression that, when the Bar Council and the Law Society presented their joint proposals to the Department, they simply told the Minister and his officials to take it or leave it and that there would be no negotiations on the basis of the Bar Council's figures. Is that something that the Bar Council and the Law Society would agree with?

Mr Mulholland:

In a word: no. I was slightly perturbed when I read that account in the Hansard transcript. Karen Hamill and I were there, along with Mr MacDermott from the Law Society and Mr O'Rourke from the Bar Council, and I have conversed with them all on the issue. Neither the Bar Council nor the Law Society said that it was the joint proposal or nothing else. The way in which that meeting was approached was that we said, "We have now made four different suggestions, and we would like to hear what you have to say. We would like to hear what you have to say because the scheme, with some modifications, that you currently wish to put into law is a scheme that you first presented nine months ago, with the caveat, 'I know you are going to reject this, but it is a starting point'." That is what was said to us.

Therefore, at the last meeting, we said, "Look, that is how you presented this. Yes, we acknowledge that you have come today, in relation to both branches of the profession, in light of the direction of the Minister because of representations that we have made. You are making a concession to each branch of the profession on one point, but what else are you prepared to offer here? You have heard us time and time and time again with different proposals. Can we please hear from you?" And the shutters came down. That — to be frank and candid — is how the last discussions with the Minister's representatives finished.

Mr A Maginness:

Chair, I have another question.

Mr Weir:

Sorry, Chair. That is the Division Bell.

Mr A Maginness:

May I ask a quick question?

The Chairperson:

Is that you then completed?

Mr A Maginness:

No.

The Chairperson:

After your second question?

Mr A Maginness:

Yes, it will be.

The Chairperson:

We have a couple of minutes before we need to go through the Lobbies. Therefore, you may ask your question if you are brief.

Mr A Maginness:

My question is to Ms Hamill. When the Minister was here — I am putting this mildly — he seemed to question the independence of your firm in relation to the scrutiny of your figures. Principally, he was saying that you are being paid by the Bar Council and the Law Society.

Ms Hamill:

I have not had an opportunity to review the Hansard minutes of the Minister's comments, but it had been indicated that our independence had been called somewhat into question. Our firm intends to write to the Minister to set out our views on the process of negotiations that we have been involved in, from its inception to current date, with a view to clarifying, in the Minister's mind, the status of our independence, vis-à-vis the Bar Council.

Mr A Maginness:

You would robustly assert that you are independent.

Ms Hamill:

Absolutely. Our firm, and specifically the forensic department in which I work, is primarily retained on behalf of plaintiff or defence bodies in litigation. At all times, irrespective of how or by whom our fees are paid, we take on the role of independent expert. We believe that our independent role in this matter remains intact.

Mr Michael Duffy (Bar Council):

Askign Goldblatt McGuigan to comment on itself is difficult. However, as a practitioner, I have never heard any such allegation in a case, and I have been involved in a number of cases in which Goldblatt McGuigan was on the same side as I was and on the opposite side. As is the case with PricewaterhouseCoopers or such groups, I have never heard its independence or professionalism questioned by the opposition, by a judge or by any other expert in a case.

Mr A Maginness:

Thank you.

The Chairperson:

I thank everyone for coming along to the session. We will now adjourn.