Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Briefing on SL1 Criminal Aid Certificate Rules, Assignment of Two Counsel

13 October 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 Basil McCrea
Mr Alban Maginness
Mr Jim Wells

Witnesses:
Mr Robert Crawford)
Mr John Halliday) Northern Ireland Courts and Tribunals Service
Mr Peter Luney)

The Chairperson:

The witnesses are from the Courts and Tribunals Service. I welcome Robert Crawford, head of public legal services division; John Halliday from the public legal services division; and Peter Luney, head of court operations. If you make a presentation, members can ask you questions afterwards.

Mr Robert Crawford (Northern Ireland Courts and Tribunals Service):
I will speak very briefly and then answer questions, after which Peter and John will help out with any detail as required.

The issue was last before the Committee on 3 March 2011 when it had a fairly extensive discussion on the proposals. As a result, we agreed to amend the proposals so that the proposed rules would include provision to ensure that where a judge believed that the assisted person to be tried required two counsel, the judge shall grant the certificate for two counsel if they believe that the person's rights under the Human Rights Act, or the European Convention on Human Rights (ECHR) incorporated by that Act, would be infringed. It has been agreed that that be done, and it is included in the draft rules that we propose to make.

Following the meeting, we made a further change, which is set out in the document provided to the Committee. Following correspondence from the chairman of the Bar Council on 9 March, we made an amendment to the rules to replace the words "Queen's Counsel" with "junior counsel" as a requirement of any award of two counsel. The requirement now is for just two counsel. That is relevant, and I will come to it when referring to points made by the Attorney General.

I understand that the Committee took further evidence from the Bar at its request, and the Attorney General wrote on 2 June and again on 26 September. As the Committee will be aware from the briefing paper that we provided in June, we have been following up concerns raised by the Attorney General, which I will run through briefly. The Minister met the Attorney General on 3 October and has written to him to respond to his concerns, so we regard that consultation as having been completed.

The three key points raised by the Attorney General are as follows. He is concerned about delay, which was raised in previous meetings with the Committee. In particular, he believes that the decision about the award of two counsel should be taken in the magistrates' courts at the even earlier stage of committal rather than awaiting an opportunity for that to be put to a Crown Court judge. We have not accepted that view, which we discussed at the meeting on 3 March, because we believe that any delay will be minimal. We did not feel that the benefits of having the

decision taken by a Crown Court judge should be lost by moving back to the current situation of having the decision taken at the magistrates' courts.

The Attorney General also argued that the rule should specify that one of the two counsel awarded should be senior counsel. Interestingly, that is the exact opposite of the recommendation in correspondence from the Bar Council, which we had previously accepted as an amendment. We believe that the right answer is to allow the flexibility to the solicitor, because the solicitor of carriage in the case will have the choice of whether to appoint a senior counsel if the award is for two counsel. The judge will give a certificate for two counsel and the solicitor can choose which two counsel he wishes to employ.

Moreover, in the immediate future, that would be restrictive in relation to the use of solicitor advocates, in that if there was a requirement to have a senior counsel as one of the two counsel, the option of having two junior counsel or a solicitor advocate leading the case would be missed. It is not uncommon for a very experienced junior counsel to lead in a case, particularly in specialised areas such as financial crime. We wanted to reflect that possibility in the rules. If a solicitor feels that senior counsel is required, the award of two counsel by the court allows that decision to be taken by the solicitor.

The final point raised by the Attorney General was a general concern that there could be a case that was not substantial, novel or complex but in which human rights issues were raised and that the rules would not allow two counsel to be awarded in that case. The amendment that we had already agreed to make, with the Committee's support, would allow a judge to award two counsel in any situation where he believed that two counsel were necessary to protect an assisted person's rights under the European Convention on Human Rights or the Human Rights Act. Our proposed amendment would require the judge to award two counsel in that situation. We believe that that concern is taken care of by the amendment that we had already agreed to put into the rules at our 3 March meeting, with the Committee's support.

I am happy to leave it there and invite questions. The matters are dealt with in the paper, but there may be details that the Committee wishes to address.

The Chairperson:

Thank you very much, Robert. The recent Criminal Justice Inspection (CJI) report on legal services pointed out that the 11% of cases where the prosecution uses two counsel is quite high compared to the 50% of cases where two counsel are used in defence. What is the reason for that discrepancy, and how do the proposals address it?

Mr Crawford:

We have estimated that the likely percentage after the amended proposals have been introduced will be somewhere below 20%. We have evidence for that, in that the withdrawal action by solicitors meant that applications had to be made to the Crown Court after that action ended, because the opportunity for two counsel to be awarded at the magistrates' court had gone. The statistics show that Crown Court judges award two counsel in just under 20% of cases. That is without having the criteria that we have set out in the rules, without a requirement to have written reasons for two counsel and without the judge needing to give reasons. We are fairly confident that the final figure will be a bit below the 19% that we are following at the moment.

That is based on funding in 60 cases that have progressed to this stage. There is nothing to prevent defence teams arguing later before the judge that a second counsel is required, so that figure may be subject to adjustment. However, we are fairly confident that it will be below 20% when the rules are put into place.

We always felt that we would not get the 5% nor did we set that as a target, and we estimated the savings accordingly. We want to reduce it to a more reasonable figure but one that judges, and the Committee, are comfortable with so that we can be safe that no one will be deprived of a good defence team where they need two counsel, one of whom should be senior. Perhaps that is a slightly lengthy explanation. We are not trying to get to 11%, but we believe that we will get reasonably close in that direction and somewhere below 20%.

The Chairperson:

You make a valid point, although the CJI report indicated that even the 11% on the prosecution side was high compared with other areas. It felt that that needed to be reduced, but the disparity on the defence side is then an issue.

Mr Crawford:

It is always better to err on the side that the defence has more leeway and flexibility. The CJI report compared prosecution percentages, so 11% here was high compared with England and Wales. That is a slightly separate issue. We would always want to be on the upward side of the prosecution figure; if we were not, we may be concerned that we had drawn the rules too tightly.

The Chairperson:

You spoke of the decision to assign second counsel as opposed from magistrates' court to Crown Court and said that it would be a marginal delay. Can you be more specific about the length of delay?

Mr Crawford:

At present, most decisions on the assignment of counsel are taken at the preliminary enquiry stage, which is committal proceedings; that is when the case has reached the end of the magistrates' court proceedings. It is still in the magistrates' courts, and that is the last thing that happens before it moves to the Crown Court, if it is moving there. The application tends to be made at that point.

The next formal stage is arraignment. My colleagues will help me out if I get any terminology wrong, but that is the first appearance in the Crown Court. That can be some weeks later, and there are targets to prevent delay so that it is not too lengthy a period. However, there is nothing to prevent a defence solicitor, following the end of magistrates' court proceedings, from making an application for two counsel between those two stages.

The rules require the application to be made in writing; they do not require a hearing before a judge. It is our view that in many cases, particularly where there is an obvious need for two counsel, a Crown Court judge will make a decision on the papers. If a hearing is necessary, the judiciary can list extra hearings or an application to be heard in court, as has been happening following the withdrawal action. In consultation with courts operations colleagues, and Peter is here to help with that if you want to get into the detail, we believe that it ought to be possible in most cases for a defence solicitor who believes that senior or second counsel is needed quickly in

a case to make that application and have it considered by a judge within days. If that is the case, there would not be any real delay in the case because the arraignment stage will happen at the same time.

If there is a risk, a defence solicitor may delay and choose to make the application at the arraignment stage. Having consulted senior judges, they are not convinced that that will itself necessarily lead to delay. However, if it does, the judiciary response to the listing of cases will be fed back to the courts operations folk, and we will aim to put in place some form of procedure to mitigate that.

However, we think that the risk of delay is low and is likely to be no more than a few days in most cases. We do not believe that that risk means that we should move back to a situation where decisions are taken at the magistrates' courts, particularly when we see that when the decision is taken by a Crown Court judge without having put tighter criteria in place that the percentage drops from 51% to 20%. In other words, we have a great deal of confidence that that will achieve what we are looking for.

The Chairperson:

Are you still of the view that it will save £1·5 million without having a detrimental impact on people's ability to get good legal representation?

Mr Crawford:

The £1·5 million was based on not getting to the 5% level in England and Wales, which would have saved £2·15 million. We did not aim at that as we did not believe that we would achieve it. The 20% level is approximately £1·5 million. That will depend on the exact mix of cases that go through. We may not be able to be more specific and to provide a better judgement until the bills come in.

Mr A Maginness:

The proposed criteria for certifying two counsel are:

"a criminal aid certificate may be granted in respect of two counsel if and only if:

(a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact such that it could not be adequately presented by one counsel".

Two points arise from that. You are making the assumption that, in most cases, if one counsel is appointed, it will be junior counsel. Is that right?

Mr Crawford:

That is correct. At an early stage, we looked at the provision in England and Wales —

Mr A Maginness:

I will stop you at that point, because I want to ask you a further question. Why could a court not simply appoint senior counsel?

Mr Crawford:

In the original consultation document, which was published in 2009, we included that possibility because it exists in England and Wales, as I am sure you are aware. However, we took that provision out at the request of the Bar, because it said that in situations where a senior is appointed, it would prefer if a junior were also appointed. We felt that that was reasonable, and it did not seem to affect any volume of savings. Therefore we left that open.

Mr A Maginness:

Therefore it is open to the court to decide whether it is to be junior or senior counsel?

Mr Crawford:

If the court believes that a senior is required, it will award two counsel.

Mr A Maginness:

I do not understand that. Under the rules as framed at present, if the court is appointing counsel, it could appoint either.

Mr John Halliday (Northern Ireland Courts and Tribunals Service):

The position under the rules is that when the magistrates' court grants legal aid to go forward to the Crown Court that is in respect of a solicitor and one junior counsel.

Mr A Maginness:

Therefore that is implied rather than explicit in the rules?

Mr Crawford:

The magistrates' court does not have the power to award two counsel, which means that it does not have the power to award a single senior counsel. As I say, we had originally contemplated that option, but it was removed at the request of the Bar. If a junior feels that he or she is not able to deal with a case without the assistance of a senior, an application for second counsel, who may be a senior, will go to the Crown Court.

Mr A Maginness:

However, the assumption in most cases is that where one counsel is appointed, it will be junior counsel.

My other point involves — I have mentioned this to you before at previous hearings — the reference to:

"substantial novel or complex issues of law or fact".

I understand why the references to "complex issues of law or fact" and "novel" are included, but I cannot understand why the reference to "substantial novel" is included. I do not understand what that means. Can you explain it?

Mr Crawford:

What we are trying to capture — it is a subjective assessment by the judge who is making the decision — is that, take the "complex" line, for example, it may be complex, but it may not require the level of work that would require two counsel. We are allowing the judge to make that decision. In England and Wales, they attempted to nail that down by having very restrictive page counts; that is how they judged whether something was substantial. They had a rigid system whereby the case had to involve more than X thousand pages of evidence. We felt that the word "substantial" avoided that restriction and left it to the judge to determine.

Mr A Maginness:

I could understand it if it was not "substantial" but purely "novel".

Mr Crawford:

A case may involve a "novel" point of law, but junior counsel may be well able to deal with it.

Mr A Maginness:

I still do not understand the terminology; however, we will move on. Why are you so keen to remove the power to appoint counsel from district judges? Are they not capable of assessing a case and making a good judgement of how cases should be properly represented?

Mr Crawford:

Our view is that the Crown Court judge is in a better place, having experience of such cases weekly, day and daily; the Crown Court judge knows from his everyday experience what the case requires. We are not casting doubt on the ability of the magistrate, but the Crown Court judge is in a better position to make that judgement.

Mr A Maginness:

I am not convinced by that, although that will hardly surprise you. However, experienced judges working at the coalface will know, I suggest, through their long experience, what proper representation should be, given the criteria. You are saying that the Crown Court judge is in a better position; I would have thought that magistrates' court judges are in as good a position to judge as Crown Court judges.

If you are saying that when a case gets to the Crown Court, the judges there could review the position and say that the magistrate has got this wrong and that there is over-representation, for example, I could understand that.

Mr Crawford:

In a way, we are not too far from that, in the sense that a magistrate can award junior counsel immediately. In a sense, the Crown Court judge would ask whether more is required. We do not doubt magistrates' or district judges' ability to award counsel; we are saying that if it requires

more than one counsel, we will leave that to the Crown Court judge, because they will have greater experience in more complex cases.

Mr A Maginness:

In my experience, given the use of two counsel in cases, it is important that as a barrister progresses, certainly in the practice of criminal law, that they avail themselves of the experience of senior counsel in the Crown Court. They learn from that senior counsel. Now, however, because of the inevitable reduction in counsel under these new rules, a junior counsel will be deprived of the opportunity of learning from seeing a senior counsel in operation in a serious case. That will affect the standard of advocacy in our courts.

That is the general point that I am making, although I am sure that you will not agree. There is much to be said for the system that we have; it shapes and informs junior counsel's experience and helps them to mature as practitioners.

Mr Crawford:

I do not disagree, because it is a fact that there will be fewer opportunities. However, there will be more opportunities for junior counsel to lead cases on their own. The training of counsel is not addressed by these rules, but I have to acknowledge that there will be fewer opportunities.

Mr A Maginnis:

I understand what you say. However, as a result of these rule changes there will be a greater number of junior counsel dealing with a wider number of cases, but the junior counsel that will be dealing with these cases will be senior juniors.

Mr B McCrea:

That is clear, then.

Mr A Maginness:

Well, if you understood the system, you would be aware of the problems that I am trying to identify.

The fact is that one will find senior juniors squeezing out relatively junior counsel from cases. Therefore, the opportunities that you are talking about for increasing work for junior juniors in the Crown Court will be more restricted. I do not expect everyone to understand the system here, but junior counsel need to acquire experience if they want to perfect their skills of advocacy and representation in the Crown Court. The proposed statutory rule will have a deleterious impact on the ability of junior junior counsel to get into the Crown Court.

Mr Crawford:

We accept your point about fewer opportunities. However, there is no way around that if we want to reduce the number of cases with two counsel. That would be an effect of whatever we did. Beyond that, that is not an issue that is contemplated in the rules as a factor that argues against it. However, I have to acknowledge that that would be an effect. With regard to the scale of it, we wait to see what the impact will be.

Mr B McCrea:

I suppose that I had better go back to that point, which, I confess, I do have a little difficulty with. The briefing paper states:

"For instance, a solicitor may wish to instruct a seasoned junior counsel with experience in a particular area rather than a Queen's Counsel with no experience in that area."

I do know the point that is being made, but the public may not completely understand the difference in a junior junior, a senior junior, a Queen's Counsel, or a whatever. Perhaps you will explain that to me.

Mr Crawford:

It is not uncommon to find cases being led by senior junior counsel — to use that term — who are those who have developed their expertise and may be close to getting a call to be a Queen's Counsel but who have recognised expertise, particularly in specialised areas. Those can include areas such as financial crime but can also include someone who deals predominantly with, say, sexual offences. Personal injury is another area in which expertise is developed over time and very much by specialisation.

What we are saying is that you may well find that there is a Queen's Counsel available with that expertise, in which case it is open to the solicitor to choose that QC. However, the solicitor

may find that there is not a QC available, and it therefore may be preferable to choose a senior junior — to keep that term in play — with the expertise, rather than bring in a QC who may be very good in many areas of law but not have the expertise in that particular area.

Mr B McCrea:

OK, I get that point. Briefly explain to me the difference between a QC and not a QC.

Mr Crawford:

A QC has been effectively called and recognised as having a standard of knowledge, ability and expertise. However, that does not mean that every QC is specialised in every area of the law. It is a bit like hospital consultants. For example, if you bring an orthopaedic consultant into a paediatrics case, it does not help that he is a consultant. It is the area of expertise and knowledge that is most relevant to a particular case.

Mr B McCrea:

OK. May I direct you to table B on page 15 of the consultation document? I am looking at comparisons between Northern Ireland and England and Wales in indictable-only cases with two counsel instructed. What strikes me is that two counsel are instructed for homicide in 90% of cases in Northern Ireland and in 55% of cases in England and Wales. I can understand that. However, there seems to be a huge difference in class-B cases — offences involving serious violence or damage, and serious drugs offences — with 61% of cases in Northern Ireland and only 2% in England and Wales having two counsel instructed. As I look down the table, I am struck by how significant the difference is for other classes of cases, and that is why I am curious that you do not think that you are going to approach the 5% level. There is a mismatch here somewhere.

Mr Crawford:

The simple answer is that we have not applied the same approach as that in England and Wales. It is the same broad approach, in that it is a Crown Court judge, but in England and Wales there are very restrictive — I think that I use that word properly — criteria that require specific page counts and amounts of evidence, and so on, in order to get over the bar for having two counsel. We have left that judgement to the judge by using words such as "substantial".

Mr B McCrea:

I have no problem with you having different criteria. If it is a judge as opposed to a page count, that is fair enough, but my question is, if England and Wales can deliver effective justice in class-B offences with only 2% having two counsel, why can we not?

Mr Crawford:

I would not say that we have concluded that we cannot. What we have concluded, having taken into account all the comments made during consultation with stakeholders, is that applying that restrictive approach in Northern Ireland might lead us to below 5%. There may be particular cases for which defence teams would not be properly resourced, and we want to avoid that. All those things can be reviewed in the light of operation, but, to take an example, the page counts that apply in England and Wales would not work if they were read across here. We simply do not have cases of that kind —

Mr B McCrea:

I have agreed with you that a page count may not be the issue. Somebody makes a subjective judgement about complexity or whatever, and I accept that that is the basis on which a judgement is made. However, whether you do it by page count, by subjective assessment or by throwing a dart at the wall, you still get to the stage at which England and Wales are trying to deliver justice effectively with — in that particular class of offence — two counsel in only 2% of cases, whereas we are indicating that we will not be approaching that level. I just think that we might approach the same level. Either the cases in England and Wales are not really working because they are not doing justice particularly well, or we are being a little generous here.

Mr Halliday:

I think the case is that we are not sure. We feel that our criteria are slightly less rigorous and that we probably will not get down to England and Wales's level. We will find out only when we introduce the rules and monitor their effect.

Mr B McCrea:

I will leave it at that. I will just say that I think that, when we see how this goes, you will

probably come back at some stage and ask why we are at 10% and England and Wales are at 5%. The argument is that the public purse will need justification showing that that is value for money.

Mr Crawford:

That is a question that we get asked by our finance colleagues, but we are trying to balance doing something that is a bit different from what is done in England and Wales — because there are concerns that a direct read-across might cause other problems — with the requirement to make savings as quickly as possible. I accept that we will review it in the light of experience, but, at the moment, the proportion of cases coming through that are going to the Crown Court is below 20%. It may be that, when the criteria are fully introduced, that will be below 10%. We are not able to estimate that precisely.

Mr B McCrea:

The final point that I want to make, which may surprise Alban, is that I actually get the bit about the Magistrate's Court. Surely that particular district judge will have been able to see the case develop and be presented, so that person is in a better position to decide — I may have got this wrong — than someone who just has the case presented to them, who may not even be the judge who is ultimately going to try the case.

Mr Crawford:

If we are looking for a reduction in cases, we believe that the Crown Court judge is better placed to achieve that. The evidence for that is in the 560 cases that we have looked at since the ending of withdrawal action. Before that, 51% of cases were getting two counsel. Of those 560 cases, which have all gone in front of a Crown Court judge, less than 20% were awarded two counsel. The point is made that Crown Court judges take a stricter view of the existing criteria, and we therefore believe that, when we bring in new criteria, it is right to move to the Crown Court judge to ensure that we get a reasonably strict application of what we are proposing.

Mr McCartney:

We have had some discussion about this before. In the Courts and Tribunals Service, we are guided by the interests of justice and the right to a fair trial. That is the framework through which we come at this. In reading through the documents, fixation may be too strong a word, but almost

everything is compared with England and Wales, to the point at which the terminology suggests that a benefit of the proposal will be to bring this jurisdiction more into line with England and Wales. Even in the consultation questions, the last question contains the words

"as is the case in England and Wales".

Whatever we do, we must create a framework for here. We need comparators; I do not say that there should not be comparators. However, the only comparator that we seem to see in all the documentation is England and Wales. We have no examination, nor has any analysis been provided for us, of whether the system in England and Wales has continued to act in the interests of justice and the right to a fair trial.

As we heard before, the Public Accounts Committee report was critical about the move away from who has the right to decide on whether two counsel should be provided. As we take this forward, whatever decisions we are making, we should make them within that framework. Having said that, if a person currently feels that a magistrate's decision not to award two counsel is wrong, has he a right to challenge that?

Mr Crawford:

At present?

Mr McCartney:

Yes, as it now pertains.

Mr Luney:

I am sorry, Mr McCartney. At the moment, I am not sure that it would happen terribly often, but judicial review would be available from a decision by a district judge. However, because the Crown Court judge sits in a superior court, there is no judicial review option.

Mr McCartney:

Therefore, that is a big shift. That is my point, and it does not come at us. The magistrate's decision can be judicially reviewed.

Mr Luney:

Yes, it can, although —

Mr McCartney:

— but a Crown Court judge's decision cannot be judicially reviewed.

Mr Luney:

That is correct, but, obviously, the test for judicial review is reasonably restrictive. It is not just that a person disagrees with the decision, but he would have to be trying to prove that the decision of the magistrate was so unjust that it fell within the remit of judicial review.

Mr McCartney:

A person who feels that he has not been given proper counsel may have grounds for an appeal at a further stage, such as after sentencing.

Mr Crawford:

That would be reviewed by the Crown Court judge. If proceedings had moved to a stage at which the defence team felt that the original decision not to award two counsel should be reviewed, I do not believe that there is anything to prevent further application.

Mr Halliday:

It could form a ground for an appeal to the Court of Appeal.

Mr McCartney:

As Alban in particular has outlined, as with any interpretation of law, on a Monday a judge could make a decision, but a different judge on the Tuesday could overturn it. Terminology such as

"substantial novel or complex issues of law"

could in itself become the basis for an appeal. Therefore, we have not tested that model. If someone feels that he did not get a fair trial because he did not have two counsel —

Mr Crawford:

We have not tested it, but the phrasing "substantial" replaces a restrictive test based on page

count, as discussed.

I think that having a restrictive model is more likely to be vulnerable to challenge, on the basis that it does not provide a fair representation under the ECHR. That is why we have moved away from that and allowed the judge to make that decision. If there is any challenge, the judge has discretion. In the judicial review, the applicant would have to show how that discretion had been exercised unreasonably.

We believe that this is a good system for ensuring that, if anything, judicial discretion is likely to err on the side of generosity to the defence, not the other way around. I also draw attention to the fact that we have put in this specific requirement for the judge: if he believes that there is a human rights risk, he must award two counsel. He has no choice in that.

Mr McCartney:
On the general observation, have you compared it with any jurisdiction apart from England and Wales?

Mr Crawford:
Scotland is not a great comparator, because of the differences in jurisdiction. Our view is that England and Wales is the best comparator, simply because of the structure of the courts. That is why we use it as a benchmark. We have departed from that. The starting point in the first consultation was the system in England and Wales. Our proposal was to introduce here the system in England and Wales, and we have come a very long way from that. I am very happy with the approach that we are now taking, but it will not be as dramatic a reduction as it would have been if we had done the same as in England and Wales.

Mr S Anderson:
You talk about £1·5 million of potential savings. Have you got those figures since the withdrawal action? From the indications so far, are most of the cases being done by two juniors? I am getting all mixed up with juniors and seniors. Is that figure based on there being more instances of two junior counsel being instructed than two senior counsel or counsel made up of one junior and one senior? Is there potential for making even more savings than £1·5 million?

Mr Crawford:

There is potential for more savings. If we had done the same as in England and Wales, based on some very detailed accountancy work when the first consultation paper went out in 2009, we estimated savings of £2·25 million. We never believed that that was entirely possible. The estimate that we settled on — £1·5 million — works out at approximately 20%.

The point that I am making about the withdrawal action in cases that have been considered since then is simply that Crown Court judges are making decisions to award two counsel in approximately 20% of cases.

Mr S Anderson:

Do we know the make-up of those two counsel? Are they two junior counsel or one senior counsel and one junior counsel? What category of counsel are they?

Mr Crawford:

I do not know that.

Mr Halliday:

I was involved in the exercise, but it was a couple of years ago. As far as possible, we used figures from England and Wales and from our own computer system. Therefore, there was a comparison of figures, which made us feel that our estimate of the savings was quite a good one.

Mr Crawford:

We have not broken down the make-up of the two counsel awarded into senior and junior or two junior. We lifted it from the Northern Ireland Court Service records. The defence certificate may be for two counsel, which is what we picked out. We have not done any broader analysis.

Mr S Anderson:

Therefore, there is a possibility for greater savings, depending on the level of counsel in those figures.

Mr Crawford:

We would want to review the operation before reaching that conclusion. It is always possible to look at how further savings might be made. The difficulty is whether we are running into any serious risk of defendants not being properly represented. I acknowledge that there may be scope for further savings to be made. However, I would not be rushing to review this in a year or so, in the hope that we would get further savings.

Mr S Anderson:

If there is the possibility that proper representation is somewhere down the line or into a case, and a decision can be appealed or reviewed, does that warrant movement from junior counsel to senior counsel in that appeal?

Mr Crawford:

A single senior counsel is not used in this jurisdiction, so we would really be looking at two counsel or a change of counsel by a defence team. A solicitor can change counsel, as can a client. If two counsel were initially appointed to a case, it would be possible for one of them to be discharged and a senior counsel brought in. Those things happen all the time. In some cases, there are changes of defence team several times during a case. It is hard to judge exactly how that cost would vary, but it is possible to have the effect that you mention.

Mr A Maginness:

I want to make a further point, which arises from the present position. My understanding of the present position is that, if there is only one counsel appointed in a case and the need for a senior counsel is established, the Crown Court judge can appoint a senior counsel. Is that the correct position?

Mr Crawford:

That is correct. In that case, there would be a second counsel, so a junior would remain and a further counsel would be awarded, who could be senior.

Mr A Maginness:

What you previously suggested in answer to my question is that it is, in effect, similar, in that you

can review it at the Crown Court.

Mr Crawford:

Absolutely. We see no reason why it would not operate in that way.

Mr A Maginness:

I have one final point, which Mr McCartney was making. Are we not in danger of simply retreading the sorts of mistakes that were made in England and Wales? There have been fairly hostile reports from the Public Accounts Committee at Westminster about the quality of justice in the Crown Court, as well as comments made by the Lord Chief Justice in England that were very critical of the quality of justice arising out of the very changes that are being proposed here. Are we not in danger of going through that again and reducing the quality of advocacy and legal representation that we have in Northern Ireland? I think that we should be very proud the quality that we have.

Mr Crawford:

Following the consultation, which drew representations from a wide variety of folk on that kind of point, we believe that leaving the discretion to the judge mitigates that risk considerably. By that, I mean that we are not imposing the same restrictive criteria that England and Wales have done, where if the criteria apply, two counsel cannot be awarded. We leave it much more to the judge to make that decision, and we have also added in the human rights safeguard, which means that the judge must award two counsel if there is a risk that any defendant's human rights would be compromised by not so doing.

We have built in more safeguards than England and Wales have and have provided for more judicial discretion. We believe that that will lead to a higher percentage of cases with two counsel than in England and Wales. I cannot guarantee that there will not ever be a case in which there is an issue about the quality of representation, but we believe that we have gone quite a long way in trying to prevent that coming about.

Mr A Maginness:

We have not seen the text of the human rights provision. Perhaps it is contained in the papers.

Mr Crawford:

I do not think we have set it out in the papers, but I have it in front of me. We can certainly forward it to the Committee Clerk if you want to look at it, rather than have me read it out.

Mr A Maginness:

I think that that might be helpful.

The Chairperson:

OK. Thank you very much, gentlemen.