Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Briefing on Proposals for Reform of Legal Aid

1 July 2010

NORTHERN IRELAND ASSEMBLY

COMMITTEE FOR JUSTICE

Briefing on Proposals for Reform of Legal Aid

17 June 2010

Members present for all or part of the proceedings:
Lord Morrow (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Jonathan Bell
Mr Paul Givan
Mr Conall McDevitt
Mr Alban Maginness
Ms Carál Ní Chuilín
Mr John O'Dowd

Witnesses:

Mr Robert Crawford	)	
Mr John Halliday	)	Northern Ireland Courts and Tribunals Service
Ms Angela Ritchie	)	

The Chairperson (Lord Morrow):
We have with us Mr Robert Crawford, who is head of the public legal services division. Mr Crawford is no stranger to the Committee. We are also joined by Angela Ritchie, who is the business manager of civil legal aid; and John Halliday, who is the business manager of criminal legal aid. Mr Crawford will update the Committee about proposals for reform of legal aid.

Mr Robert Crawford (Northern Ireland Courts and Tribunals Service):
Thank you for the invitation to talk about specific items of the reform programme that are to be included in the proposed justice Bill. I can cover some of the other items if required.

As you said, Angela and John are responsible for civil and criminal legal aid matters respectively, and they will chip in on the details as required.

Three reform items are to be included in the proposed justice Bill. Other matters can be taken forward through subordinate legislation. Therefore, we do not require primary legislation to deal with changes in remuneration rates, for example.

The three items that I will deal with are means-testing; recovery of costs from criminal defendants; and the contingency legal aid fund, which will require the repeal of article 41 of the Access to Justice Order 2003. There is a provision to enable the proposed justice Bill to provide the power to set a fixed financial means test for criminal legal aid, as applies to civil legal aid. I stress that it is an enabling power, the details of which will require subordinate legislation. We are conscious that a fixed means test could have an impact on access to justice and could affect greatly the number of people who would have the ability to access criminal legal aid. With that in mind, we are about to commission research into what that impact would be. That research will take the form of consultancy work to look at the effect of different levels of a fixed means test on access to criminal legal aid. It could take several months to complete and would be available in the autumn before the justice Bill will have gone through all its legislative stages. We are happy to come back to share that research with the Committee.

Before making any subordinate legislation on proposals for a fixed means test, we would, of course, come back to the Committee. We do not rule out the possibility that we will decide that the impact is too great. However, based on the consultation responses to date, it is our belief that there is support for the proposition that those who can pay for their criminal defence should do so and that publicly funded criminal legal aid should be available to those who need it on the basis of their being the least well off in society. That is our starting position. The research that we are commissioning will help to inform decisions. As I said, we will come back to the Committee before any draft legislation is brought forward.

Should I take questions on each topic as we go along or wait until the end?

The Chairperson:
We will take all three and then we will come back.

Mr Crawford:
OK. What we are doing about the recovery of defence costs is, again, taking an enabling power. What that means in practice is that, when a criminal defendant is convicted, a recovery from convicted defendant order is issued. We are talking about a defendant who, when convicted, appears to be quite wealthy and could afford to pay the costs of their criminal defence. The order will apply to take the cost of the defence that has been paid by legal aid back from that person.

I stress again that we propose that the power would be used only in more exceptional cases. It is not intended to deal with a person who has minimal means and might just be able to afford to pay for their defence but a person who is seen to be well able to have funded their legal defence in a criminal case.

This was consulted on back in 2002 in preparation for the Access to Justice Order 2003. It became part of that Order, and we now need to repeat the taking of that power because it is included in a part of that 2003 Order that has not been commenced. In order to commence it, we would need to commence the whole part of that Order. It is easier to include it in the proposed justice Bill and re-enact it. The consultation at that time was supported by the Bar Council, and

the Human Rights Commission said it believed that it should be exercised only in the most exceptional cases, and we have picked up on that point. We take the point that it would apply only in the most exceptional cases.

The next item that I mentioned is the repeal of article 41 of the Access to Justice Order 2003. We believe that that is necessary to allow the Legal Services Commission to put some public money, by way of seed-funding or otherwise, into what is known as a contingency legal aid fund. That is a way of dealing with what is called money damages, where one litigant takes another to court on the basis of getting some property or money from them. It would, for example, be a simple damages case or a dispute over property or perhaps a matrimonial situation. What we have here is a situation in which the contingency legal aid fund would operate by either putting a levy on the costs that were paid by the losing defendant or taking a proportion of the successful litigant's gain and putting that into a fund that would pay out in cases in which both parties were receiving legal aid and in which one would not actually be paying costs.

The consultation ended on 23 April, and there was support for this, primarily from the Law Society. It was a targeted consultation at the legal profession and the judiciary. There were no objections, and the Law Society was very much in favour. The Legal Services Commission is engaged in consultation on the way forward with the Law Society, and the Bar Council has recently joined in. It is hoped that it would be possible to enter into a voluntary pilot scheme in the autumn.

The underpinning policy objective is to take the cost away from publicly funded legal aid and to allow money damages cases to effectively become self-funding. It has a similar objective to the contingent fee approach that is applied across in England and Wales, but it provides greater support for litigants in that it removes the risks that exist in a contingent fee case that that cost will not be met. I think that that is why it has the support of the legal profession. There has been no negative consultation comment on it. Other than that, the only other matters in the proposed justice Bill relate to technical, minor corrections or amendments.

Mr Bell:
I have one point. I am conscious of the fact that the Northern Ireland Human Rights Commission had an issue. I do not want to see people who are just on the breadline having to pay for their defence, but I am not fully sure that I understand the human rights principle involved. If somebody is comfortably able to pay for their defence for a crime that they have been convicted of — therefore making them a criminal — why should the law-abiding taxpayer pay for that criminal's defence?

Mr Crawford:
There are two principles on that issue. First, access to justice must be secured. In other words, everyone must be given the right to a fair trial under article 6 of the European Convention on Human Rights. Legal aid is an important component of that, so, where there is a need for legal aid to provide support for legal representation, it must be provided. The recovery of defence costs applies where, subsequent to the conviction, it appears that the granting of legal aid would not have been necessary. For the purpose of ensuring that a fair trial would take place, the trial judge might have made an award of legal aid, and, subsequently, it might become clear that that was not necessary and the person could have funded their defence. The orders would be used only in cases where it is clear that the person is well above any breadline and well above any need for financial assistance.

Mr Bell:
I fully agree with your first point on access to justice. Everyone will agree with the principle of human rights. It is not a question of access to justice; my question was on the recovery of defence costs. Why must someone be well above the threshold? Why should the law-abiding taxpayer pay for the defence of people who have committed a crime and who are able to pay and, therefore, able to get access to justice?

Mr Crawford:
If legal aid has been awarded in the first instance, a judge has made a decision that the means of the applicant for legal aid are not sufficient to fund their defence. By saying that we are looking at defendants who are much more well off, we are not using that as a way of second-guessing a judge's decision, because the judge will have made that decision for a very good reason. Looking backwards, and with more information available, it may become known during the trial that property and funds are available to the defendant. That information might not have been available at the time that legal aid was granted. We want to have the provision to allow us to do what you are suggesting, which is that, where someone can clearly pay, the money should be recovered.

Mr Bell:
OK.

Mr A Maginness:
The proposals are sensible. Some actual financial eligibility has to be established; it is right and proper that that be done. The level at which it is established is another debate and, in any event, it would require secondary legislation. It is important that people have access to justice and to defence, but, in many criminal cases, people are, at least ostensibly, without any serious assets or means of support. In many cases, an order would be made, but, in some cases, people could afford to pay some or all the legal costs, and that is right and proper. The recovery of defence costs is done regularly in Britain and it is appropriate that it also be done here. On the repeal of article 41: it is necessary to try to establish some sort of self-financing civil legal aid fund. That is a step in the right direction.

Mr McCartney:
As you know, our party has made a submission to the consultation, and I will not rehearse it. As a result of the research, have you any idea about what the financial limit will be in practice?

Mr Crawford:
We have not yet specified it, because we are in the process of drawing up the tender. If the Committee wishes, we are happy to come back with some thoughts on that. We aim to test a number of options as part of the research. John can jump in with more detail on that. We will set out what the impact will be at a lower level and at other levels, so that we can see what the different variations might mean.

Mr John Halliday (Northern Ireland Courts and Tribunals Service):
That is exactly right. The research that we are doing will focus on Northern Ireland.

Mr McCartney:
Will you be designing the research?

Mr Crawford:
We will engage an external consultant to do it. We will have proposals for that consultant that we would be happy to discuss with him or her to see whether there are any gaps in it. We have a consultant in mind, though I cannot say that we have a particular individual in mind because we are going out to tender on this. However, the kind of person that we want will be somebody who has great experience of social services and the social science field in Northern Ireland. We are confident they would pick up on anything that we would miss. We will be quite happy to be given some assistance and guidance in the course of the research.

Mr McCartney:
Are they, in essence, being set a task to save £1 million a year?

Mr Crawford:
No. Sorry, thank you for that question. We said that that would be the maximum that could be saved if we applied the same financial means test that applies in England and Wales. That would be one of the options that they would test for us, but we will also be looking at options that would save less than that. We may also look at an option that would save more than that, but that is not a target for us. We are simply indicating the level of saving that might be generated. The only thing that we can compare with at the moment is the level across in England and Wales.

Mr McCartney:
The briefing document states:

"Research conducted to date suggests that this reform could offer the potential to produce savings to legal aid of as much as £1 million."

There is no point in doing it if you are not going to save £1 million.

Mr Crawford:
No. If the research says that there is sufficient negative impact on access to justice at that level in Northern Ireland, we will not go with that level of financial eligibility. We are in a recession that is affecting a lot of people in Northern Ireland. We have a different social profile than England and Wales, and we expect the research will highlight that.

Mr McCartney:
The concern is that you are going to set a financial limit, which will save you £1 million, so the issue of access to justice becomes a bigger worry.

Mr Crawford:
Let me be very clear: that figure is the only estimate that we can give. It would have been wrong for us not to give it and to say that that would be the impact on funding if we were to do it on the same level of England and Wales. However, we have commissioned research precisely because of the point that you are making. We recognise that the reform will have an impact in Northern Ireland and that that impact might be different and potentially more severe than we would see in England and Wales.

We will bring the research to the Committee before the enabling power is in place and well before we would produce draft subordinate legislation. We are trying to give every reassurance that we want to get this right, and by right, I mean ensuring the correct level of access to justice.

Mr McCartney:
As regards the financial limit setting: are you saying that, if someone employs a solicitor or solicitor's advocate, the ceiling would be set at point X, or if they were to employ one counsel, it would be set at point Y, or if employing two counsel, it would be set at point Z? Given that you are already putting proposals to minimise costs, those things all fit together. Is that the type of idea you are working towards, or will it be a case of, if someone earns more than £15,000 or £25,000 a year, they are not entitled to legal aid, or if they earn £25,000 and they want to employ a QC, they have to contribute something?

Mr Crawford:
The financial eligibility threshold would operate in the same way as in civil and criminal legal aid in England and Wales. A person's earnings, or possibly disposable income, depending on how we would set that out, would have to be of a certain level beyond which a contribution would have to be made. The extent of that contribution and how that would scale would depend on the subordinate legislation that would come afterwards.

There would be a threshold below which legal aid would be available with no contribution. We would not tell someone that they had to take a particular standard of representation; we would say that, once someone is eligible, they will get the representation in an appropriate form for the case or the court based on whatever is in place at that time. They may have to make a contribution based on the level of their income above that threshold. Again, those are things to be determined.

Mr McCartney:
You said during your presentation that the recovery of the costs would come when a person is convicted and at no other time.

Mr Crawford:
Yes.

Mr McCartney:
Is the value of a person's house taken into account when deciding on their ability to pay?

Mr Crawford:
Do you mean for the purposes of the means-testing?

Mr McCartney:
No, the recovery. For example, if someone is convicted, and they have a family and four children, but they are the sole owner of the house.

Mr Crawford:
It could form part of that, but it does not necessarily have to, because that detail is for consideration and inclusion if we decide to go down that road in the subordinate legislation. It is an enabling power. The subordinate legislation that we will be consulting on will set out which court could make such an order, the classes of defendants to which it would apply — it would not necessarily apply to all defendants in criminal cases — the circumstances of their ability to pay and other matters about how the administration will work and about the time scale, and so on. We are not yet in a position to say what those details will be, but it could form part of it.

Mr McCartney:
We are being asked to agree in principle to enabling legislation, but we are not sure what will

come afterwards.

Mr Crawford:
Because the subordinate legislation will be the subject of consultation.

Mr McCartney:
We need to get the broad picture, because there may be cases in which people are obviously able to pay, but if a person owns a house, and their spouse or partner and children are subject to action because of them, it has a wider impact.

Mr Crawford:
Again, that is not really the intention.

Mr McCartney:
I understand that it is not the intention, but the road to hell is paved with good intentions, as they say.

Mr Crawford:
We hope to draft the subordinate legislation in such a way that that will not be the outcome. We will be in a position to bring some proposals to the Committee in advance of the enabling power being made. If the Committee wants to consider that before the proposed justice Bill completes its passage, we will be in a position to do that.

Mr McCartney:
I just want to make the broad point: when presenting the proposed Bill — I do not mean this in a pejorative way — you will outline the best possible case for yourself. We saw an example of that a couple of weeks ago when we got the comparison showing that 58% of cases in the North have two counsel, but in England and Wales it is 5%. Within half an hour, we were given an explanation and rationale for that. We got the same about the fact that there were no complaints about the way a certain procedure was carried out. We are not lawyers, but within 10 minutes, someone told us that there cannot be a judicial review in the High Court.

There is a different reflection cast on that, and that is why we need the process that we are involved in to be as open and transparent as possible, and for you not to baffle us with statistics. If you are making a point, make it as it is, not with a bit of padding around it. That is why I am asking these questions.

Mr Crawford:
I take the point. In our explanations, we are trying not to use many statistics. I apologise for the error about the judicial review, which was mine. The regulations covering judicial reviews state that the judge's decision requires an appeal. I apologise for misleading the Committee on that.

Mr McCartney:
That is OK.

The Chairperson:
What form do you see the subordinate legislation taking? Whatever form it will take will have an impact on whether the Assembly will have less or more control over it, will it not?

Mr Crawford:
Yes. Negative resolution is our expectation, although it could be done differently if the Assembly

chose to do so.

The Chairperson:
Would that mean that we would have the least amount of control over it?

Mr Crawford:
Yes, although the Department will go out to consultation on the issues we have been discussing, because there are quite a number of details on which we want to hear views. On the points that have just been made — about means-testing and the recovery of funds from convicted defendants — there are issues about how they will impact on people, and we want to have full consultation on those.

Before moving ahead with the subordinate legislation, we will bring the consultation paper and its results to the Committee. It will be done through negative resolution, but it is legislation; therefore, we could not simply devise the scheme without coming back to the Assembly.

Ms Ní Chuilín:
Implementing the scheme through negative resolution will almost undercut any proper consultation and not allow for debate. Although you will go through a process, it will actually cut out part of the Committee's role, will it not?

Mr Crawford:
No, because, as with any subordinate legislation, it will involve a full consultation.

Ms Ní Chuilín:
Will the proposal be subject to an equality impact assessment (EQIA)?

Mr Crawford:
I will deal with the proposals in turn. Angela has had quite a lot of consultation with the Equality Commission on the means-testing proposal. Given that we are taking the enabling power and a lot of detail is yet to be determined, we could not carry out a full equality impact assessment. However, we have not decided not to do so. When the research is finished — I imagine that there will be further consultation with the Equality Commission — we may well decide to conduct a full EQIA. We are entirely open to that idea. Given the potential impact of that proposal in particular, we are already aware of the necessity to carry out research.

More detail has to be worked out on the defence costs orders. As yet, we have not carried out any screening of the detail. At the time of the 2003 Order, we did look at the enabling power, on which a screening was carried out on. However, at that point, there was no detail that would have required a full equality —

Ms Ní Chuilín:
But, it was screened out.

Mr Crawford:
We do not have the detail at this point. The enabling power is silent on who the orders would be applied to. It is only when we look at how that would work that we could actually carry out an EQIA.

Ms Ní Chuilín:
When you got the detail in 2002, it was still screened out, was it not?

Mr Crawford:
A screening was carried out —

Ms Ní Chuilín:
It was screened out, and there was no option for an equality impact assessment.

Mr Crawford:
We could not have carried out an equality impact assessment at that time because more detail is yet to be determined.

The Chairperson:
What timescale is involved in all this?

Mr Crawford:
The research for the means-testing should start as soon as we can get it out to tender. We have almost cleared the approval process for the tender, so we hope that that will issue over the summer. We envisage that the research will take no longer than perhaps two or three months. That should enable us to come back to the Committee in mid- to late-autumn, possibly with a consultation paper on the way forward, which will be subject to our Minister's approval.

A similar timescale is involved for the defence costs orders because we need to work up the detail. Again, we will bring the consultation paper with the detail back to the Committee.

Taking into account the points that have just been made, we will carry out any equality impact assessments that we believe are necessary as part of the process.

It is envisaged that the Law Society and the Legal Services Commission will manage to reach agreement on the way forward on how the contingency legal aid fund will operate. A pilot scheme may be up and running in the autumn. In that case, we would want to see the outcome of the pilot scheme before working on the subordinate legislation and the consultation paper if required.

Subordinate legislation cannot be made until the proposed justice Bill goes through the Assembly. However, we hope to go ahead with the consultations in advance of that.

The Chairperson:
What about costs?

Mr Crawford:
Depending on where we draw the financial limit, means-testing may produce a saving. The figure that we provided is probably the maximum saving that would come from that. Administrative costs are involved in making and enforcing defence costs orders involve. However, again, money would come back into the legal aid fund as a result. Seed-funding or pump-priming would be necessary for the contingency legal aid fund. Thereafter, the system would pay for itself and there would be a saving. We have not fully quantified that at this stage.

The Chairperson:
Do you see that as a win-win proposal?

Mr Crawford:
Do you mean the proposal for the contingency legal aid fund?

The Chairperson:
Yes.

Mr Crawford:
That is certainly a win-win proposal.

The Chairperson:
But you are not sure about the other one.

Mr Crawford:
The impact of the other proposals has to be assessed, so that is a different kind of cost-benefit analysis. There would be potential savings, but they would have to be balanced against any impact on access to justice.

Mr Halliday:
It should be recognised that there is a means test at the moment, but it is not a fixed means test. Because it is not fixed, people are sometimes not granted legal aid when they perhaps should be, and vice versa. A set means test would bring certain advantages.

Mr Crawford:
We propose to introduce means-testing in the Magistrate's Court in the first instance. We have no intention of introducing it right away in the Crown Court under the first piece of subordinate legislation, because we will first want to see how it operates in relation to the lesser offences.

The Chairperson:
Mr Halliday, you said that a means-testing mechanism is already in place.

Mr Halliday:
The means test at the moment is whether your means are sufficient to enable you to defend yourself, but it does not define what sufficiency is. That can lead to different decisions being made by different district judges.

The Chairperson:
It is a case of how long is a piece of string.

Mr Crawford:
We believe that there is inconsistency in the decisions at present. In one court on one day, someone will be granted a legal aid certificate, but, in another court on another day, someone with equivalent means might be denied a certificate.

The Chairperson:
Mr Crawford, I believe that you want to brief the Committee on remuneration for Crown Court cases and the proposed introduction of the guaranteed fees scheme. The briefing paper is in members' packs.

Mr Crawford:
I am happy to do that. We thought that it might be helpful to update the Committee on the current state of play on negotiations that we have had with the legal profession on remuneration.

Those negotiations cover very high cost cases (VHCCs) and standard fee cases in the Crown Court. They are all criminal legal aid cases.

I will not go over all the points in the briefing paper in detail. Basically, we have been involved in discussions since December. We have had quite a lot of positive engagement with the Law Society and the Bar Council. We believe that we may be in a position whereby we can reach agreement on those matters, but that is not yet certain. On 17 June, similar sentiments were expressed by both sides of the profession. At that point, I might have been a little less optimistic, but, following a meeting with the Bar Council last night and one with the Law Society this morning, I am more optimistic.

Our objective has been to find a new way of dealing with remuneration in Northern Ireland that meets the public funding test or the expenditure requirement of bringing legal aid expenditure down to the £79 million budget figure for 2013-14 that was agreed in the Prime Minister's letter — that is our bottom line in all of this — while, at the same time, ensuring that the system operates as fairly, efficiently and appropriately as possible.

Not surprisingly, the main subject of discussion has been very high cost cases, which have featured in the media a lot. We seem to be in a position whereby, subject to final agreement, we might get rid of the VHCC system completely. I do not know if members know how the system works or what some of the problems are, so I will briefly outline what is involved. If a case is likely to last more than 25 days, the Legal Services Commission may grant a certificate to state that the case will be considered a very high cost case. That gives access to higher rates of remuneration for preparatory work and higher fees. Basically, the fees move into a higher bracket. We believe that the reason that expenditure on VHCCs reached £28·4 million last year was that the system that was supposed to have produced, in our estimate, about five very exceptional cases a year produced about 55 in the end. Therefore, the system was not tight enough when it came to deciding which cases were to be accepted.

We found that, to some extent, costs went a bit out of control. Under the VHCC system, a taxing master assesses the claims submitted by the profession. We found that hours were not always submitted. The number of hours spent on preparatory work was supposed to be submitted; the legislation, we believed, required it, but perhaps it was not quite tight enough. In particular, we found that brief fees were submitted for cases, which meant that hours would not have been set out at all. A simple figure was put to the taxing master who then had to assess whether or not that figure was appropriate.

It is hard to say whether that resulted in particular overpayments, but, from September 2009, my division of the Courts Service has had the right to intervene in appeals. If members of the profession perceived that the taxing master's figure was not acceptable, an appeal was then made to the taxing master and, if a fee was still considered inadequate, ultimately, to a court. We have intervened in 38 cases, mainly in the past few months. A quick analysis of the figures might be instructive. In the 38 cases, £10·5 million was claimed by members of the profession. The taxing master approved £5·5 million, so the claims were cut by nearly 50%. Appeals were lodged in the 38 cases, because the claimants considered that £5·5 million to be inadequate. We have intervened because, in many of those cases, the numbers of hours spent on preparatory work has not been submitted. Since we intervened, 13 of the 38 claimants have withdrawn their appeals, and because some payments were made in advance, we will, as a result, recoup about £800,000 that was overpaid in advance.

We hope that that matter has been repaired by legislation in 2009, but we now think that we

are on the verge of agreeing a new system that will get rid of all that subjectivity. All credit must be given to the members of the profession who have been working with us on this. At the end of the process, we will, if we reach agreement, be ahead of England and Wales. We will have an entirely bespoke system for Northern Ireland, which I believe will be better than the one in England and Wales. All that subjectivity that provides scope for error or things not to be properly controlled will be taken out of the system.

We hope to bring the discussions to a close next week. The Minister has asked me for a proposal on the way forward by the end of next week, so a bit of urgency is required if we are to get that done to try to bring things to a close before summer. Helpfully, members of the legal profession are around next week to have further meetings with us. Therefore, subject to where we are by the end of the next week and whether the Minister is happy to agree a way forward thereafter, we hope to be in a position to bring a consultation paper to the Committee shortly for its consideration.

Again, this matter will be dealt with in subordinate legislation, so, if the Committee is happy for us to do so, we will hold an eight-week targeted consultation, because the discussions with the profession have already gone on for six months. That would allow legislation to be brought forward relatively early in the autumn, and that is what we are working towards. In the briefing note, we said that, because this wraps together all expenditure on criminal Crown Court cases, the extent of the saving involved could be as much as £1 million a month.

The Chairperson:
I lost you at a stage there: did you say that £800,000 is recoverable?

Mr Crawford:
That would be recovered from a number of cases that have been appealed. The figure is perhaps not as surprising as it sounds. There was a period when the Legal Services Commission had fallen very considerably behind in making payments to members of the profession. When I say very considerably, I am not talking about a couple of months; I am talking about much longer than that. Last year, a scheme was introduced to allow advance payments of up to 60% against a submitted claim, and that operated for the best part of a year. We ended it in April because the payments were essentially up to date, so the scheme was no longer necessary. What has happened is that, in a number of cases that are being appealed, the initial claim was quite high, 60% of it was paid and the taxing master then assessed the value of the claim at less than the 60% that was paid. That money must, therefore, be recovered. Once the appeal is withdrawn, that is the end of the matter, and the Legal Services Commission will recover the money that has been overpaid.

The Chairperson:
Who will they recover it from?

Mr Crawford:
From the professional who claimed it; either a solicitor or a barrister.

The Chairperson:
So who got it wrong?

Mr Crawford:
I would have to say that the whole system was not right from the start. The lack of controls and scrutiny are a particular failing, and that is a fault of ours, the Courts Service, for not designing a tight enough system, which is why we are trying to get all subjectivity out of any new system.

The claims were certainly very high, and the figures that I have given illustrate that. The taxing master, who is a judge, has, I think, been doing his honest best to try to clear claims quickly so that payments can be made and to come to a reasoned view on what the value of the claim should be. We have found that, in the absence of hours being submitted to substantiate claims, the taxing master has had to work things out very roughly. As regards the taxing master's decision, we are not able to say how much of a claim relates to preparatory work and how much relates to any uplift or exceptionality or anything else. We do not regard that as being a system that we should stand over in today's world.

The Chairperson:
That then puts pressure on somewhere else. For instance, a lawyer might have thought that he would get x number of pounds and will now not get that. Is that right?

Mr Crawford:
That is right.

The Chairperson:
He has to get paid for doing his work, so he will go down a different route. Is that right?

Mr Crawford:
In all those cases, money will have been paid. In many VHCCs, the taxing master will have awarded a lower amount than the amount claimed. Those appeals were lodged because the amount awarded by the taxing master was not considered by the profession to be the right amount. It is appropriate to have an appeals mechanism. It is simply that, in this case, we believe that the taxing master was right, or more right, than the higher level of the claim. Money will still have been paid. The taxing master, who is the right person to assess the claim, has assessed it a particular level. We believe that, in future, the taxing master is not the right person to carry out that function and that a standard fee-based system would work better. I believe that we now have the profession's support for that approach.

Mr Givan:
I am interested in this issue. If 13 appeals have been withdrawn, I take it that that is because either the barrister or the solicitor clearly feels that they cannot stand over what they claimed for. Why else would they withdraw their claim? If they have challenged the taxing master's decision, why would they withdraw their claim? The fact that they have withdrawn it tells me — Chairman, you can stop me if I am wrong — that they have been submitting claims that are not accurate. They are trying to defraud the taxpayer.

Mr Crawford:
I am not sure that I would agree with the last part of your statement.

Mr Givan:
They are chancing their arm. It is a fine line.

Mr Crawford:
Our intervention will be to say to the taxing master that this claim must be dealt with on the basis of a full and accurate record of hours worked. That will be the nature of our intervention. These cases are quite often old, so it may well be that the person who has lodged the appeal is no longer in a position to provide that information simply because the records no longer exist. I am not defending anyone, but nor would I feel that it is appropriate for me to speculate on why people have withdrawn their claims.

Mr Givan:
You talked about the taxing master not being the most appropriate person to assess the claims. I think that you said that it is a judge who carries out the taxing master role. Therefore, the person who has been adjudicating on this matter is someone who has risen through the ranks of the profession. Would that not be similar to a Member of Parliament who has been elevated to the House of Lords adjudicating on a Member of Parliament's salary and expenses? The public just would not wear that, yet that system has been in place for the legal profession.

Mr Crawford:
In the old scheme for VHCCs, no civil servant could have properly assessed the value of a claim, because that civil servant would not have understood the amount of work that would have gone into any particular case. I would like to strike out the words "not the appropriate person", because that would apply to our new scheme. The point is that, in the existing scheme, the taxing master was the most appropriate person because he is a judge. Taxing masters do just that job — they adjudicate on the value of fees. That is their role. Therefore, the taxing master was the most appropriate person to perform that function.

We take responsibility for not tightening the system in the first place to ensure that better information reached the taxing master, and we now have the power of intervention to enable us to put that right. However, a much better solution, which is what we are seeking to agree, hopefully, next week, would be a system in which none of that subjectivity is required. We have a fair system of remuneration that is based on set fees that can be determined and allocated by a public or civil servant.

Mr Givan:
That new system will lay down very clear criteria, and you will not simply be able to submit a claim without having any evidence to back it up.

Mr Crawford:
Depending on how discussions with the profession work out — we had some new suggestions from the Law Society this morning — the kind of criteria that we would be looking to establish for the scale of fees would be very similar to the kind of criteria used in existing standard fee cases in the Crown Court, where there is no such problem. The criteria would include, for example, the length of the trial and the amount of paperwork involved, which is, effectively, the amount of evidence served, and that could, in some cases, run to thousands of pages.

We are seeking to find a way of objectively quantifying the work that a solicitor or barrister puts into a case and fairly remunerating them on that basis. There will be swings and roundabouts. Some cases may not involve lots of paperwork and may not last very long, but they may involve an extremely complicated legal matter, and, therefore, more legal work would be required. On the other hand, some cases may involve lots of paperwork but quite simple issues. In our attempt to find objective criteria, we believe that it is necessary to take account of that.

Mr Givan:
You reckon that the new system will save £1 million a month.

Mr Crawford:
If we manage to get agreement somewhere close to the figures that we are discussing.

Mr Givan:
That is pretty staggering.

Mr Crawford:
That figure is based on the Legal Services Commission's current forecast of £18·5 million for VHCCs year on year. Last year, we spent £28·4 million, although we believe that that was an excessively high figure.

The Chairperson:
It should have come in years ago, Mr Givan.

You talked about coming back to the Committee with the consultation paper. When did you intend to do that?

Mr Crawford:
We will bring the consultation paper back to the Committee at the earliest opportunity. If we get the agreement of the Minister and the profession, we hope to be in a position to get the consultation cleared by the Minister in a couple of weeks. I understand that the Committee's next meeting will be early September. I did pick up — perhaps I should not have been eavesdropping — that there is a possibility that the Committee will meet during the summer.

The Chairperson:
I thought that that is what you might have had in mind. *[Laughter.]*

Mr Crawford:
If that were the case, and if we had agreement — I do not think that we would want to bring the consultation to the Committee without agreement, unless we were so close to agreement that the only way of cracking the thing was to publish the consultation paper — we might presume to invite you to consider discussing the matter at that meeting.

The Chairperson:
If there is to be a meeting, we could certainly put it on the agenda. You were listening well.

Mr Crawford:
Thank you very much. The advantage of having the Committee endorse the agreement over the summer would be that, before the start of the new legal year in September, all the difficulties that have arisen in the past year should be settled and the issue about members of the legal profession taking on cases should be solved.

Mr A Maginness:
I hope that the objective of establishing a local criminal and legal aid system for our own local circumstances will be successful, because that is more important than anything else. The problem with the present system — this touches on Paul's point — is that it allowed far too much subjectivity in the assessment of fees. Fees are self-assessed on a subjective basis, and, naturally, one would go for the highest fee rather than the lowest. Therefore, in those circumstances, the system was, at times, open to misuse and abuse or simply open to argument, with one side saying that the fee was too high and the other saying that it was reasonable. A degree of objectivity was necessary and that objectivity was absent in that there was no mechanism to deal with the issue. That is the nub of the problem.

The Chairperson:
I thank you and your team for coming here today. I wish you all the best. We look forward to receiving your paper in due course.

Mr Crawford:
We are not there yet, but we will send it in fairly shortly. Thank you.