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Northern Ireland Court Service

Graduated Fee Schemes (Annex D)

Impact Assessment Summary: Intervention & Options

August 2009

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Impact assessment of introducing graduated fee schemes to remunerate solicitors and advocates representing defendants in cases at the Crown Court in Northern Ireland.

Stage: Initial consultation	Version: 1	Date: 19 August 2009
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Available to view or download at : <http://www.courtsni.gov.uk/>

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What is the proposal under consideration? Why is government intervention necessary?

It is proposed to introduce graduated fee schemes to remunerate solicitors and advocates in cases disposed of at the Crown Court in Northern Ireland to replace the current standard fee schemes prescribed by the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (the 2005 Rules). This will be achieved by replicating the graduated fee schemes prescribed in the Criminal Defence Service (Funding) Order 2007 as amended, with necessary changes made to the Order to enable the schemes to operate in the Northern Ireland jurisdiction. Government intervention is necessary to bring control and predictability to the funding required to meet the fees payable to members of the legal profession in the single highest spend area.

What are the policy objectives and the intended effects?

At present, total expenditure by the Northern Ireland Legal Services Commission on legal aid on behalf of the Northern Ireland Court Service exceeds the Comprehensive Spending Review settlement (agreed under CSR 2008) by circa £25m per annum. The introduction of the graduated fee schemes will go some way to reducing this overspend and will simplify and speed-up the payment process. By reducing to a minimum the number of time-based fees it will enhance forecasting of expenditure.

What policy options have been considered? Please justify any preferred option.

1. No intervention.
2. Revise the current fees within the 2005 Rules.
3. Introduce graduated fee schemes to replace the 2005 Rules.

The preferred option is to introduce graduated fee schemes to replace the current standard fee schemes prescribed by the 2005 Rules. In addition to bringing a greater degree of control and predictability over funding by (largely) replicating the graduated fee schemes operating in England and Wales, this will reduce levels of remuneration in Northern Ireland to levels consistent with England and Wales. Also, it would be difficult to make

the necessary changes to the current schemes to align them properly with England and Wales and replicating any future changes to the schemes would be problematic. The most appropriate and effective option is to replicate the schemes already in place in England and Wales.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effect?

Given the lifecycle of the remuneration of Crown Court cases it will be in excess of 18 months before sufficient data is available to allow a satisfactory assessment to be made in respect of the impact of the new schemes. In these circumstances, it is proposed that the policy behind the schemes will be reviewed 2 years after implementation.

Ministerial Sign-off for initial consultation stage impact assessment.

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister

 **Date:** 28 August 2009

Summary: Analysis & Evidence

Policy option: 1

Description: No intervention

Annual costs

One-off (Transition)	Yrs	Average annual cost (excluding one-off)	Total Cost (PV)
£0	1	£0	£0

Description and scale of key monetised costs by 'main affected groups'

Solicitors and barristers working on cases at the Crown Court.

Northern Ireland Legal Services Commission

Other key non-monetised costs by 'main affected groups'

None

Annual benefits

One-off (Transition)	Yrs	Average annual cost (excluding one-off)	Total Cost (PV)
£0	1	£0	£0

Description and scale of key monetised costs by 'main affected groups'

Solicitors and barristers working on cases at the Crown Court.

Northern Ireland Legal Services Commission

Other key non-monetised costs by 'main affected groups' None

Key assumptions/sensitivities/risks

Inadequate funding available to meet requirements.

Price Base Year	Time Period Years	Net Benefit Range (NPV)	Net Benefit (NPV Best estimate)
N/A	N/A	£ N/A	£ N/A

What is the geographic coverage of the policy/option? Northern Ireland

On what date will the policy be implemented? N/A

Which organisation will enforce the policy? NILSC

What is the total annual cost of enforcement? £0

Does enforcement comply with Hampton principles? Yes

Will implementation go beyond minimum EU requirements? N/A

What is the value of the proposed offsetting measure per year? N/A

What is the value of changes in greenhouse gas emissions? N/A

Will the proposal have a significant impact on competition? No

	Micro	Small	Medium	Large
Annual cost per organisation (excluding one-off)	N/A	N/A	N/A	N/A
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (Increase – Decrease)

Increase of £ N/A

Decrease of £ N/A

Net impact £ N/A

Policy option: 2

Description: Revise the current fees within the 2005 Rules. This would entail retaining the existing fee structure but adjusting the fees to provide like-for-like remuneration with England and Wales.

Annual costs

One-off (Transition)	Yrs	Average annual cost (excluding one-off)	Total Cost (PV)
£2,500,000	1	£5,000,000	£4,750,000

Description and scale of key monetised costs by 'main affected groups'

These changes will affect solicitors and barristers working on cases at the Crown Court.

The revised fees will potentially lead to an overall reduction in their fee of approximately 30% on criminal cases disposed of in the Crown Court.

Other key non-monetised costs by 'main affected groups' None

Annual benefits

One-off (Transition)	Yrs	Average annual cost (excluding one-off)	Total Cost (PV)
£0	0	£0	£0

Description and scale of key monetised costs by 'main affected groups'

None

Other key non-monetised costs by 'main affected groups' None

Key assumptions/sensitivities/risks

Inadequate funding available to meet requirements.

Price Base Year	Time Period Years	Net Benefit Range (NPV)	Net Benefit (NPV Best estimate)
N/A	N/A	£ N/A	£ N/A

What is the geographic coverage of the policy/option? Northern Ireland

On what date will the policy be implemented? April 2010

Which organisation will enforce the policy? NILSC

What is the total annual cost of enforcement? £0

Does enforcement comply with Hampton principles? Yes

Will implementation go beyond minimum EU requirements? N/A

What is the value of the proposed offsetting measure per year? N/A

What is the value of changes in greenhouse gas emissions? N/A

Will the proposal have a significant impact on competition? No

	Micro	Small	Medium	Large
Annual cost per organisation (excluding one-off)	N/A	N/A	N/A	N/A
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (Increase – Decrease)

Increase of £ N/A

Decrease of £ N/A

Net impact £ N/A

Policy option: 3

Description: Implement graduated fee schemes. These schemes would (largely) replicate the schemes that currently exist in England and Wales.

Annual costs

One-off (Transition)	Yrs	Average annual cost (excluding one-off)	Total Cost (PV)
£2,500,000	1	£5,000,000	£0

Description and scale of key monetised costs by 'main affected groups'

These changes will affect solicitors and barristers working on cases at the Crown Court.

The new scheme of graduated fees will potentially lead to a reduction in expenditure of approximately 30% on criminal cases disposed of in the Crown Court.

Other key non-monetised costs by 'main affected groups' None

Annual benefits

One-off (Transition)	Yrs	Average annual cost (excluding one-off)	Total Cost (PV)
£0	0	£0	£0

Description and scale of key monetised costs by 'main affected groups'

None

Other key non-monetised benefits by 'main affected groups'

The legal profession will benefit from a reduction in administration as these schemes require less record keeping. The legal profession will also benefit

from being remunerated more quickly and this should lead to a reduction in banking costs.

The Northern Ireland Legal Services Commission will benefit through less administration as the calculation of fees will be more straightforward.

Key assumptions/sensitivities/risks

None identified.

Price Base Year	Time Period Years	Net Benefit Range (NPV)	Net Benefit (NPV Best estimate)
N/A	N/A	£ N/A	£ N/A

What is the geographic coverage of the policy/option? Northern Ireland

On what date will the policy be implemented? April 2010

Which organisation will enforce the policy? NILSC

What is the total annual cost of enforcement? £0

Does enforcement comply with Hampton principles? Yes

Will implementation go beyond minimum EU requirements? N/A

What is the value of the proposed offsetting measure per year? N/A

What is the value of changes in greenhouse gas emissions? N/A

Will the proposal have a significant impact on competition? No

	Micro	Small	Medium	Large
Annual cost per organisation (excluding one-off)	N/A	N/A	N/A	N/A
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (Increase – Decrease)

Increase of £ N/A

Decrease of £ N/A

Net impact £ N/A

Evidence Base (for summary sheets)

1. Scope of the Impact Assessment

Solicitors and advocates are currently remunerated for work undertaken in the Crown Court through standard fee schemes together with some fixed and time-based fees. Under these schemes, expenditure has continued to rise at an unsustainable rate and it now stands at almost double the figure of ten years ago, rising in that period from just over £23m to in excess of £44m. Overall expenditure has exceeded funding for each of those years and in the past year expenditure has exceeded funding by 15%.

During the review of the current schemes prescribed in the 2005 Rules, it became clear that steps had to be taken to reduce expenditure to a sustainable level either by making substantial alterations to the schemes or implementing new ones that would give control and predictability over spending for the future. Consequently, it is imperative that any revised or new schemes reduce to a minimum the number of bolt-on fees and clearly set the parameters in which any fees are to be paid.

It became clear that graduated fee schemes (GFSs) offered the most workable solution to address this problem. The proposed schemes would (largely) replicate the schemes operating in England and Wales. Experience there has shown that the fees are much more predictable and with the exception of a few cases, in which it can be shown that additional preparation work has been required, the fees can be calculated simply based on readily available data associated with the case.

2. Rationale for Government Intervention

The Government is fully committed to providing funding to ensure access to justice is available for those who cannot afford to pay for it themselves, but it also recognises that this must be done more efficiently and in a manner that is sustainable. Legal aid expenditure is continuing to grow at an unsustainable rate and over a number of years additional funding has been required to meet demand. In doing this, funds have been obtained through reductions in other areas of expenditure within the Northern Ireland Court Service's overall budget and, where that has been insufficient to meet the demand, monetary assistance has been received from the Ministry of Justice/the Treasury. When Policing and Justice is devolved to the Northern Ireland Assembly, funding will be provided through a new Northern Ireland Department of Justice again

with a finite budget. Within the Northern Ireland environment, legal aid will have to compete for funds with other areas such as health and education and it is less likely that requests for additional funding will be met by the Assembly.

If the problem is not addressed decisions will have to be taken on how to allocate funding across the various areas of legal aid spending and this would result in some payments not being made on a timely basis. Year-on-year the problem would escalate creating financial difficulties for members of the legal profession and administrative problems for the Commission. No doubt this would also lead to friction between the Commission and members of the legal professions. In short, it is imperative that the problem be addressed urgently.

3. Cost/Benefit Analysis

Introduction

In determining the level of benefits to be obtained from the preferred option, the Court Service used the current rates applied in the GFSs in England and Wales. It should be noted, that the Ministry of Justice has recently gone out to public consultation on reducing the rates under the advocates' GFS by an, as yet, unspecified amount. Pending the outcome of that consultation, it may be necessary to re-visit this impact assessment in light of any reductions proposed for England and Wales.

Costs

There are no discernable costs associated with the preferred option other than some negligible start-up costs.

Benefits

To assess the benefits associated with the preferred option the Court Service obtained data on 294 actual cases enabling it to develop a sample of 212 cases that were considered to be representative in terms of numbers and size of cases being dealt with at the Crown Court in Northern Ireland. This sample was then used to calculate the fee payable under the current fee schemes and under the GFSs. A comparison of fee levels facilitated by that exercise indicated that fees in Northern Ireland would reduce by 34% overall on the introduction of the GFSs. It should be noted, however, that the exercise took no account of certain add-on fees and 'special preparation' fees paid under the GFSs meaning that the actual savings will be somewhere lower than 34%. In the circumstances, it would be reasonable to estimate overall savings to be

in the range of 25% to 30%. Applying these percentages to the total Crown Court expenditure on standard fees under the 2005 Rules for 2008/09 of £19m (exc.VAT) would produce savings in the range of £4.8m to £5.7m. Based on these figures it would be reasonable to assume annual savings of £5m.

In addition to the level of savings on fees identified above, there will be a small reduction in effort required by the Commission to administer the GFSs.

Conclusion

The cost/benefit analysis clearly indicates there would be a positive case for proceeding to implement the selected option.

Option 1: No intervention

The current remuneration schemes for criminal legal aid for Crown Court cases in Northern Ireland are set out in the 2005 Rules. Their predecessors set out in the 1992 Rules, prescribed standard fees for cases meeting certain criteria and also prescribed rates of remuneration to be applied to work undertaken in non-standard fee cases. Over time many cases came to be paid under non-standard fees and, as this produced higher and unpredictable costs, the cost of legal aid continued to rise at an unsustainable level. To address this rise in costs the 2005 Rules were introduced to provide a wider range of standard fees with allowance for a limited number of additional time-based fees. Provision was made, however, to allow for a percentage enhancement of fees where the circumstances of the case, or part of it, were deemed to be 'exceptional'.

The review of the operation of the 2005 Rules has shown that the objective of controlling expenditure has not been achieved and expenditure continues to rise. In brief, the existing schemes lack control and under them, expenditure has risen to an unacceptable level giving remuneration that is higher than in England and Wales. With the devolution of Policing and Justice to the Northern Ireland Assembly expenditure will come under increasing scrutiny and, with other calls on the resources available, additional funding may not be available.

In summary, the standard fees are currently set too high and are unsustainable and the number of fees claimed on any report is difficult to predict leading to a lack of control.

Option 2: Revise the current fees within the 2005 Rules.

Implementing the option to revise the fees payable under the 2005 Rules, whilst retaining the structure of the schemes, would entail reviewing the fees and revising them to levels that would currently match the funding provided in England and Wales through the fees in the GFSs.

In essence, the GFSs provide a small basic fee (varied to reflect different types of offence) which is enhanced by additional variable fees paid to reflect the size and complexity of the case, for the number of pages of served evidence and, where appropriate, the number of prosecution witnesses (advocates only) and the duration of trial. In Northern Ireland, the 2005 Rules provide a significantly higher standard fee (varied to reflect different types of offence) and, where appropriate, refresher fees, but with no facility for the automatic enhancement of fees provided by the GFSs. On the basis that there are significant differences in the make-up of the schemes in both jurisdictions, it is not possible simply to compare remuneration by making direct comparisons between fee rates.

In these circumstances, it would be necessary to compare remuneration levels by case type and means of disposal in both jurisdictions. Whilst this may be possible (dependent on the amount and quality of data available on reports in England and Wales), it would be a significant and time consuming piece of work. Moreover, the revised fees in Northern Ireland would be simple averages of their English counterparts and take no account of the size and complexity of cases. This in turn could lead to an increase in applications to enhance fees in larger cases under the 'exceptionality' provisions in the 2005 Rules, leading the Commission to incur additional costs over and above funding levels in England and Wales. To counteract this, it would be possible to do away with the 'exceptionality' provisions based on the argument that the fees operate on a swings and roundabouts basis, though this may be challenged as being unfair.

As previously mentioned, making the necessary comparison would be a time consuming process and it is unlikely that new fee rates could be brought into operation before 2011. With the continuing projected funding shortfall there is a need to adjust fees at the earliest opportunity making this option problematical.

Finally, implementing this option could present problems in the future where any changes are made to the GFSs in England and Wales. Where this occurred, it would be necessary to establish the impact the changes would have on costs and incorporate complementary changes in the Northern Ireland fee rates. This could only be done once sufficient data was available to analyse the changes meaning that the Northern Ireland schemes would be out of sync with the English schemes for a period of time.

Option 3: Implementing the Graduated Fee Schemes

This option involves the implementation of graduated fee schemes based on the schemes currently operating in England and Wales.

Implementing these schemes will bring a greater degree of control and predictability over funding for a large section of Crown Court cases in Northern Ireland. In addition, implementation will bring the rates of remuneration into line with the lower rates being paid in England and Wales and assist the Court Service in reducing its overspend on legal aid.

This option will be relatively straightforward to implement and implementation can be achieved in the short to medium term, which is important given the Court Service's projected funding shortfall.

Summary of Options

Option 1 would maintain the existing schemes and current level of fees. However, maintaining the status quo is not affordable and would not provide the Commission with greater control and predictability over spending. For these reasons the Court Service discounts this option. Options 2 and 3 would lead to a reduction in fee levels bringing them into line with fees being paid in England and Wales. Option 2 would be difficult and time consuming to implement and the Court Service discounts this option on that basis. Option 3 can be implemented in the short to medium term and it is an easier system to support administratively. For these reasons it is the preferred option.

Enforcement and Implementation

A consultation paper and draft rules have been prepared and will be circulated widely for a 13 week consultation exercise. During that period, the Court Service will enter into informal consultation on request to discuss the proposals. At the end of the consultation period draft rules will be amended to incorporate any agreed changes and will be laid before parliament before

coming into operation. The Rules will apply to any criminal aid certificates granted on or after the date on which the Rules come into operation

Impact Tests

It is likely that there will be opposition to the introduction of this scheme by both branches of the profession primarily because of the reduction in the remuneration levels, but this is unlikely to have any significant impact on supply. While solicitors' firms will oppose the reductions, as they will be worst hit by the new scheme, they are likely to welcome an improvement in payment performance that the schemes will bring. Payment performance has been a major concern for all providers.

The introduction of GFSs will have no effect on other parts of the justice system or on the granting of legal aid by the court and will, therefore, not impact on competition.

The new system of graduated fees will be governed by the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2010 which will include a range of sanctions for non compliance.

Consultation within government

The main interested body, that is, the Public Prosecution Service of Northern Ireland, is fully aware of the development of this proposal and will be consulted further as part of the proposed consultation exercise. It is intended that the consultation documentation will be circulated widely, including government bodies.

Public consultation

Copies of the consultation paper, the equality impact screening form and this assessment will be made available to the public in hard copy on request or electronically via websites maintained by the Commission and the Court Service. The consultation period will run from September 2009 to December 2009.

Summary and recommendation

The preferred option will go some way in helping the Commission reduce the current overspend of £25m. In addition it will assist the Commission in better forecasting future expenditure and deliver better value for money. This will be achieved by introducing the graduated fee schemes.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Types of testing undertaken	Results in Evidence Base?	Results annexed?
Competition Assessment	No	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No



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