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Northern Ireland Court Service

Graduated Fee Schemes to remunerate solicitors and
advocates representing defendants at the Crown Court

August 2009

Should you require any further information about the Court Service please visit our website at www.courtsni.gov.uk or alternatively contact us at our Communications Group.

The report will be made available in a wide range of alternative formats. Requests for alternative formats should be made to the Communications Group.

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1 Introduction

- 1.1 The budget for legal aid in Northern Ireland is finite. Over the last number of years, spending on criminal legal aid has increased significantly resulting in expenditure exceeding the budget. This meant that the Northern Ireland Court Service (the Court Service) was in the difficult position of having to secure additional funding from the Treasury. The Court Service has to take steps to reduce the overall cost of legal aid in Northern Ireland. Indeed, in a post-policing and justice devolution scenario, the funds allocated to criminal legal aid need to be judged alongside other priority areas of spending such as health and education and additional end-year funding for legal aid may not be forthcoming. The challenge for the Court Service, therefore, is to ensure that access to justice is maintained within the funds allocated by using them more wisely.
- 1.2 A significant area of spending on criminal legal aid in Northern Ireland is in respect of cases at the Crown Court. The remuneration of solicitors and advocates providing defence services in criminal cases at this Court tier is governed by the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (the 2005 Rules). They do this by way of standard fees with the exception of large cases certified by the Northern Ireland Legal Services Commission as being 'very high cost' cases. In these cases, solicitors and advocates are remunerated (mainly) by way of hourly rates.
- 1.3 Under rule 20 of the 2005 Rules, the Court Service is required to 'keep the general operation of the 2005 Rules under review and to conduct a formal review of the levels of the prescribed fees and rates of payment at least once every two years'. In line with this requirement, the Court Service has recently completed a review of the 2005 Rules in two parts. The first part being in respect of 'very high cost cases' that resulted in the publication of a report in February 2009 with the second being on the standard fees element of the 2005 Rules that resulted in a report being published in August 2009. The review of the 'very high cost case' provisions resulted in new transitional arrangements being introduced for such cases, with reduced rates of remuneration in line with current

rates in place in England and Wales. The principal conclusion of the report on standard fees was that it would be appropriate to develop new schemes for Northern Ireland, based on the graduated fee schemes being operated in England and Wales, as this had the potential to reduce significantly the cost of these cases.

2 Purpose of this document

- 2.1 The purpose of this document is to obtain the views of consultees on the introduction of graduated fee schemes to replace the standard fee schemes in the 2005 Rules.

3 How to respond

3.1 When responding to this consultation document, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where appropriate, how the views of the members were assembled.

3.2 Please submit your response to this consultation by post, fax or email to:

Chris McGregor
Public Legal Services Division
Northern Ireland Court Service
Bedford House
16-22 Bedford Street
BELFAST
BT2 7FD
Tel: 028 9041 2241
Fax: 028 9041 2357
Email: chrismcgregor@courtsni.gov.uk

Closing date

3.3 Responses must be received by Friday 4 December 2009.

Miscellaneous

3.4 Additional copies of this consultation document may be made without seeking permission from the Court Service. Printed copies may be obtained by post by contacting the Consultation Co-ordinator at the address below. An electronic version is available for viewing on the Court Service's website at <http://www.courtsni.gov.uk>. This document will also be made available in a wide range of alternative formats on request. Requests for alternative formats should again be made to the Consultation Co-ordinator.

3.5 Please tell us if you know of others who would be interested in receiving this consultation document.

Confidentiality and complaints

3.6 Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the information access legislation (that is, the Freedom

of Information Act 2000 [FOI] and the Data Protection Act 1998 [DPA]). If you want information that you provide to be treated as confidential, please be aware that, under FOI, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence.

- 3.7 In view of this, it would be helpful if you would explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system, or included as a general statement in your fax cover sheet will not, of itself, be regarded as binding on the Court Service and will be taken to apply, therefore, only to information in your response for which confidentiality has been requested.
- 3.8 The Court Service will process your personal data in accordance with the DPA and, in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.
- 3.9 If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

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Consultation Co-ordinator
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23 - 27 Oxford Street
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- 3.10 A copy of the consultation criteria being used in this consultation is set out in Annex A to this document.

4 Proposed Graduated Fee Schemes

- 4.1 As part of the statutory review of the 2005 Rules, the Court Service looked at the operation of the litigators' and advocates' graduated fee schemes (GFSs) in England and Wales, contained in the Criminal Defence Service (Funding) Order 2007, as amended (the 2007 Funding Order). This included undertaking a comparison of remuneration levels between the two jurisdictions. To do this the Court Service used a sample of 212 actual cases, that were considered to be representative in terms of numbers and size, to calculate the fees payable under the current fee schemes and under the GFSs. This indicated that fees paid in Northern Ireland under the 2005 Rules could be approaching 50% higher than in England and Wales. This is significant given that spending on Crown Court standard fees in the financial year 2008/09 was in excess of £19m. Any potential saving will be less as further individual fees will be added depending on the particular characteristics of each case. A comparison of projected costs between the GFSs and the 2005 Rules is set out in Annex B to this document.
- 4.2 Given that the Court Service is of the opinion that there is no justifiable argument for paying more for work which is essentially the same in both jurisdictions, consideration was given to introducing the English GFSs in this jurisdiction. In considering this proposition, the Court Service could find no insurmountable reason why this could not be done. The Court Service accepts that it would be necessary to make a number of modifications to ensure a proper fit in this jurisdiction. However, the Court Service is content that these modifications can be made in a manner that provides like-for-like remuneration between the jurisdictions.
- 4.3 It should be noted at this point that the Ministry of Justice has recently gone out to public consultation on reducing the rates of remuneration under the advocates' GFS to better align defence fees with prosecution fees. The consultation paper in England and Wales notes that defence fees are on average 23% higher than prosecution fees. This consultation proposes the introduction of the GFSs in Northern Ireland, with the necessary modifications. It also proposes the reduction in advocates' fees in keeping with England and Wales. Therefore, where a decision was

made to apply a further reduction in Northern Ireland, savings would be in excess of the projected figures in Annex B.

4.4 In modifying the English GFSs and developing the draft rules for Northern Ireland set out at Annex C, the Court Service proposes to include provisions from the 2007 Funding Order that relate to the Crown Court only. This means that provisions in respect of proceedings at the Court of Appeal or in the House of Lords etc. have been omitted. Moreover, the Court Service proposes that certain other provisions from the 2007 Funding Order should be omitted, as follows:

- (a) article 19 - provision for staged payments in long Crown Court proceedings;
- (b) article 25 - provision for notifying the court of the amount due by an assisted person under section 17 of the Access to Justice Act 1999 for the payment of some or all of the costs of his representation;
- (c) article 27 - provision for the Legal Services Commission to reduce any fee where the court has made adverse observations;
- (d) article 28 - provision for the Legal Services Commission to deduct the amount of a wasted costs order made by the court from the amount otherwise payable;
- (e) paragraph 13 of Schedule 1 (advocates' GFS) – provision for the payment of a fee for ineffective trials;
- (f) paragraph 16(3)(b) and (c) of Schedule 1 – provision for the payment of fees for consultations and views in trials lasting longer than 25 days;
- (g) paragraph 25 of Schedule 1 (including table) – provision for the payment of fees in trials lasting over 40 days;
- (h) paragraph 27 of Schedule 1 – provision for defence representation for purposes of cross-examination;

- (i) paragraph 28 of Schedule 1 – provision for an advocate solely for the purpose of providing written or oral advice to the assisted person;
- (j) paragraph 29 of Schedule 1 – provision for an advocate solely for the purpose of applying to the court to mitigate an assisted person’s sentence;
- (k) paragraph 4 of Schedule 2 – pages of prosecution evidence cut-off figures in trials table exceeding 25 days; and
- (l) paragraph 6 of Schedule 2 – length of trial proxy table exceeding 25 days.

4.5 In terms of (a) above, the Court Service considers that the lower threshold to very high cost case certification contained in the 2005 Rules in Northern Ireland and the provision governing hardship payments in rule 14 of the draft rules make it unnecessary to have a provision for staged payments. In terms of (b), (c) and (d) above, the Court Service considers that there is no legislative basis for applying these provisions in Northern Ireland at this time. The fact that these provisions have been omitted from this consultation exercise would not, however, preclude the Court Service from seeking to introduce them at a later date.

4.6 In terms of (e) above, the Court Service considers that this provision has been drawn too loosely for direct application in this jurisdiction and, whilst there may be occasions where it would be appropriate to incur a fee in this respect, there would be other occasions where it would be inappropriate. For instance, where the defence team has been notified that the trial will not proceed. In terms of (f), (g), (k) and (l) above, the 2005 Rules provide that any trial lasting over 25 days will be treated as a very high cost case. In these circumstances, advocates and solicitors will be remunerated under those rules making the provisions at (f) and (g) and the tables in (k) and (l) where the figures exceed 25 days obsolete. In terms of (g) above, where the court appoints an advocate for the purposes of cross examining a witness under the Criminal Evidence (NI) Order 1999, the costs associated with this are met by the Northern Ireland Office, again, making this provision obsolete. In terms of (i)

and (j) above, the Court Service is content that the draft rules are able to remunerate advocates properly in these areas without the need for separate provisions. This would be done under a limited legal aid certificate.

- 4.7 The Court Service has also made a number of other significant modifications to the 2007 Funding Order text being brought forward into the draft rules. References to 'plea and case management hearing' have been replaced with 'first arraignment' or 'arraignment' to reflect circumstances in Northern Ireland. The provision for interim payments of disbursements in Article 14 of the 2007 Funding Order has been replaced by the text in rule 5 of the 2005 Rules, thereby retaining the existing position in Northern Ireland which is working well.
- 4.8 The Court Service has also amended paragraph 17 of Schedule 1 to the 2007 Funding Order by removing the provision to enhance fees and for the payment of certain fees for appeals, committals for sentence and breach hearings. This was because criminal appeals and committals for sentence from the magistrates' court do not form part of the work of the Crown Court in Northern Ireland. The draft rules now cover the payment of fees in breach hearings only and the Court Service is content that these proceedings can be properly remunerated by fixed fees alone.
- 4.9 In addition, the provision in paragraph 22 of Schedule 1 to the 2007 Funding Order as it relates to an advocate's remuneration for additional cases has been carried over to paragraph 18 of Schedule 1 (solicitors' GFS) in the draft rules. This is consistent with the existing position in Northern Ireland in respect of additional cases.
- 4.10 Finally, the Table of Offences in the 2007 Funding Order has been modified by replacing references to legislation in England and Wales with their Northern Ireland counterparts where relevant and creating two new classes of offences, J and K that did not exist under the 2005 Rules. Class J consists of serious sexual offences, formerly part of Class D. Class K consists of certain offences of the type mentioned in Classes F or G where the value involved exceeds £100,000.

4.11 In essence, the GFSs provide practitioners with a small basic fee (varied to reflect different classes of offence) that is enhanced by variable fees payable for the number of pages of served evidence and, where appropriate, the number of prosecution witnesses (advocates only) and the duration of trial. In this way, the fees paid under the GFSs better reflect the size and difficulty of the case. An impact assessment on the introduction of the GFSs as proposed in this consultation document has been conducted in line with standing guidance. The impact assessment is at Annex D to this document.

4.12 It is the Court Service's view that the new fees should apply to all criminal aid certificates granted on or after 1 February 2010. Certificates granted before that date will continue to be remunerated under the 2005 Rules.

5 Consultation questions

Introduction

5.1 The Court Service is eager to obtain the views of as many consultees as possible on all parts of the draft rules and their schedules and the impact assessment. It is important that the rules are appropriate for this jurisdiction and that they cover all circumstances that can arise in the Crown Court in Northern Ireland. The Court Service is, however, particularly interested to receive views in certain areas and would specifically ask for responses to the questions set out below.

Questions

- Q1. Do you agree that it is not necessary for the rules to provide staged payments in long Crown Court proceedings?
- Q2. What are your views on paying a fee for an ineffective trial?
- Q3. Do you consider that the rules can properly remunerate advocates in providing written or oral advice to an assisted person or applying to the court to mitigate an assisted person's sentence under a limited legal aid certificate?
- Q4. What are your views on replacing references to plea and case management hearings with first arraignment or arraignment in the rules to calculate whether a trial has cracked in the first, second or last third?
- Q5. Do you agree that breach hearings can be remunerated properly by fixed fees alone?
- Q6. What are your views on the introduction of two new classes of offences, namely J and K?
- Q7. Are you content that the new rules should be brought into effect for all Criminal aid certificates granted on or after 1 February 2010?
- Q8. Do you agree that it is reasonable in most cases for prosecuting and defending advocate to receive the same level of remuneration?
- Q9. Should harmonisation of prosecution and defence fees be achieved at this time?

5.2 All comments in relation to the proposed introduction of a graduated fee scheme and the draft impact assessment are most welcome.

ANNEX A

Consultation Criteria

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what the proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out an impact assessment if appropriate.

ANNEX B

Cost comparison between GFS and 2005 Rules

	2005 Rules £'000's	GFS £'000's	GFS as % of 2005 Rules	% Reduction
Overall	2,175	1,436	66.02%	33.98%
Solicitor	901	382	42.40%	57.60%
Counsel of which	1,274	1,054	82.73%	17.27%
QC	536	502	93.66%	6.34%
Leading Junior	43	39	90.70%	9.30%
Led Junior	211	190	90.05%	9.95%
Sole Junior	475	318	66.95%	33.05%
Cert Sol Adv.	8	5	62.50%	37.50%
Uncert Sol Adv.	1	-	-	-



For further information on the work of the Northern Ireland Court Service please contact

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