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Northern Ireland Court Service
Impact assessment on the reform of representation
provided by way of criminal legal aid at the Crown
Court (Annex C)

August 2009

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The consultation document will be made available in a wide range of alternative formats. Requests for alternative formats should be made to the Information Centre.

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Impact assessment on the reform of representation
provided by way of criminal legal aid at the Crown Court.

Stage: Initial consultation	Version: 1	Date: 25 August 2009
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What is the proposal under consideration? Why is government intervention necessary?

It is proposed to introduce a new set of rules which seek to prescribe the circumstances in which two counsel may be assigned to cases at the Crown Court in Northern Ireland. These rules, which are based on current regulations in England and Wales, seek to ensure appropriate levels of representation for defendants charged with criminal offences while reducing the cost of providing criminal legal aid in Northern Ireland. Government intervention is needed to reduce unnecessary expenditure and bring greater control over the funding required to meet the fees payable to members of the legal profession.

What are the policy objectives and the intended effects?

At present total expenditure by the Northern Ireland Legal Services Commission on legal aid exceeds the Comprehensive Spending Review settlement (agreed under CSR 2008) by some £25m per annum. Historically, there has been a higher instance of more than one counsel in cases disposed of in the Crown Court in Northern Ireland. The higher instance of the use of two counsel in Northern Ireland adds to the overall cost of criminal legal aid. The new rules should assist the Northern Ireland Legal Services Commission in remaining within the CSR settlement.

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

1. No intervention.
2. Introduce new rules in line with England & Wales.

The preferred option is to introduce new rules prescribing the circumstances in which two counsel may be assigned to defendants in cases at the Crown Court. The higher instance of the use of more than one counsel in Northern Ireland adds to the overall cost of criminal legal aid. Government intervention is needed to reduce unnecessary expenditure and bring greater control over the funding required to meet the fees payable to members of the legal profession.

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

A post implantation review will be carried out one year after the commencement of the new rules to establish the percentage of cases in which more than one counsel has been assigned to defendants at the Crown Court.

Ministerial Sign-off for implementation 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 28th 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'

Counsel 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 benefits** by 'main affected groups'

Counsel working on cases at the Crown Court.

Northern Ireland Legal Services Commission

Other **key non-monetised benefits** 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? NI Court Service

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: Introduce new rules prescribing the circumstances in which two counsel may be assigned in cases at the Crown Court in Northern Ireland.

Annual costs

One-off (Transition)	Yrs	Average annual cost (excluding one-off)	Total Cost (PV)
£750,000	1	£1,500,000	£1,425,000

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

These changes will affect counsel working on cases at the Crown Court.

The new rules prescribing the circumstances in which two counsel may be assigned to cases at the Crown Court will lead to a reduction in the number of counsel, particularly Queens Counsel, assigned to defendants at that court tier, which would lead to a reduction in expenditure on criminal legal aid estimated at £1.5m

Other **key non-monetised costs** by 'main affected groups' None. Defendants at the Crown Court will continue to be represented by two counsel where that is appropriate as is the position with defendants in England and Wales.

Annual benefits

One-off (Transition)	Yrs	Average annual cost (excluding one-off)	Total Cost (PV)
£750,000	1	£1,500,000	£1,425,000

Description and scale of **key monetised benefits** by 'main affected groups'

The Northern Ireland Legal Services Commission will benefit by a reduction in reports submitted by counsel to be assessed and paid.

Other **key non-monetised benefits** by 'main affected groups'
None

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? February 2010

Which organisation will enforce the policy? NI Court Service

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

The grant of criminal legal aid in Northern Ireland is a judicial function, by virtue of Article 29(2) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. This function is usually exercised by a district judge (magistrates' courts), or in certain circumstances the trial judge. Under the Legal Aid in Criminal Cases: Defence Certificate Rules 1966 (the 1966 Rules) the court has the power to certify for more than one counsel and where this happens it is usual for a Queen's Counsel and a junior counsel to be assigned to a defendant. However, in a small number of cases three counsel have been assigned.

Introducing rules prescribing new criteria that must be met by a case before the court can certify for two counsel is part of a programme of measures to prevent unnecessary legal aid expenditure while at the same time ensuring appropriate levels of representation is available to defendants being prosecuted at the Crown Court.

2. Rationale for Government Intervention

The Government is fully committed to ensuring that the proper level of representation is available to defendants at the Crown Court for those who cannot afford to pay for it themselves. Legal aid expenditure is continuing to grow at an unsustainable rate and the current level of representation for defendants at the Crown Court is a contributing factor to that growth. 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

Costs

There are no discernable costs associated with the selected option.

Benefits

To assess the benefits associated with the preferred option the Court Service obtained data on all criminal aid certificates granted for indictable only cases in Northern Ireland in the 2008/09 financial year. Analysing this data indicated that in Northern Ireland two counsel were assigned in 58% of indictable cases. An analysis of data obtained from the Ministry of Justice, indicated that the corresponding figure for England and Wales for 2008/09 was only 5%, meaning that there is a

significantly higher instance of two counsel being assigned in Northern Ireland as compared to England and Wales.

Average costs for each class of case (as defined in the Legal Aid for Crown Court (Costs) Rules (Northern Ireland) 2005 (the 2005 Rules) were calculated and these averages were applied to the Northern Ireland data to align with the levels of representation in England and Wales. This indicated potential annual savings of approximately £2.0m per annum.

It should be noted that the figure of £2.0m represents the potential savings if the level of representation in Northern Ireland was brought into line with England and Wales. As the decision on the number and level of counsel being assigned will remain a judicial function, and this will depend on the circumstances surrounding each case, the level of representation cannot therefore be accurately forecast. It is therefore likely that the level of savings achieved will be less than the indicated £2.0m, and it would be appropriate to assume savings of £1.5m per annum.

Option 1: No intervention

Without intervention it is likely that the current practices in respect of the granting of two counsel would continue. While the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 is the statutory basis for the provision of legal aid and it provides for the making of rules to prescribe the manner in which counsel and solicitors are to be assigned, no such rules have yet been made. Therefore the provisions of rule 2(4) of the 1966 Rules still apply to the grant of more than one counsel. While these Rules still apply in this respect some parts of the Rules have subsequently fallen into disuse. While it can be argued that the wording of Rule 2(4) is fairly restrictive in the circumstances in which more than one counsel should be granted for cases other than murder, practices well-established

over a number of years would make it difficult, if not impossible to effect the change needed.

It is not possible to predict what might happen if the legislation remains unchanged. It is probable, however, that because of the high level of cases in which more than one counsel is granted that this level of representation would continue.

Option 2: Introduce new rules in line with England & Wales.

This option involves the making of new rules under Article 36(3) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. This enables the Lord Chancellor to make rules to prescribe the manner in which counsel are to be assigned to defendants at the Crown Court. The Court Service believes that it is appropriate to mirror the provisions made in England and Wales as they relate to the assignment of two counsel. The current provisions in England and Wales are contained in the Criminal Defence Service (General) (No.2) Regulations 2001 (the 2001 Regulations). Regulation 14 of the 2001 Regulations deals with the use of counsel in the higher criminal courts, including the Crown Court. The regulation prescribes criteria that must be met by a case before the court can certify for two counsel. The criteria include the complexity of the case, the level of representation by the prosecution, the number of prosecution witnesses and the number of pages of prosecution evidence.

The introduction of rules would have an impact on counsel in the Crown court. It will reduce the number of cases in which two counsel are instructed but it is not possible to predict the extent to which each level of counsel will be affected. Although the magistrates' court may certify for one junior counsel only this will not preclude a Queen's Counsel being assigned where the Crown Court considers this appropriate.

Summary of Options

The first option would maintain the current level of representation. However, it is not affordable. Option 2 would lead to a reduction in representation by two counsel bringing this jurisdiction more into line with England and Wales with a reduction in unnecessary legal aid expenditure. For this reason, it is the preferred option.

Enforcement and Implementation

A consultation paper and draft rules have been produced. These will be circulated to affected bodies including the Bar and the Law Society for consultation over a 12 week consultation period. The Court Service will offer to meet with both these bodies and any other interested body on request to discuss the proposals. At the end of the consultation period the draft rules will be amended to incorporate any agreed changes and will be laid before parliament before coming into operation.

Impact Test

It is likely that there will be opposition by the Bar Council to the introduction of these new rules as they will reduce the number of cases to which more than one counsel is assigned. However, the rules will provide appropriate representation for defendants being prosecuted at the Crown Court in Northern Ireland. They will also assist in reducing unnecessary expenditure on criminal legal aid and establish the legislative framework for bringing the Northern Ireland jurisdiction more into line with England and Wales.

Consultation within government

The relevant interested body, that is, the Public Prosecution Service of Northern Ireland, is aware of the development of this

proposal and will be consulted further as part of the proposed consultation.

Public consultation

Copies of the consultation papers, the equality impact screening form and this assessment have been made available to the public in hard copy on request or electronically via a web-site maintained by the Court Service. The consultation period will run from the week commencing 21 September 2009 to 18 December 2009.

Summary and recommendation

The recommended option is to introduce new rules prescribing criteria that must be met by a case before the court can assign two counsel to a defendant being prosecuted at the Crown Court. The criteria will be consistent with criteria applied in England and Wales. Implementation of the proposal should lead to savings of approximately £1.5m.

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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