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# Third Statutory Review of the Legal Aid for Crown Court Proceedings

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## Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland which comprises over 650 self-employed members who operate on an independent referral basis. Members of the Bar specialise in the provision of expert independent legal advice and advocacy, serving the administration of justice and upholding the rule of law across this jurisdiction.
2. Northern Ireland's independent referral Bar represents one of the cornerstones of our legal and justice system with an important history of providing expert impartial representation across a range of areas. The existence of a strong and independent Bar serves the public interest, facilitates the protection of the rights of citizens, the enforcement of their duties and is fundamental to the efficient and effective administration of justice.
3. Around 20% of Bar of Northern Ireland members specialise in criminal law. These barristers are members of The Criminal Bar Association (CBA), which represents the interests of barristers practicing in criminal law including prosecution, defence and appeal work in the Magistrates Court, the Crown Court and the Court of Appeal. The CBA has worked through the review process under discussion at present on behalf of the Bar of Northern Ireland.
4. It is estimated that approximately two thirds of all barristers practising in Northern Ireland will have a practice that will mainly or exclusively entail the provision of legal services funded by Legal Aid. Retaining these highly skilled practitioners is essential to ensure access to justice across society.
5. Barristers have trained for many years and undertaken extensive and costly education, usually accruing large debt in the process. Their work also involves long hours. In a 2022 survey of criminal barristers, conducted by the Bar of NI, over half of respondents said that they worked 60 hours or more in an average week. More detail on the membership survey is provided later in this document.
6. The work of criminal barristers in the Crown Court can be stressful and sometimes traumatic in nature, covering serious matters such as violence, rape, domestic abuse, terrorism, and paedophilia. The work is often complex and serious, requiring much skill and time. Criminal barristers in the Crown Court also deal with serious criminal charges such as theft and robbery, drugs, assault and matters such as murder and manslaughter.

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7. Most barristers are self-employed and all criminal defence barristers are self-employed. As such, they do not have state pension provision, and they are not entitled to holiday or sick pay.
8. The Bar Council regulates all members of the profession so that the public can have confidence that their barrister is fully qualified to undertake the complex work involved. In addition, the Bar Council requires that all members hold Professional Indemnity Insurance (PII) policies that reflect the complexity and value of the cases in which they have been instructed. PII costs across the UK legal services sector have risen steeply in recent years.
9. The Bar of Northern Ireland welcomes the opportunity to respond to the Department of Justice's consultation on the Third Statutory Review of the Legal Aid for Crown Court Proceedings (Costs) Rules (NI) 2005. This follows on from our participation in the consultation process in 2005 and 2016.

### Background

10. Legal aid is an essential tool in achieving equality of access for members of society who cannot afford legal advice and representation. People charged with more serious criminal offences will normally be committed from the Magistrates' Court to the Crown Court to face those charges. Where their means are insufficient to pay for their own legal representation and the court considers that it is in the interests of justice that they should be legally represented, they will be granted legal aid and the costs of representing them will be met out of public funds. This assists the State to meet its obligations under Articles 5 (right to liberty) and 6 (right to a fair trial) of the European Convention on Human Rights.
11. The legal aid system is there to ensure access to justice for all. The system is particularly important as a support service for the most vulnerable in our society and those who otherwise could not afford legal representation. Research conducted by the Joseph Rowntree Foundation<sup>1</sup> in 2022 on Poverty in Northern Ireland found that as Northern Ireland entered the pandemic, nearly one-in-five people lived in poverty. This includes over 100,000 children. Some groups are impacted by poverty much more than others, with disabled people often locked out of the labour market, carers being at huge risk of poverty, and nearly 4 in 10 single-parent families living in poverty.

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<sup>1</sup> [Poverty in Northern Ireland 2022 | JRF](#)

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- 12.** It is likely that inflation levels will exacerbate poverty across society, with the groups identified by the Joseph Rowntree Foundation being particularly impacted by rising costs, specifically single parent families and disabled people.
- 13.** Across jurisdictions, there has been an unwelcome downward trend in investment in publicly funded legal services resulting in services under pressure and practitioners at breaking point. The Bar Council of England and Wales has identified deep cuts to the justice budget by consecutive governments since 2010. The Bar Council's Small Change for Justice report<sup>2</sup> calculated that in 2019, 39p was spent on protecting the public, the courts and wider justice system, per person per day (£144 per year). They found this figure to be much less than many other government departments and bottom of the leader board in comparison with other European countries.
- 14.** In December 2021, Sir Christopher Bellamy QC conducted an independent review of criminal legal aid in England and Wales. The review was designed to find ways to protect the future and long-term sustainability of the criminal legal aid system<sup>3</sup>. In making recommendations, Sir Christopher followed two principles which were described as, "of central importance". Firstly, that the remuneration of criminal lawyers should be such as to attract lawyers of the talent and calibre that the system requires. Secondly, that the principle of equality of arms – broadly that the resources available to the defence should not be inferior to those of the prosecution – is central to the present system of criminal justice.
- 15.** The central recommendation contained in the Bellamy Review was that funding for criminal legal aid should be increased overall for solicitors and barristers as soon as possible to an annual level, in steady state, of at least 15% above present levels. In broad terms, this would represent additional annual funding of some £135 million per annum.
- 16.** In response to the Bellamy Review, the Government announced a package of reforms that would, according to the Ministry of Justice, include the "biggest pay boost in a decade"<sup>4</sup> as part of a pledge to make the legal system "fit for the 21st century" and ensure professionals are "better paid for the work they actually carry out and help free up capacity in courts". After initially welcoming the Government's response to the Bellamy Review, the Bar Council of England and Wales later told the Justice Select Committee that the 15% increase in fees would be applied to new representation orders and so, barristers were unlikely to see the uplift until 2023 or 2024.

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<sup>2</sup> [Small-Change-for-Justice-report-2020.pdf \(barcouncil.org.uk\)](#)

<sup>3</sup> [Independent Review of Criminal Legal Aid - Report \(publishing.service.gov.uk\)](#)

<sup>4</sup> [Legal aid sector put on sustainable footing for years to come - GOV.UK \(www.gov.uk\)](#)

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- 17.** In June 2022 the Criminal Bar Association of England and Wales commenced court walk outs to highlight poor pay and conditions across the criminal legal aid system. The Criminal Bar Association calculated that barristers have suffered an average fall of 28% in their real earnings since 2006 and juniors, in their first three years of practice, earned a median income of just £12,200, which is below the minimum wage.<sup>5</sup>
- 18.** The picture is similarly problematic in Scotland. The Law Society of Scotland estimated that legal aid spending in the jurisdiction fell from £130.9m in 2020 to £99.1m in 2020-21. They have described the situation as constituting a “funding crisis”. Since April 2022, the Scottish Solicitors Bar Association (SSBA) did not accept new instructions in summary cases where a contravention of section one of the Domestic Abuse (Scotland) Act 2018 is alleged. In a statement, the Glasgow Bar Association said that domestic abuse cases are, “far too complex and lengthy to undertake for a fixed fee that was set in 1999<sup>6</sup>”. An offer of an additional 7.5% increase for criminal legal aid and 5% for civil legal aid was rejected. The Law Society of Scotland says the increases have been swallowed up by inflation and don't go far enough.<sup>7</sup>
- 19.** The picture is no better in the Republic of Ireland according to those working in legal advice services. Eilis Barry, Chief Executive of the Free Legal Advice Centre (FLAC) has set out how, “The current civil legal aid system is under-resourced, stretched to capacity, and excludes a number of critical areas of law”. In FLAC's Annual Report for 2021<sup>8</sup>, Ms Barry spoke of a, “ongoing crisis of unmet legal need” across Ireland.
- 20.** Furthermore, Maura McNally, outgoing Chair of the Bar of Ireland predicted that a “constitutional crisis” is looming in the Republic of Ireland, because poor pay rates mean that barristers are abandoning criminal and family law work for other cases, with barristers, “continuously filling the gap that the Government refuses to step into.”<sup>9</sup>

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<sup>5</sup> [Barristers walk out of courts in strike over pay - BBC News](#)

<sup>6</sup> [Legal aid: Defence lawyers boycott domestic abuse cases | Scottish Legal News](#)

<sup>7</sup> [Lawyers boycott domestic abuse cases in legal aid dispute - BBC News](#)

<sup>8</sup> [Calls to Free Legal Advice Centres spike to six-year high \(irishexaminer.com\)](#)

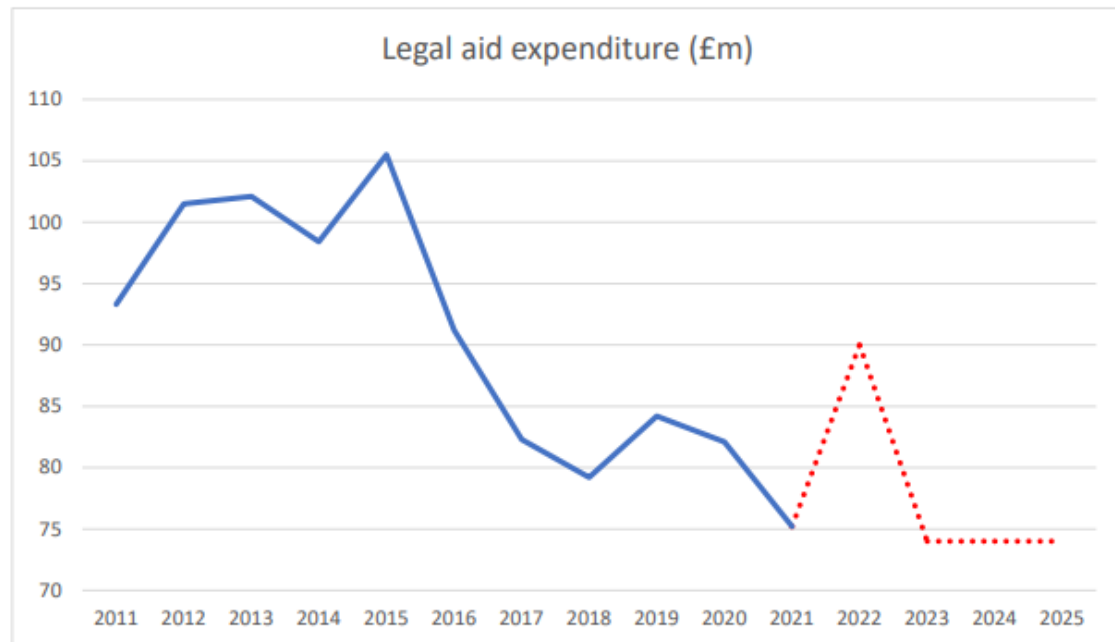
<sup>9</sup> [Barristers 'abandoning criminal and family law work for other cases' – The Irish Times](#)

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## The Northern Ireland situation

21. Payments of costs to legal representatives working on legally aided cases in the Crown Court is governed by the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005, as amended (“the 2005 Rules”).
22. Legal aid expenditure since legal aid became the responsibility of Stormont in 2010. Aside from top-up funding related to COVID-19 recovery, there has been a significant reduction over time while the DoJ’s baseline is currently already 9% lower than what it was in 2011-12.



Source: Department of Justice / Legal Services Agency

23. Despite the clear evidence this would be insufficient, the LSA’s opening budget in 2021-22 was less than £75.7m. It has required significant top-ups through in-year monitoring rounds. The reliance on in-year funding to secure sustainable levels of payments has been a feature of the legal aid system over many years. This creates uncertainty for both the LSA and for practitioners where payment times fluctuate with the available budget and therefore cashflow cannot be relied upon.
24. Rule 20 of the 2005 Rules requires the Department of Justice (“the Department”) to keep the general operation of the Rules under review and to conduct a formal review of the levels of the prescribed fees and the rates of payment. This is due

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to occur at least once in every three-year review period. This is the third statutory review of the 2005 Rules.

- 25.** The commencement of the Third Statutory Review was delayed due to a series of issues over recent years including resourcing issues within the Department, the lack of an Assembly and Executive and issues related to Covid 19. These issues are understood by the Bar, and we appreciate that they have been almost entirely outside of the control of the Department. The Bar has participated in ongoing engagement with the Department of Justice since the recommencement of the review process.
- 26.** The Bar of NI welcomed the approach that the Department originally proposed in August 2020 when it wrote to the Bar proposing a review approach which the Department described as being one in which it was "...keen to ensure that we engage proactively, openly and constructively with the profession and other consultees throughout the review process. We intend to set up a Stakeholder Reference Group at an early stage, comprising representatives of the legal profession to provide input to the review and to offer views on policy proposals prior to the formal consultation."
- 27.** The scope of the Review at that time was to include: "a review of the standard fees in line with the criteria set out in the Legal Aid, Advice and Assistance (NI) Order 1981, to include the rates currently paid and the work they cover"; "A review of the implementation and operation of the exceptionality provisions introduced in 2016." And also, "a third area of focus in relation to cases which do not resolve in the "normal" way – for example cases directly transferred to the Crown Court which are then discontinued".
- 28.** Regrettably, the Department unilaterally changed its position over the subsequent months and years. Much to Bar's regret and to the damage of the overall consultation process, the scope of the review shifted and the opportunity to engage with the Department as part of a Stakeholder Reference Group was removed before the current formal consultation which has featured a much narrower and piecemeal scope. The Bar participated with a commitment to meaningful engagement during the pre-consultation process. We noted the obligation of the Department to conduct the consultation, as a whole, in accordance with applicable statutory requirements and the Sedley principles as per Lord Gunning in *R v Brent LBC ex p Gunning* (1985) 84 LGR 168.
- 29.** There have been several difficulties with the approach taken by the Department of Justice in conducting the Third Statutory Review, in our opinion and as outlined

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by the Bar at various junctures. The Bar of NI communicated these difficulties to the Department following the commencement of the formal consultation process. We also pre-empted some of these difficulties during the pre-consultation process. Our objective was to resolve these issues during the pre-consultation process. We refer the Department to the existing correspondence and minutes of meetings that document our consistent concerns about the Department's approach.

- 30.** Regrettably resolution was not achieved and when the consultation exercise was commenced by the Department of Justice the issues identified by the Bar in the pre-consultation exercise remained. We want to take this opportunity to, once again, highlight these problematic issues and make clear that we reserve our position to revisit those difficulties should the consultation process fail to address our concerns.

#### **Exclusion of "exceptionality"**

- 31.** The Bar has previously, in both correspondence and meetings, questioned the Department's decision to exclude remuneration in exceptional cases from the scope of this consultation.

We contend that the exclusion means that the present consultation does not constitute a proper review of the levels of proscribed fees and rates of payment as required by Rule 20 of the 2005 Rules.

Rule 20 provides:

- (1) The Department shall keep the general operation of these Rules under review to ensure that they are consistent with the requirements of Article 37 of the Order.
- (2) Without prejudice to paragraph (1), the Department shall conduct a formal review of the levels of the prescribed fees and the rates of payment under the Rules at least once in every review period.

The review period is defined by Rule 20(5) as 'the period of three years beginning with 5th May 2015 and each subsequent period of three years'<sup>10</sup>.

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<sup>10</sup> That is: (1) May 2015 – May 2018 (2) May 2018 – May 2021 (3) May 2021 – May 2024.

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It will be seen that Rule 20(1) imposes a continuing obligation to review the 'general operation' of the Rules to ensure consistency with the Article 3711 requirements.

In particular, Rule 20(2) imposes an obligation, which is to be discharged in each review period, to conduct a formal review of 'the levels of the prescribed fees and rates of payments'.

- 32.** The consultation document suggests that the Department considers the present exercise to be in discharge of both the Rule 20(1) and 20(2) obligations. The Bar takes the view that the current consultation exercise on its own will not satisfy the Rule 20(2) duty to review the levels of the prescribed fees and rates of payments (that is, the amounts payable) given the DOJ's confirmation that there will be no review of 'the payment of additional remuneration in exceptional cases' (para 2.5).
- 33.** Though we note the Department has offered its explanation for excluding remuneration in exceptional cases from the scope of the consultation, it remains our view, that there will not be a compliant delivery of the statutory review without consideration of exceptional preparation.

#### **Impact assessment and data analysis**

- 34.** The Bar of NI has sought to fully understand and evaluate the impact of any changes to the rules on the levels of the prescribed fees and the rates of payment to barristers working on legally aided cases in the Crown Court.
- 35.** The Bar contends that data, rather than anecdotes or assumptions, is key to developing effective policy and mapping the impact of that policy. As such, during the pre-consultation process with the Department, we requested data sets relating to fees paid to barristers working on legally aided cases in the Crown Court from both the LSA and Department of Justice.
- 36.** The Bar has been frustrated by the Department's position in relation to making data available. One of the main reasons advanced by the Department for excluding exceptionality from this review was that it did not have the data available to analyse and include it. Yet, for all of the other items that the Department has determined should be within the scope of the review, data has not been available either in advance or at the commencement of the consultation process. This has therefore been a contradictory, slow and wholly unsatisfactory

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<sup>11</sup> Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.



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position to take. Bar representatives were clear during meetings with the Department and in written correspondence that failure to consult without reference to applicable data for impact assessment purposes would not constitute a discharge of the Department's statutory duties.

- 37.** The Department did not make the required data available under the normal course of business requests, an unusual decision and one that does not reflect the positive and productive working relationship between the Bar and the Department. Accordingly, the Bar submitted a series of information requests including some requests made under the Freedom of Information Act. These requests were made to both the Department of Justice and the Legal Services Agency (LSA).
- 38.** The data supplied by the LSA was released in a series of tranches during twelve-week consultation process. We acknowledge that the consultation deadline was extended in acknowledgment of the slow nature of the data release. Nevertheless, it remains our contention that the Department should have itself considered and shared the data at the outset of the consultation and as part of the overall review process.
- 39.** The Bar contends this for several reasons. Firstly, it is the general position of the Bar of Northern Ireland that data driven policy making not only results in better policies but creates legitimacy amongst stakeholder groups. According to HM Government Code of Practice on Consultation (July 2008)<sup>12</sup> a stated criteria is that: "Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals."
- 40.** Secondly, the availability of data and the ability to interrogate that data are vital because of the Department's contention that "the financial objective of the review is to achieve value for money." Without a baseline drawn from the data, the Department cannot ascertain whether value for money can be achieved by any policy variance and where that value for money has been derived from.
- 41.** Thirdly, we assert that the Department cannot be said to have properly conducted Impact Assessments, including against section 75 criteria, without the pertinent data to map out the impacts of a policy change. It was wholly unsatisfactory for the Department to have proposed a consultation without enabling or performing the impact assessments in the required manner. The s75 screening and other impact assessments included in the consultation have no basis or value if they do

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<sup>12</sup> [Code of Practice on consultations \(publishing.service.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/282222/code_of_practice_on_consultations.pdf)

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not relate to the current proposals and the current affected population. It is of even greater concern that the Department should have approached impact assessments in this way given that they were previously advised of the required process through the judgment of Maguire J in *Re General Council of the Bar of Northern Ireland and the Council of the Law Society of Northern Ireland's Applications* [2015] NIQB 99.

42. Furthermore, the Equality Commission for Northern Ireland has provided guidance for public bodies on “Ensuring Effective Equality Assessments”<sup>13</sup>. The guidance states that, “Public authorities should ensure that screening decisions are based on relevant information, whether qualitative and/or quantitative.” We contend that the Department did not base screening decision on relevant information in this instance.
43. The Bar of Northern Ireland, in preparing this consultation response, conducted a survey of members engaged in Crown Court representation to obtain quantitative and qualitative findings to inform our response. The survey was conducted electronically, and responses were received from 100 members of the Bar who practice regularly before the Crown Court. The Bar is always amenable to making our members available as part of co-designed policy development processes. Indeed, practitioner focus groups were discussed during the pre-consultation period. However, the Department did not pursue the establishment of such focus groups. The Bar of NI believes that this is regrettable because focus groups are likely to have enhanced the consultation process as a whole and, specifically, informed impact assessments.
44. The Bar of NI also conducted a general survey amongst all members, looking at a broad range of issues. The membership survey was conducted by an independent third party, Cognisense, who sent individual invitations to 825 members of the Bar Library in January 2022. Responses were obtained from 296 members, the majority (40.8%) are practicing employed barristers. The results are relevant to this consultation in several aspects, as detailed below:

#### **Practice health & working practice**

- (a) Two-thirds (66%) of members experienced a substantial decline in workload during the peak of Covid 19 pandemic.
- (b) Members reported an average working week of 51 hours. Half of this time is spent in court or preparing for court.

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<sup>13</sup> [S75Advice-ScreeningEQIA.pdf \(equalityni.org\)](#)

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#### Wellbeing

- (c) Almost a half (46%) of members consider that their wellbeing has deteriorated compared to 3 years ago, treble the proportion who consider that their wellbeing has improved (14%). Females (58%) and younger members (64%) are most likely to have seen a deterioration in their wellbeing.
- (d) Female members are twice as likely to experience negative wellbeing impacts on a frequent basis. Younger members are much more at risk of adverse effects on their sleep and mental health.

#### Future plans

- (e) 20% of barristers do not expect to remain in practice as present in two years' time.
- (f) Females are more likely to envision career change (26% vs 17% of males).

#### Financial

- (g) 44% of barristers are earning less than in pre-Covid circumstances.
- (h) The earnings of female barristers are two thirds of male barristers. Females also experience longer delays in receiving payments in comparison to their male colleagues.
- (i) Half of members needed to use some form of debt or financial support to run their practice.
- (j) A three-month delay in payment would see 28% experience serious concerns around the viability of practice.

**45.** In preparing this consultation response, the Criminal Bar Association also surveyed its members. This survey was conducted electronically and involved 100 members of the Bar of NI who practise criminal law as a whole or part of their practice. The survey was conducted in April 2022.

**46.** The survey provided some useful findings of relevance to this consultation response, as set out below:

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- (a) The majority of respondents (53%) stated that their working week constitutes an average of sixty hours or more. A further 29% of respondents stated that their working week constituted 50-60 hours.
- (b) When asked how the nature of Crown Court practice has changed during the past three years, 82% identified an increased period of time required to read and prepare a case.
- (c) The impact of Covid was noted by criminal practitioners. 38% stated that they are working more and earning less since the pandemic. A further 33% stated that they are working more and earning the same.
- (d) The survey asked the two following questions:
  1. **What would the impact be on your practice if the legal aid rates remained unchanged?**
  2. **What would the impact be on your practice if the legal aid rates reduced?**

The answer field to both questions was an open text box and the answers therefore qualitative in nature. Most of the answers demonstrated great concern at any stagnation in Crown Court fees. There was great consternation at the notion of a reduction in Crown Court fees with many respondents stating they would be forced to cease to practice criminal law altogether. A dip sample of responses are detailed below:

1. **What would the impact be on your practice if the legal aid rates remained unchanged?**
  - I would have to seriously consider my position as a publicly funded member of the Bar. Living and professional expenses have increased exponentially. My profits are now significantly reduced, and my family life and mental well-being are suffering.
  - This amounts to a cut in real terms of between 5-6% based on the current rate of inflation. This will put me under considerable financial pressure.
  - I would have to take on even more work at a time when I am finding it difficult to find free time to dedicate to family and other interests outside of work.
  - Unlikely to sustain my practice - very likely to seek to shift to other publicly funded work e.g. working for government civil panels.
  - I would have to seriously consider my position as a publicly funded member of the Bar. Living and professional expenses have increased exponentially. My profits are now significantly reduced, and my family life and mental well-being are suffering.

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### **2. What would the impact be on your practice if the legal aid rates reduced?**

- I would seriously pursue alternative work, even if that meant leaving the Bar.
- Huge detrimental effect. I would not be prepared to accept lesser rates. The prosecution rates are the same. They are out of kilter with all other publicly funded work CSO, Dept Sols; coroner; special counsel etc.
- Shocking...I am working on effectively 2005 rates. In next 5 years no self-respecting young Barrister will work for these rates...why take the high pressure and responsibility of hopelessly paid Crown Court trial lawyering when many other well-paid opportunities abound?
- Will make a concerted effort to move to civil work and stop criminal work.
- A reduction would lead me to question whether it was sustainable to continue to do criminal work.

### **Barristers' time and skill, the Crown Court backlog and covid recovery**

- 47.** In accordance with Rule 20 of the 2005 Rules, when reviewing the fees and rates of payment within the Rules, the Department is required to ensure they are consistent with the requirements of Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order"), as follows:

"the time and skill which work of the description to which the rules relate requires;"

In terms of "time and skill", the external context that barristers operate in has shifted significantly since the previous review. The changes have been drawn out through the membership surveys conducted by the Bar, where the majority of criminal practitioners said that they have been doing more work for the same or less rates of pay since Covid.

Although the time and skill involved have been directly affected by Covid related circumstances (as detailed below), the increase in barristers' time and skill cannot be attributed to Covid alone. The practice of criminal law has evolved significantly in this jurisdiction since the devolution of policing of justice and a relatively stable period of devolved government. For example, during the last Assembly mandate and since the previous review of fees, the Department of Justice brought forward five major Bills on tackling domestic abuse and violence, stalking, human trafficking, as well as the implementation of many of the Gillen recommendations.

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- 48.** New legislation and case law means the development of new and relevant knowledge and skills on the part of practitioners. Accordingly, all barristers are required by the Bar to undertake Continuing Professional Development (CPD). Each day of practice will bring new learning so that the barrister can keep themselves up to date and develop knowledge and skill, safeguarding clients and the public interest.
- 49.** New technology and scientific practices mean that the nature of criminal law evolves and adapts. As with society in general, the practice of law has changed significantly over recent decades because of the growth and development of new technology and scientific advances. Developments have taken place in virtually every aspect of these fields from the gathering of evidence to the prosecution and defence of cases in the Crown Court. The time and skill required by barristers has increased and will continue to increase as technological and scientific advances are made.
- 50.** Adapting to the use of new technology in Crown Courts because of Covid as also increased the time and skill required of barristers. December 2021 saw more than one million audio or video connections made for remote and hybrid hearings in the Northern Ireland courts since the onset of Covid. Fifty-six courtrooms are now digitally enabled for remote and hybrid hearings. The Covid-19 pandemic has had a major impact on the operation of the criminal justice system and barristers have adapted and adjusted to new way of administering justice throughout this period.
- 51.** The Covid pandemic has also had a significant impact on the Court backlogs and Northern Ireland was already a significant outlier in respect of case backlogs. Without additional funding, it is estimated that backlogs will continue beyond 2027 in the Crown Court. This is unacceptable for victims, witnesses and practitioners. Delays will lead to yet further pressures as cases take longer to complete and squeeze resources ever tighter.
- 52.** The impact of the backlog was noted by the Justice Minister. In an interview with Irish Legal News in April 2022, Minister Long said that there remains “a considerable amount of work” to be done in the courts to recover from the pandemic.” Minister Long added that NI Executive decisions to allocate funding boosts from UK Government away from Justice, “slow down the recovery of the Crown Courts from the end of 2023 to as far as the end of 2027.”<sup>14</sup>
- 53.** Barristers have played their role in adapting to new technological arrangements in the Crown Court. They have shown great agility and willing in making new arrangements work, maintaining access to justice during the worst of the pandemic. Practitioners

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<sup>14</sup> [Naomi Long: 'Success breeds ambition... I have more work to do as justice minister' | Irish Legal News](#)

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have reported benefits to remote hearings – for example, for brief mentions. However, the Bar of NI would also urge the Department to consider the time and skill required for barristers to operate within this changing landscape, for example, adapting to the use of new practice management software and further practice directions around electronic bundles.

#### **Societal value and the cost of delays, disruption and inefficiencies**

54. In written correspondence dated 11 March, the Department of Justice indicated to the Bar of Northern Ireland that, “the financial objective of the review is to achieve value for money.” The Bar of NI contends that barristers deliver significant value for money at present and indeed exceed that given current fees and the time and skill they employ during Crown Court cases.
55. The Northern Ireland Audit Office (NIAO), in setting out the parameters of their Value for Money Audits<sup>15</sup>, speak to, “whether economy, effectiveness and efficiency has been achieved in the use of public funds.” The NIAO considers value for money in terms of realising financial saving and reducing costs - but not just in those terms alone. The NIAO also looks at value for money in terms of, “providing a better quality of service.” We will return to examine the application of these value for money criteria in a later section of this document. Before doing so, we consider the Department should be conscious of the fact that Legal Aid is not merely a cost but actually an investment that has the proven ability to deliver both societal and economic value.
56. Community Justice Fund research conducted in 2021<sup>16</sup> demonstrated the benefits of legal aid in generating significant savings to other areas of public expenditure. For example, availing of professional legal advice and assistance can bring many benefits to clients and savings to wider society, including avoiding homelessness, families remaining together, avoidance of A&E/ambulance visits. This supports a report by the World Bank, which shows that the cost of not investing in legal aid is substantial in terms of delay, disruption and inefficiency.
57. In March 2022, Justice Minister Long spoke of the inadequacy of the proposed two per cent reduction to the Department of Justice’s spending, as set out in Stormont’s three-year draft budget. The value of legal aid and its importance to citizens was outlined by Minister Long. In a March 2022 interview, Minister Long said, “People lose sight of the fact that those actually in receipt of legal aid are the clients. Without that legal aid, these are individuals who would not be able to access the justice system

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<sup>15</sup> [Value For Money Audit | Northern Ireland Audit Office \(niauditoffice.gov.uk\)](https://niauditoffice.gov.uk)

<sup>16</sup> [Defending-the-public-purse-The-economic-value-of-the-free-legal-advice-sector-September-2021.pdf \(atjf.org.uk\)](https://atjf.org.uk/Defending-the-public-purse-The-economic-value-of-the-free-legal-advice-sector-September-2021.pdf)

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because they can't afford it. For me, the legal aid system is part and parcel of our welfare system."<sup>17</sup>

- 58.** As Lord Neuberger remarked, "Good Lawyers save money." Skilled barristers can get to the core of the issue and quickly. Barristers can assist in the resolution of cases, some of which may otherwise be time intense, costly and ultimately intractable. Criminal barristers are crucial to delivering justice. It is in the public interest for the criminal justice system to be properly resourced.

#### **Independent financial analysis of the current Crown Court Rates**

- 59.** In addition to determining rates that reflect the time and skill of practitioners, it is acknowledged that the Department must also address the need to establish value for money. The National Audit Office (NAO)<sup>18</sup> uses three criteria to assess the value for money of government spending i.e. the optimal use of resources to achieve the intended outcomes:

- Economy: minimising the cost of resources used or required (inputs) – spending less;
- Efficiency: the relationship between the output from goods or services and the resources to produce them – spending well; and
- Effectiveness: the relationship between the intended and actual results of public spending (outcomes) – spending wisely.

- 60.** While we shouldn't consider legal aid fees in strictly monetary terms, this consultation exercise does provide an opportunity to interrogate the figures and analyse the Crown Court rates as they operate at present. The Department should take account of whether it is proposing to balance its drive to minimise the cost of the resources with the requirement for the service to remain efficient and effective. The Department must not solely apply only one of these criteria and must pause to reflect on the extent to which the costs of the service have already been reduced. It should not be assumed that it is valid to seek to spend less on a vital service if the costs of that service have already been reduced to a significantly greater degree than would be expected of other vital public services. Furthermore, as highlighted above, the Department must reflect and demonstrate that it has given consideration to not only spending less on legal aid but also on the effectiveness of the spending, recognising that not only is it procuring a much needed service but also on the fact that the money spent on legal aid is demonstrably being spent wisely because it is delivering additional societal and economic value. The Department, especially in the context of

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<sup>17</sup> [Naomi Long acknowledges perception of legal aid as 'wealthy people making money' - The Irish News](#)

<sup>18</sup> [Assessing value for money- \(nao.org.uk\)](http://nao.org.uk)



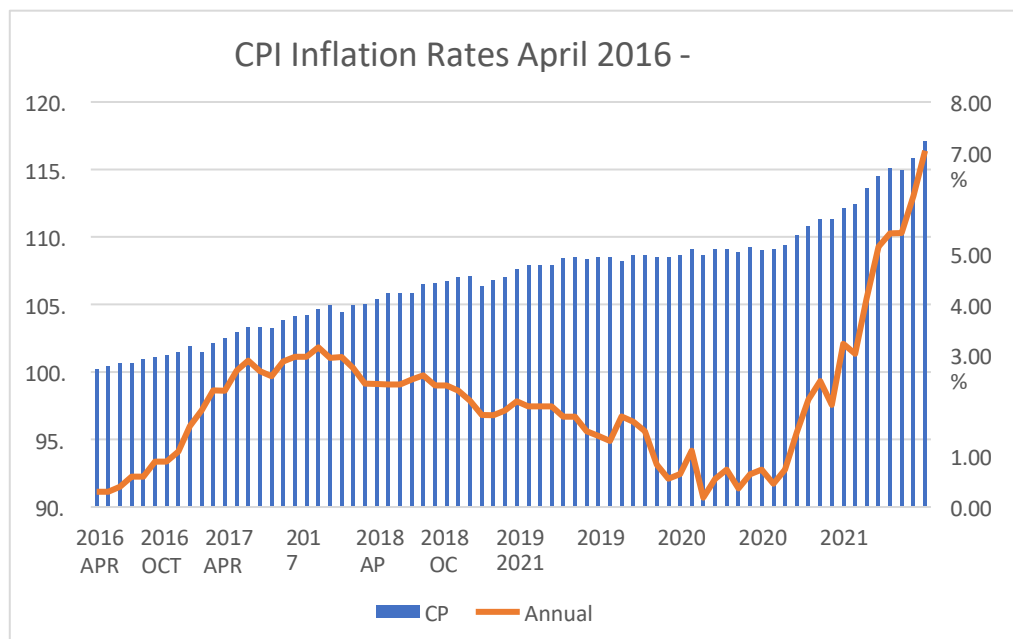
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soaring backlogs in the Crown Court, must also be conscious of whether restricting the money spent on legal aid will result in a more efficient system or whether in fact it could cause grater inefficiencies. As described above, the Bellamy Review in England & Wales has already considered such matters in relation to criminal legal aid.

- 61.** The Bar of Northern Ireland commissioned Goldblatt McGuigan (GMcG) Chartered Accountants to carry out a review of the legal aid rates paid for barristers appearing in the Crown Court. GMcG Chartered Accountants provided a commentary on inflation since 2016, when the most recent rates were set, and analysed how inflation has impacted the level of fees currently being paid on Legal Aid.
- 62.** To set context, GMG have analysed and reported what cumulative inflation has been in the period from April 2016 to March 2022 and have also, applying projections from the Office of Budget Responsibility (OBR) examined what inflation is projected to become. This analysis is now several weeks old, and it is reasonable to conclude that, given the worsening economic situation, coupled with industrial action being taken by a variety of public service providers, this represents a conservative understatement of the projected inflationary position.

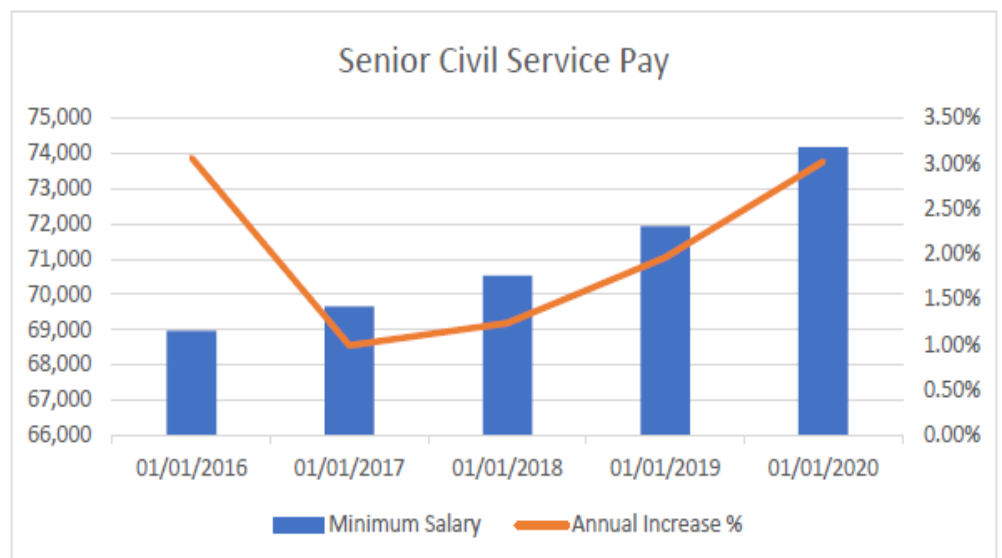
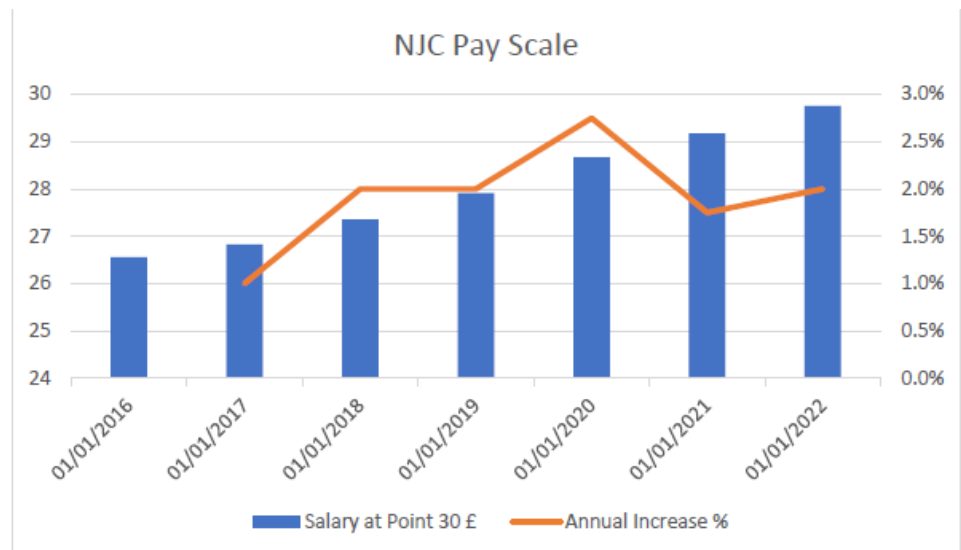
**Cumulative inflation in the period from April 2016 to March 2022 is 17%** and is shown in the following graph:



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63. GMG has also examined the position regarding public sector pay and Senior Civil Service pay over the period covered by this review. GMcG Chartered Accountants looked at public sector pay in the equivalent period through local government pay scales as used by local councils and the community sector in Northern Ireland. These pay scales have seen annual increases of between 1% and 3% each year since 2016. The cumulative increase from 1 April 2016 to 1 April 2021 was just under 10%. The increase for the year beginning 1 April 2022 has not yet been confirmed. If a modest increase of 2% is applied, then cumulative increases will have been over 12% in the period since April 2016.



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64. By stark contrast to the above, the data relating to Legal Aid fees shows that rates have decreased significantly since 2005, both in actual terms and in real terms after inflation has been considered. **Actual decreases since 2005 are between 20% and 37% for most fees, which equates to between 47% and 58% after adjusting for inflation.**
65. Travel rates for barristers including for example for attending court or conducting client consultations are £12 per hour, a figure that has not changed since 1992. Adjusted for inflation, this figure would be £22.68 in 2022.
66. It is evident that barristers working on Crown Court fees have, over the last 17 years, already faced cuts of approximately 50% since 2005. The impact of these cuts is being felt by practitioners in a profound way given the soaring rates of inflation. This is in direct contrast to the increases in funding of other parts of the public sector locally and the recommendations of the Bellamy Review in England & Wales. These cuts have taken place despite an increase in the time and skill required of barristers. Backlogs within the Crown Courts are at huge levels and will only be reduced if the system can operate, not merely at the lowest possible cost, but with a high rate of efficiency and effectiveness. Costs of living pressures are peaking at present and are recognised as key issue for pay and sustainability of services within public sector. This Review must address this imbalance, or the effectiveness and sustainability of the service will be irrevocably damaged.
67. As previously detailed, successive membership surveys conducted by the Bar of NI have shown that any further cuts in Legal Aid fees will cause significant attribution amongst membership. Members may cease to practice at all or be forced to practice in other areas, where reduction in fees is not as acute. Membership attrition means further delay, disruption and inefficiency within the system. The Bar of NI holds that this outcome does not represent value for money.
68. It would be inappropriate for the Department to take a blinkered approach to delivering value for money by minimising cost saving over the delivery of an efficient and effective service. We need only to look at the situation in Crown Courts across England and Wales where successive fee reductions and under investment have created a “national emergency”<sup>19</sup> where, “the very future of our criminal justice system is in jeopardy.”

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<sup>19</sup> [Barristers walk out across Wales and England in mass protest - Wales Online](#)

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## Consultation Questions

### **Q1: Do you have any views on the issues raised in pre-consultation engagement?**

The Bar of NI welcomed the approach to this review that the Department originally proposed in August 2020 when it wrote to the Bar proposing a review approach which the Department described as being one in which it was “...keen to ensure that we engage proactively, openly and constructively with the profession and other consultees throughout the review process. We intend to set up a Stakeholder Reference Group at an early stage, comprising representatives of the legal profession to provide input to the review and to offer views on policy proposals prior to the formal consultation.”

The scope of the Review at that time was to include: “a review of the standard fees in line with the criteria set out in the Legal Aid, Advice and Assistance (NI) Order 1981, to include the rates currently paid and the work they cover”; “A review of the implementation and operation of the exceptionality provisions introduced in 2016.” And also, “a third area of focus in relation to cases which do not resolve in the “normal” way – for example cases directly transferred to the Crown Court which are then discontinued”.

Regrettably, the Department unilaterally changed its position over the subsequent months and years. Much to Bar’s regret and to the damage of the overall consultation process, the scope of the review shifted and the opportunity to form and engage with the Department as part of a Stakeholder Reference Group was removed before the current formal consultation with a much narrower and piecemeal scope and approach was commenced. The Bar participated with a commitment to meaningful engagement. We noted the obligation of the Department to conduct the consultation, as a whole, in accordance with applicable statutory requirements and the Sedley principles as per Lord Gunning in *R v Brent LBC ex p Gunning* (1985) 84 LGR 168.

There have been several difficulties with the approach taken by the Department of Justice in conducting the Third Statutory Review, in our opinion and as outlined by the Bar at various junctures. The Bar of NI communicated these difficulties to the Department following the commencement of the formal consultation process. We also pre-empted some of these difficulties during the pre-consultation process. Our objective was to resolve these issues during the pre-consultation process. We refer the Department to the existing correspondence and minutes of meetings that document our consistent concerns about the Department’s approach.

Regrettably resolution was not achieved and when the consultation exercise was commenced by the Department of Justice and the issues identified by the Bar in the pre-consultation exercise remained. We want to take this opportunity to, once again, highlight

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these problematic issues and make clear that we reserve our position to revisit those difficulties should the consultation process fail to address our concerns. Our concerns are detailed in full in the earlier part of this consultation response.

**Q2: Do you agree that the upper limit of 3000 PPE remains fit for purpose?**

Yes.

**Q3: What are your views on whether the PPE thresholds should be reviewed to achieve a greater balance and more accurate payment?**

There was a significant rebalancing of the PPE thresholds in 2015 to reflect the standardised limits of 1 - 750, 751 - 1,500 and 1,501 – 3,000 for Trial Preparation for counsel. It is unknown what purpose could be served by amending the page number thresholds further or what concern, if any, the Department has in relation to these thresholds.

As the Department is aware, there is only one tier of fee for counsel for a Basic Trial Fee, that is 1 – 3,000. This is not the case for solicitors' fees, which have a banding of 1 – 750, 751 – 1,500 and 1,501 – 3,000 which was introduced in 2016. It is unknown whether the Department believes there is a rationale for the difference in fee tiers payable for a Basic Trial Fee for counsel compared to that of a solicitor.

The Department is invited to replicate the three-tier fee structure available for counsel Trial Preparation as exists for counsel Basic Trial Fee.

**Q4: What are your views on the Department's position that reading PPE is a standard component of any case and should be remunerated via a standard fee?**

The Bar of Northern Ireland is content that reading PPE is a standard component of any case and should be remunerated via a standard fee. At present, high volume PPE cases are generally remunerated via the Exceptional Preparation Scheme at a reading time of either 2 or 3 minutes per page.

**Q5: What are your views on the format and level of an additional PPE fee to adequately remunerate defence representatives for the reading of PPE in excess of the upper PPE threshold under the standard fee structure? Should the fee vary according to level of representative?**

As per the above, the Bar argues that there should be a three-tier counsel Basic Trial Fee in line with the provision available to the solicitor profession.

Using the rates payable via the Exceptional Preparation scheme for reading PPE above 3,000 pages [£80 for led junior, £90 for sole junior and £130 for senior counsel] the equivalent rates per page equate to:

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Equivalent of 2 minutes per page

- Led junior: £2.67 per page
- Sole junior: £3 per page
- Senior counsel: £4.33 per page

Equivalent of 3 minutes per page

- Led junior: £4 per page
- Sole junior: £4.50 per page
- Senior counsel: £6.50 per page

The Bar believes the fee should vary according to level of representative, per the above.

**Q6: Do you consider that the Rules should be amended to explicitly state that the basic trial fee for counsel includes the reading of the first 3000 pages of prosecution evidence?**

The Bar does not believe any reasoning for explicitly stating that the Basic Trial Fee for counsel includes the reading of the first 3000 pages of prosecution evidence. If there was such an amendment it may have an impact on how cases with an Exceptional Preparation element are paid. The DoJ has taken the decision not to include Exceptional Preparation as part of this review despite the Bar consistently stating that standard fees should not be reviewed in isolation.

**Q7: What are your views on whether the basic trial fee for counsel should be amended to include explicit PPE thresholds in line with the solicitor basic trial fees?**

As per the above, the Bar believes that this anomaly should be rectified and there should be explicit PPE thresholds in line with the solicitor Basic Trial Fee.

**Q8: How has the volume and composition of audio/video evidence in Crown Court cases changed since the 2005 Rules came into operation? What kind of work is required of defence representatives when assessing audio/video evidence?**

Since 2005, there has been an increase in use of Body Worn Video evidence, CCTV evidence, surveillance recording and ABE evidence. Generally, Body Worn Video and ABE evidence is relatively short (usually below 2 hours). Depending on the nature of the surveillance or CCTV evidence, this can be longer.

At paragraph 4.29 the Department refers to the PPS fees for listening to or viewing tapes. There is a significant distinction between the viewing of lengthy CCTV or surveillance evidence between the prosecution and defence.

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In prosecution cases, the surveillance or CCTV evidence will have been viewed and analysed by police officers or HMRC officers or Mi5 officers (depending on the nature of the case) in advance of being provided to the PPS, and they will be able to provide guidance on this material. That is obviously not the case for the defence, who have to undertake the same viewing and analysing exercise.

The Department is invited to consider the average listening to/viewing tapes times in cases and to compare the majority of cases with a minority of cases which may have high volume audio or visual materials.

That is, it is the experience of the Bar that the vast majority of cases will have no audio or visual material to be listened to or viewed, and that many other cases will only have short (i.e. typically below 2 hours) of material to listen to or view, usually by way of short CCTV, PACE interview tape, Body Worn Video or ABE and that it is only in a very small number of cases that vast amounts of audio or visual materials are provided.

The Department is also asked to take note that criminal practitioners (when compared to civil practitioners) will spend significant periods of time in court. Usually audio or visual materials are listened to or viewed in evenings and weekends, that is, during antisocial hours.

#### **Q9: What are your views on aligning the fee payable for listening to/viewing tapes with the rates for consultations/views in the 2005 Rules?**

The current fees payable for consultation/view in the 2005 Rules do not represent reasonable remuneration. There is no disagreement in principle in aligning the fees payable for listening to/viewing tapes with the rates for consultations/views but only in circumstances where the fees for consultations/views were being increased to the same level as listening to/viewing tapes.

#### **Q10: Do you have any comments on whether similar provision should be considered to remunerate solicitors for viewing large amounts of audio-visual evidence?**

A similar provision should exist for solicitors to view large amounts of audio-visual evidence.

#### **Q11: Do you have any comments on the proposal that the Rules should be amended to include specific remuneration arrangements in the event of the death of defendant during proceedings?**

Yes, the Bar agrees that this anomaly should be rectified. The natural fee payable should be a Basic Trial Fee.

#### **Q12: Do you have any comments on the proposal to amend the Rules to expressly provide that a basic trial fee is not payable where a Bill of Indictment is quashed?**

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The Bar strongly opposes a quashed Bill being remunerated by way of a fixed fee and expenses. If, upon application by the defence, the Court agrees that the Bill of Indictment is improperly before the Court and quashes that Bill, then the fee should be a Basic Trial Fee, in the same way that a stayed case or a “No Bill” is remunerated.

It is for the prosecution to decide whether to launch a further Bill of Indictment. There may be circumstances where the prosecution does not do so, and therefore no brief fee would be payable which is obviously unfair. The Bar invites the DoJ to provide data on the number of quashed Bills on any given year, as it is anticipated the number is low.

The DoJ further states that the Rules operate on a “swings and roundabouts” basis. If the prosecution has laid a Bill of Indictment which has been quashed upon application by the defence, that ends the case and as such a Basic Trial Fee should be payable.

**Q13: Do you have any comments on how trial length should be defined for the purposes of calculating the basic trial fee and applicable refreshers fees?**

Clarification was brought by the Taxing Master decision of T/CC/19/00002 in relation to the definition of a trial length. The Bar believes the decision of the Taxing Master (which was not appealed by the DoJ) was correct and no further amendment is required other than to specifically state in the Rules the matters as outlined in the judgment.

**Q14: Do you have any comments on the proposed approach to clarifying in the Rules that a that a guilty plea is payable where the assisted person pleads guilty to one or more counts at any arraignment held before the case is listed for trial, and the case does not proceed to trial?**

The Bar has no specific comment to make other than to acknowledge that this matter has been the subject to a decision before the Taxing Master which was not appealed by the DoJ.

The DoJ also states at paragraph 5.8 that:

It is the Department’s view that the payment of a trial preparation fee in these instances is contrary to the original policy intention...

The DoJ is asked to clarify the material relied upon to indicate that the Taxing Master determinations was contrary to the original policy intention when the Rules were first established in 2005.

**Q15: Do you have any comments on the proposal to amend paragraph 26 of Schedule 1?**

It is hugely disappointing that despite that despite Rule 20(2) of the 2005 Rules stating:



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“Without prejudice to paragraph (1), the Court Service shall conduct a formal review of the levels of the prescribed fees and the rates of payment under the Rules at least once in every review period.”

the DoJ has not sought to consult on the fees and rates of payment under the Rules, except in circumstances where the legal profession raised specific matters they wished be included in the consultation. The purpose of the statutory review is as stated in Rule 20(2), that is, to conduct a formal review of the levels of the prescribed fees.

At a pre-consultation meeting the Bar held with the DoJ in September 2020 a number of factors considered within scope of the consultation were raised by the DoJ, however notably the reference to legislating to overturn the decision of Mr Justice Maguire (as he then was) in the case of Tiernan was not raised.

It was further confirmed by the DoJ that this matter was not considered for inclusion in the consultation until April 2021, despite the ruling having been delivered on the 19th February 2019. It is somewhat surprising that if the DoJ were of the view that this case had been wrongly decided and that they should legislate to overturn this decision, that this was not done in a more timeous way particularly given the powers the DoJ has per Rule 20(1) of the 2005 Rules.

It is further grossly disappointing that the DoJ had conducted no research or data collection in the cost saving by reversing the decision of Mr Justice Maguire (as he then was) in the case of Tiernan. It is remarkable that it took for the Bar to seek the breakdown of the costs savings by overturning this decision before the DoJ sought this information.

The data provided by the DoJ clearly indicates that there will be a cost saving for the DoJ if the Tiernan judgment by amendment to the Rules. However, as detailed previous, a cost saving does not in of itself represent value for money.

The membership survey conducted by the CBA (as detailed previously) is a reflection of the potential negative impacts that may come about from a change to the rules in relation to Tiernan fees. Particularly in circumstances where there have been real time reductions in fees payable since 2005 and when the current UK inflation rate is 9.4% and forecasted by the Bank of England to continue to rise this year.

In the CBA survey, practitioners were asked:

What would be the impact be on your practice if the Department of Justice legislated to overturn the Tiernan judgment?

A dip sample of the responses are set out below:

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- My practice would become less sustainable and my ability to remain practicing would be tested considerably.
- This is the only factor which has partially mitigated the inflationary erosion of fees. To overturn the master's judgement would be another nail in the coffin of my practice.
- I will consider stopping criminal law work.
- The Tiernan judgement served to restore some element of the swings which had steadily been eroded in the swings and roundabouts scenario and to some extent offset the increasing complexity in terms of evidence and types of applications which are becoming increasingly prevalent and time consuming.
- This would have a significant effect and would mean that the considerable work incurred by counsel in ensuring that there is a reduction in charges goes unrewarded.

It is clear that legislating to overturn the decision of Tiernan would have a detrimental impact on the vast majority of criminal defence practitioners, particularly given the failure to increase brief fees since 2005 and further given the real time fall in fees since 2005.

It is further clear that any amendment to the Tiernan judgment is likely to have a significant impact on the number of practitioners undertaking criminal defence work, which would have a devastating impact on the ability of the DoJ to clear the backlog in the Crown Court.

In order to ensure access to justice for all, it is clear that all participants in the justice system – including the DoJ – must make a concerted effort to retain the committed and skilled professionals that practice publicly funded criminal law. The reversal of the Tiernan judgment would have wholly negative impact on these efforts.

The DoJ has stated that the payment of a Basic Trial Fee for counts left on the books is in conflict with the policy intention. It was surprising that in a pre-consultation meeting with the Bar asked the DoJ if they had taken advice on the original policy intention from those who were involved in the discussions leading to the 2005 Rules as to whether or not that was the original policy intention, the DoJ stated that it had not. It is unknown on what basis the DoJ states that the original policy intention was to not pay a Basic Trial Fee for counts left on the books.

**Q16: Do you have any views regarding whether provision should be made in the Rules for remuneration of hearings related to applications for FGMPOs?**

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The Bar believes that such applications should be remunerated.

**Q17: Do you have any views regarding whether provision should be made in the Rules for a General Application Fee?**

The Bar has no issue with a General Application Fee in order to cover a wide range of applications which may arise from time to time (such as FGMPO), provided these still provide time based tiered applications fees, depending on the length of the application.

**Q18: Do you have any comments regarding the proposal to amend Schedule 1 paragraphs 27(a) and 28(3)(a) to clarify that appropriate remuneration should be provided where an arraignment is scheduled and does not proceed?**

The Bar supports the amendment to remove ambiguity.

**Q19: What are your views on the Department's understanding that attendance on counsel by non-qualified staff is uncommon, and on the proposal to amend the Rules so that remuneration for attendance on counsel is restricted to fully qualified solicitors.**

The Bar has no comment to make.

**Q20: Do you consider three years to be an appropriate time period for review?**

Yes

**Q21: Do you have any comments on the proposed technical amendment to omit paragraph 7 from Schedule 1?**

No comment

**Q22: Do you have any comments on the proposed technical amendments to Schedule 1, paragraphs 15C(1)(e) and 15C(1)(f)?**

No comment

**Q23: Do you have any comments on the proposed technical amendment to Schedule 1, paragraph 20(2)(b)(i)?**

No comment

**Q24: Do you have any comments regarding any required amendments to Schedule 3 of the Rules?**

No comment

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**Q25: Do you have any comments on the impact screenings or assessments?**  
Please see previous commentary (para. 34-44).