THE BAR of NORTHERN IRELAND

Remunerating Exceptional Circumstances in Cases in the Crown Court

Bar Council – Consultation Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

2. The Bar Council welcomes the opportunity to contribute to the Department of Justice consultation on remunerating exceptional circumstances in the Crown Court. Our fundamental position remains that provision for exceptional cases can only be fair remuneration if the fees for standard cases constitute fair remuneration. This issue is currently disputed and is the subject of a legal challenge.

3. However, we would highlight our concern that this has been issued as a four week targeted consultation. We believe that this is an issue of such significance that it merits a full 12 week public consultation as the proposed scheme for exceptionality must be looked at through the prism of the overall current structure for remuneration provided for under the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005, as amended. In addition, the proposals contain features such as the suggested charge as described in paragraph 5.1 for an appeal being made to the Taxing Master. This alone requires a full consultation.

4. Furthermore, we take the view that the Department has been aware of the issues arising from the rulings in several judicial reviews for some time and should have acted more expeditiously in addressing the issues around remuneration in exceptional circumstances. These cases are: *Raymond Brownlee* [2014] UKSC 4, *Stephen Watters* [Unreported, declaration dated 5 February 2015] and *Michael Burns* [2015] NIQB 24.

5. The inclusion of the proposed charge for an appeal to the Taxing Master is one of a number of mechanisms described in the paper which seem aimed at introducing new costs or limitations on the granting of exceptionality. With this in mind, we would therefore also query whether the Department has completed any financial forecasting around the cost of the introduction of the proposed exceptionality criteria and what financial proportionality or justification would apply to any such new charges or limitations.

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6. The Bar's response to the consultation is structured according to our comments on the substantive proposals outlined in the questions contained in the document.

Q.1. Do you agree that additional arrangements need to be made to properly remunerate legal representatives in some exceptional circumstances which can occur in the Crown Court?

7. The Bar Council agrees that additional arrangements need to be made to properly remunerate legal representatives in all exceptional circumstances in the Crown Court. However, we contend that the Department's use of "some" in this context is inappropriate as proper and fair remuneration is essential in *all* cases, including *all* exceptional cases. We believe that the level of remuneration should always reflect all of the circumstances of a case, including exceptional ones which will typically involve very complex and time consuming preparatory work. It is vital that legal representatives are properly remunerated for the time and skill which they dedicate to their cases.

8. Our views are clearly supported by the recent High Court judgement from March 2015 by The Honourable Mr Justice Treacy in *Michael Burns [2015] NIQB 24* in which the court found that the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005, as amended by the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011, did *"not have proper regard to the time and skill required to do the work involved in the Applicant's case"*.[1] Furthermore, the act of treating a case as standard when it is in fact exceptional *"runs the risk that the legal teams involved could be grossly underpaid for the work they are required to do in their client's interests"*.[2] We note that this finding has been made by the High Court in this particular case prior to the subsequent changes to legal aid implemented by the Department under the 2013 and 2015 Amendment Rules which further threaten access to justice and the provision of legal aid as an important social welfare provision for the most vulnerable.

Q.2. What are your views on the provisions outlined at paragraph 3.3 which set out the conditions that must be met before consideration can be given to admission to the exceptional arrangements?

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[1] *Michael Burns [2015] NIQB 24* at para 38
[2] Ibid at para 31

9. The Bar Council has significant concerns around the provisions outlined at paragraph 3.3 which states:

   The Legal Services Agency will consider an application by the representative involved for an additional payment where it can be shown that a specific element(s) of the case falls outside of the standard fee approach, where:
   (a) the case involves a point of law or factual issue (not an issue of fact) that is very unusual or novel; and
   (b) additional work is reasonably required on the part of the representative in order to prepare a defence; and
   (c) that work is substantially in excess of the amount normally required for cases of the same type.

10. The criteria outlined at 3.3 suggests a conjoined test made up of three elements that must all be met. The Bar takes the view that this sets the bar for exceptionality too high and therefore this test would rarely ever be satisfied under the present wording. We would call on the Department to explain how the cases of *Raymond Brownlee* [2014] UKSC 4, *Stephen Watters* [Unreported] and *Michael Burns* [2015] NIQB 24 would fall under this test as it is presently overcomplicated and unclear.

11. The Bar calls on the Department to provide a better definition of what "exceptional" looks like under the provisions of the current standard fee regime. The Bar understand the need for appropriate safeguards to be put in place to govern any scheme involving public payments. This applies equally to both fees paid under a standard scheme and fees paid under an exceptionality scheme. We consider that the most effective safeguard to prevent a loss of control over an exceptionality scheme is to ensure that the vast majority of cases fall within the scope of the standard fee scheme and are appropriately rewarded under it. The danger at present is that the test for exceptionality has been set too high meaning that whilst many cases are likely to be dealt with as standard, there will be some that require significant additional work but will not meet the threshold set by the Department under 3.3. Consequently, this could result in a situation where the work required in a number of complex cases cannot be appropriately remunerated as the stringent requirements of the test will not be met. Furthermore, this only serves to highlight the need for a better standard system which can meet the needs of most cases.

12. The Bar also requests that the Department provides further guidance on what would satisfy part (a) under a *"factual issue (not an issue of fact)"* as this is too vague. We note 3.4 which states:

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In interpreting the proposed provisions, it is the intention of the Department that the relevant decision-maker(s) under the Rules will have regard to any relevant case law in England and Wales. For example, it has been held under the corresponding provisions applying in England and Wales that a very unusual or novel point of law is a point of law which has never been raised or decided (novel) or which is outwith the usual professional experience (very unusual) of competent practitioners. A novel or unusual factual issue is one which is outwith the usual professional experience of competent practitioners. It cannot mean an unusual, novel or unique fact.

13. This stipulation appears to tie this test to case law in England and Wales where there is provision for the Very High Cost Case (VHCC) fee scheme which does not exist in Northern Ireland. Consequently, we believe that it is inappropriate for the Department to require the relevant decision-maker under the Rules to have regard to any relevant case law in England and Wales. In addition, we note the description of a novel or unusual factual issue in 3.4 as *"one which is outwith the usual professional experience of competent practitioners. It cannot mean an unusual, novel or unique fact"*. However, the Bar takes the view that this distinction is unclear for practitioners.

14. However, the Bar also points out that the test outlined at 3.3 does not fit with the Department's outline of the issues under consideration at 3.1 which states:

In developing the proposals, the issues which need to be addressed include:
(a) cases which due to their complexity, involving a range of factors, mean that:
i. the amount of work required in the specific case is substantially in excess of what would normally be required in that category of case; and
ii. the additional work required is not capable of being remunerated through the existing provisions of the 2005 Rules, notwithstanding the scope and sophistication of the existing provisions.
(b) cases where a new set of circumstances arise which are very unusual or novel and require significant additional work which cannot be addressed within the standard fee approach.

15. The test outlined in 3.3 appears to be much more stringent than the issues outlined in 3.1. The disjunctive alternatives outlined in Paragraph 3.1 are more appropriate and fitting tests for exceptionality than the single conjunctive test under Para 3.3. Consequently, we would call on the Department to reflect on the issues under consideration and amend the test at 3.3 to require a representative to satisfy parts (a) along with either (b) or (c).

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Q.3. What are your views on the process which will be applied by the Legal Services Agency when applications are submitted for exceptionality?

16. The Bar Council has some concerns around the process which will be applied by the Legal Services Agency when applications are submitted for exceptionality. We would question whether the LSA is the appropriate body to be the decision maker on these applications as an executive agency within the Department of Justice. However, we accept that there may be no alternative to the LSA at present. Proper safeguards, in the form of adequacy of training, supervision and accountability of decision making need to be applied in order to ensure that the decision making process on the grant of exceptionality is being fairly administered.

17. Furthermore, the Department needs to provide practitioners with a timeframe detailing how long it will take for the LSA to consider any application. Practitioners will need to be assured that any application will be dealt with expeditiously. This will also help to ensure that the LSA is fulfilling the objectives of the Minister in delivering a faster, fairer justice system which works efficiently and effectively.

18. The Bar Council also has a number of concerns linked to the references throughout the document to the retrospective consideration of applications by the LSA. Paragraph 3.2 suggests that the LSA will have the power to revisit applications even once exceptionality has been approved:

    It is not intended to replace the existing standard fee with a different form of payment for cases with exceptional aspects. Rather, the proposal is to provide an additional form of payment for the specific aspect(s) of the case that cannot be remunerated within the standard fee matrix. It may also happen that a case which has the potential to meet the criteria for payment through the exceptional provisions, once complete, because of the final known outcome, can be properly remunerated within the existing standard fee matrix.

19. Meanwhile paragraph 4(2)(e) states:

    The exceptionality provision will be based on a preliminary approval by the Agency of the additional work required. However, the additional amount payable will be determined by the actual work undertaken by the representative and whether it was reasonably undertaken and properly done, in accordance with the general provision in rule 4(2)(b) of the 2005 Rules. As such the final

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determination could be for an amount which is greater or lesser than the preliminary approval granted.

20. This is followed by paragraph 4(2)(h):

    On the facts of a particular case, it may not be possible for a prospective exceptionality determination to be provided to the legal representative. In such circumstances, the Agency will consider the case retrospectively, but can only do so based on the contemporaneous records of work done as maintained by the representative involved.

21. The Bar Council believes that giving the LSA this power to review cases in the manner outlined is not in keeping with the general provision of rule 4(2)(b) of the 2005 rules which highlights the need to *"allow a reasonable amount in respect of all work reasonably undertaken and properly done"*. It should not be the case that the LSA can refuse to pay for work which was reasonably and necessarily carried out on the basis of approval which was sought and obtained in good faith.
22. We would also highlight that the Department is creating the potential for appeals by legal representatives if approvals for exceptionality are subsequently revisited by the LSA. A legal representative granted approval for exceptional circumstances in a case has a legitimate expectation that they will receive remuneration commensurate with this initial finding. It is entirely wrong to be assessed against an initial set of criteria (as may be reflected by means of a revised version of paragraph 3.3), only to subsequently be subject to some form of retrospective adjustment against entirely different criteria (e.g. the actual length of trial as offered by way of example in paragraph 3.5). This is wholly inconsistent, complicates the grounds for an appeal and is potentially unlawful. Furthermore, the references in 4(2)(g) to the need for a *Costed Case Plan* and periodic progress reports only serves to reinforce the idea that the Department is allowing the LSA a general power to police the case over the course of a trial.

23. The Bar also has concerns around the provisions at paragraph 3.6:

    It is the Department's expectation that the exceptional nature of a case may impact on only one of the assisted person's representatives, or one of the representatives of one of the assisted persons where there are multiple defendants. Therefore applications may be made by any of the legal representatives in a case in respect of the additional work that representative needs to undertake. Exceptionality, if granted, will apply to that representative and not to the case as a whole. It will not apply automatically to other

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representatives, or to the representatives of any other defendants involved in that case.

24. The Bar contends that this attempt to justify legal representatives making separate applications for exceptionality fundamentally undermines the relationships and roles of the different individuals within a legal team working on a case. We would point out that a case either satisfies the exceptionality criteria for all the representatives involved or not.

Q.4. Do you agree that an appeal mechanism needs to be put in place on decisions taken by the Legal Services Agency? Should the appeal mechanism cover both entry to the exceptional provisions and the amount of the award in individual cases? Do you agree that an appeal to the Taxing Master is the appropriate approach?

25. The Bar takes the view that an appeal mechanism needs to be put in place for decisions taken by the Legal Services Agency. This should cover both entry to the exceptional provisions and the amount of the award in individual cases. We take the view that an appeal to the Taxing Master is likely to be the only viable option for appeal in these cases. Any such appeal mechanism must be open, transparent, timely and cannot result in undue delay in a matter being determined.

Q.5. Is there any reason why the hourly rates should not be prescribed by reference to the comparable provisions in England and Wales?

26. The Bar Council notes that the Department has been informed in the development of the proposals for enhanced remuneration by the rates for Special Preparation work prescribed in the Advocates' and Litigators' Graduated Fee Schemes in England and Wales as set out in the Criminal Legal Aid (Remuneration) Regulations 2013. The proposed hourly rates will be £74 for Senior Counsel; £56 for leading Junior Counsel; £39 for sole or led Junior Counsel; and £53 for Solicitor.

27. However, we would point out that this fails to recognise the existence of the Very High Cost Case (VHCC) fee scheme in England and Wales which is not in place in Northern Ireland. In addition, the fee structure in England and Wales provides compensation for reading time which is not the case under the proposals from the Department. The Bar Council considers that it is a folly to seek to model this important aspect of our criminal justice funding on a system in England and Wales which has been the subject of widespread and persistent

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criticism. At present for example, in England and Wales, action is having to be taken to stamp out the payment of 'backhanders' from Counsel to solicitors for the provision of work which serves to highlight the very dangerous state of the system in that jurisdiction.

28. We would also point to Schedule 2 of the 2005 rules which highlights the hourly rates for preparation in high cost cases which used to be in place in Northern Ireland: £110 to £180 for Queen's Counsel; £90 to £140 for Leading Junior; £70 to £100 for Led Junior; £80 to £110 for Sole Junior; and £90 to £140 for a Solicitor. These rates are considerably higher than the ones being proposed by the Department presently for dealing with exceptional cases. In addition, no other experts, providing services to the trial process are being asked to accept such rates. Medical and engineering witnesses are regularly paid in excess of £100 and £120. These hourly rates are NOT regarded by said experts as generous and in fact on numerous occasions applications are made to exceed those hourly rates for certain experts. The Bar would also contend that a situation could now exist where expert witnesses are being paid more to appear in court than the counsel involved in presenting the case. In the case of sole Counsel they are being asked to accept rates approximately 1/3 those afforded to other professionals The Bar is further given to understand that the hourly rate paid to Senior Counsel instructed in the residential abuse enquiry is £200 per hour and the PPS pay Senior Crown Counsel £140 per hour for special preparation.

Q.6. Is there any reason why the enhanced remuneration payable for exceptional cases should not be subject to the general provision in rule 4(2)(b) of the 2005 Rules?

29. Rule 4(2)(b) of the 2005 rules states that there is a need to *"allow a reasonable amount in respect of all work reasonably undertaken and properly done"* in respect of criminal legal aid in Crown Court proceedings. However, this document goes beyond this provision and is aimed at dealing with exceptional cases in which circumstances mean that the standard fee regime alone cannot give appropriate remuneration for the work involved in providing representation. Consequently, allowing for exceptional cases to be subject to the general provision in rule 4(2)(b) of the 2005 Rules will depend on the LSA's definition of a *"reasonable amount"* of enhanced remuneration payable in any particular case.

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Q.7. What controls should be introduced to ensure that the exceptionality provisions are not abused?

30. The Bar Council has concerns around the budget constraints on the LSA with the potential for meritorious applications or those on the cusp of satisfying the test for exceptionality to be refused as a result of cost concerns within the organisation. We believe that there is a need to be mindful of ensuring that those individuals in control of decision making within the LSA are not bound by fiscal restrictions. The LSA must ensure that any test for exceptionality is applied in a completely independent way and the outcome must not be dictated by cost considerations in any case.

31. The Bar of Northern Ireland does not agree with the term 'abused' but we do agree that control mechanisms should be in place to ensure that both the Department and practitioners can have confidence. We consider that the most effective safeguard to prevent a loss of control over an exceptionality scheme is to ensure that the vast majority of cases fall within the scope of the standard fee scheme and are appropriately rewarded under it.

32. It would be fair to say that the failure of the Very High Cost Case system was in part due to a lack of informed or appropriate supervision by those responsible for operating the scheme. A key control mechanism will be a competent assessment of each application on its own merits against a set of fair and robust criteria, which has been agreed with the professional bodies.

Q.8 What sanctions should be applied when a legal representative routinely submits unmeritorious applications to the Legal Services Agency for individual cases to be treated under the proposed exceptionality provisions?

33. The Bar Council takes the view that any sanctions against a legal representative in these circumstances should be a matter for the Professional Conduct Committee which regulates all practising barristers in Northern Ireland. A report should be made to the Professional Conduct Committee if a legal representative is believed to have acted in convention to any aspect of the Code of Conduct of the Bar of Northern Ireland. Furthermore, the use of the word "unmeritorious" in this instance is too broad and can be viewed subjectively. We believe that this should only relate to fraudulent or vexatious applications. The Department should seek to tighten the language around this to provide clarity for practitioners.

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34. The Bar consider that any ambiguity in definitions will cause there to be applications which may ultimately be deemed unmeritorious but that were submitted in good faith and reflecting a genuine misunderstanding of the rules. There will inevitably be a need for a period of embedding the new scheme during which parties may innocently submit claims that are ultimately deemed unmeritorious. Allowance should be made in such cases and no punitive action should be taken arising out of such initial misunderstandings.

35. Furthermore the imminent registration scheme as proposed by the Department provides a further mechanism of oversight to render the need for any additional sanction unnecessary.

Q.9 Is there any reason why applicants should not be charged a fee for appeals to the Taxing Master?

36. The Bar takes the view that it is unacceptable for applicants to be charged a fee for appeals to the Taxing Master. We believe that the introduction of such a precedent would represent a fundamental change for practitioners. This is not a matter which should be the subject of a targeted consultation on this discrete issue, given the wider implications to other areas of appeal to the Master.

37. The proposals are also silent on whether interest would accrue on any sums ultimately ruled as being due to counsel but which have been delayed during the various stages of appeal. In addition, the proposals do not make clear whether the costs of appealing to the Taxing Master will be recouped from the Department in the event of a successful finding in favour of the applicant. It is essential that fees paid for a successful appeal should be reimbursed otherwise as this is an outlay which could not be passed on to a legally aided client but be borne by the practitioner thus undermining the purpose of the legislation (fair remuneration) and arguably amount to a levy.

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