



Department of
Justice
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Consultation Document

Remunerating Exceptional Circumstances in Cases in the Crown Court

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REMUNERATING EXCEPTIONAL CIRCUMSTANCES IN CASES IN THE CROWN COURT

1. Introduction

- 1.1. The purpose of this consultation is to seek views on the Department of Justice's proposals to introduce new provisions for the remuneration for solicitors and counsel providing legal representation for defendants in the Crown Court under Article 29 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order"). The current arrangements are set out in the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005, as amended. These arrangements are based on a standard fee approach, developed on the swings and roundabouts principle, with additional fixed and time-based fees to provide payment for work not covered by the standard fees. The Rules have been successfully challenged recently by way of judicial review by several individual defendants, reflecting some very specific circumstances, and the Court found that the Rules were not sufficiently flexible to remunerate lawyers in the specific circumstances of these individual cases. A series of other challenges to the Rules have been withdrawn or dismissed at the Pre-Action Protocol Letter or the leave hearing stage. In response to those successful challenges, the Department's proposals in this Consultation Paper are intended to address a very small number of genuinely 'exceptional' cases.

- 1.2. The Department recognises that very occasionally a set of circumstances can come together which are so exceptional that the Rules as they currently stand cannot properly address the reasonable cost of representing the assisted person. This consultation brings forward proposals to provide remuneration outside the standard fee regime, for what we expect to be a very limited number of exceptional cases, where circumstances come together which mean that the standard fee regime alone cannot provide appropriate remuneration for the work involved in providing

representation as required by Article 37 of the 1981 Order. Comments are invited on the Department's proposals for exceptionality which are set out at sections 3 to 6. Specific consultation questions are set out in section 7.

2. Current Arrangements for Remunerating Crown Court Cases

- 2.1. Legal representatives appearing for defendants in the Crown Court in Northern Ireland are remunerated in accordance with the provisions of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 ("the 2005 Rules"), as amended by the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011 ("the 2011 Amendment Rules"), the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2013 ("the 2013 Amendment Rules") and, most recently, by the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2015 ("the 2015 Amendment Rules").
- 2.2. The remuneration system operates on the "swings and roundabouts" principle involving a matrix of standard basic fees which increase incrementally according to the mode of disposal of the case and the seriousness of the offence charged, together with, as appropriate, a range of additional fixed and time-based payments for specific tasks. This approach means that a range of case-types are grouped together and a standard basic fee is applied to remunerate legal representatives for each case that falls into each category. While providing appropriate remuneration to cover the costs of providing a defence, the approach accepts that some of the cases falling into each category will be relatively straightforward and the standard fee scheme will provide a relatively generous outcome. Other cases will be more complex and, consequently, the representative involved may not be as well remunerated for their work in such cases. The system is administratively simple and predictable, both for the legal representatives and the Legal Services Agency ("the Agency"), and largely avoids the need for lawyers to keep detailed records of work done in each individual case.
- 2.3. The approach which has evolved under the 2005 Rules, as amended, now provides a sophisticated matrix of fees which reflect the various levels of complexity within

the total standard fee payable in each individual case. The system operates with standard basic fees which increase incrementally, based on issues such as mode of disposal, the length of the trial (if any) and the number of pages of served prosecution evidence (“PPE”), and is further supported by various additional time-based fees for specific hearings, sittings and applications as appropriate. The system readily differentiates between similar cases of varying complexity, which have a lot of evidence, or which result in a lengthy trial. In this way, many of the elements which can make an individual case complex are recognised under the current Rules through the availability of higher levels of standard fees. An overview of the existing system is as follows:

- (a) Fees are set out in 9 groups representing different *Classes of Offences*, from the most serious (eg murder) to the least serious.
- (b) For cases which are resolved by guilty plea there is a single *Guilty Fee* for counsel, while solicitors have three tiers of fees based on the PPE count.
- (c) Where a case is disposed of by way of a plea of guilty after the first arraignment and does not proceed to trial, counsel will receive a *Trial Preparation Fee*. This is made up of three tiers based on the PPE count.
- (d) Within each *Class of Offence*, for cases which go to trial, the *Basic Trial Fee* rises incrementally based on the length of trial. For solicitors there are 3 bandings (*Trial Fees 1 to 3*); for counsel there are 10 bandings (*Trial Fees 1 to 10*).
- (e) Furthermore, for cases which go to trial, daily refreshers are paid for each additional day that the trial lasts. The rates of the refresher fee payable increase in line with the bandings (*Refresher Fees 1 to 3* for solicitors, and *Refresher Fees 1 to 10* for counsel).
- (f) For any case where the PPE count is greater than the relevant maximum *PPE range* prescribed, an additional £1 per additional page is payable.
- (g) Payment of additional fees to counsel for consultations, listening to or viewing evidential tapes, and to both solicitors and counsel for additional hearings or making additional applications.

A list of the various fees prescribed in the 2005 Rules, as amended, is attached in the Annex to this document.

- 2.4. The application of the swings and roundabouts principle, in conjunction with the matrix of prescribed fees referred to above, will appropriately remunerate the vast majority of cases heard in the Crown Court as required by Article 37 of the 1981 Order. For example, for cases which go to trial, the solicitors' fees are banded into three categories: 1-8 days, 9-16 days, and 17-80 days. For counsel there are ten bands covering trials lasting up to 80 days. The fee matrix also recognises the levels of seniority between barristers and remunerates their work accordingly, with prescribed fee rates for senior counsel, leading junior counsel, led junior counsel, and sole junior counsel. For each *Class of Offence*, the *Basic Trial Fee* increases in each band according to the *actual duration of the trial*, recognising that more preparation will normally be required for longer trials. In 2012/13 69% of trials lasted two days or less therefore, although the first band covers trials lasting up to eight days, the vast majority of cases last much less than that and solicitors and barristers are well remunerated for the cases which run in this band.
- 2.5. The current structure of the 2005 Rules, as amended, provides a comprehensive and sophisticated matrix of fees which is responsive to the types of circumstances that can arise in the Crown Court and is capable of providing appropriate remuneration in the vast majority of cases that appear in the Crown Court. However, in light of the rulings in several recent judicial reviews, the Department recognises that very occasionally a set of circumstances can come together which are so exceptional that the Rules, as they currently stand, cannot properly address the reasonable cost of representing the assisted person. The cases were: *Raymond Brownlee* [2014] UKSC 4 (change of legal team after conviction and prior to sentencing), *Stephen Watters* [Unreported, declaration dated 5 February 2015] (change of legal team after sentencing and prior to confiscation proceedings) and *Michael Burns* [2015] NIQB 24 (on-going case, involving a proposed abuse of process application).
- 2.6. Our proposals seek to address circumstances such as those found in the successful judicial reviews and other potential circumstances which have not yet emerged.

3. The Department's Proposals

3.1. In light of this analysis, proposals are being brought forward by the Department to provide appropriate further remuneration for exceptional circumstances which cannot appropriately be remunerated within the provisions of the current fee regime. The Department believes that circumstances which cannot be remunerated by the existing standard fee arrangements are likely to be very rare and as such should be subject to additional scrutiny and control. The Department considers that this is important to ensure that only genuine cases which are exceptional benefit from these proposals as this is not intended to be a means of replacing the standard fee arrangements for the vast majority of cases. Where these circumstances occur, it is proposed that the legal representatives involved in that particular case should be able to apply to the Agency for consideration of the application of exceptional provisions to remunerate the additional work they are (or were) reasonably required to undertake and to know how the additional exceptional fee will be calculated if approved. In summary, there will be a requirement that the legal representative is able to demonstrate clearly that the circumstances of that particular case are manifestly outwith the scope of the standard fee approach and, ultimately, to provide evidence of the additional work required. 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.

3.2. 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.

- 3.3. It is important to recognise that these cases are intended to be exceptional and to set very clear parameters against which a claim for exceptionality by the representative involved in a particular case can be considered. The Department proposes to bring forward amendments to the 2005 Rules to provide for the following arrangements:

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.

- 3.4. 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 held¹ 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.

¹ See *R. v. Ward-Allen* [2005] 4 Costs LR 745 at paras. 17 to 24

- 3.5. The provisions will allow for an additional payment for the preparation of a case because the total standard fee (made up of the relevant standard fee elements) cannot be considered to appropriately recognise the full extent of the work involved in preparing the individual case. This approach will address the sorts of situations that have arisen in the past, and a range of situations which may emerge. In applying these provisions to an individual case, it will be necessary for the Agency to make an assessment of the complexity of the case based on the specific circumstances of the case, together with the work which the representative will reasonably be required to undertake. For example, where a case goes to trial, the Agency will need to consider the actual length of the trial and how the total standard fee is increased as a consequence of this. This is because the incremental increases in the standard *basic trial fees* and *refresher fees* in line with the duration of the trial will already recognise complexity, and it is not the intention of these proposed further amendments to the 2005 Rules to remunerate the same work twice.
- 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 representatives, or to the representatives of any other defendants involved in that case.
- 3.7. It is not possible to precisely define, in advance, the types of circumstances which could come together to mean that a case may come within the proposed exceptional arrangements. It will be for the applicant to make-out their entitlement to enhanced remuneration and to explain why the circumstances in the specific case cannot be appropriately remunerated within the standard fee matrix. However, some examples of the types of circumstances which might come together to make a case sufficiently complex to warrant consideration might include: the number of defendants involved; where there is conflicting defence evidence; where an unusual number of expert witnesses are required; or where there is a reliance on

a new forensic approach. If exceptionality is considered to apply to more than one representative of a defendant, or the representatives of more than one defendant in a case, the Agency will seek to avoid unnecessary and inappropriate duplication of additional work.

- 3.8. The Department also intends to issue guidance to the Agency as to how the proposed exceptionality provisions are to apply in practice – and, specifically, as to the types of circumstances which will, and will not, be considered ‘exceptional’. The Agency will be required to have regard to that guidance when considering an application by a representative for exceptionality in any individual case. The guidance will be published on the Agency’s website. The Agency will also publish guidance and forms which will govern the operation of this provision.
- 3.9. Remuneration for that aspect of the case which has been certified as exceptional will be on the basis of an assessment of the additional hours worked which were necessary to cover the additional preparation and which is not covered by the total standard fee prescribed under the current Rules. All legal representatives seeking payment for exceptionality will be expected to apply to the Agency at the earliest opportunity and will be required to set out the basis of the application; to comply with all the requirements of the Agency in applying for exceptionality and to undertake to fully record and report on the number of additional hours worked to address those issues which were not covered by the standard fee matrix. Where appropriate, the Agency may require the applicant to submit a costed case plan and will require the applicant to provide periodic reports of the work undertaken. Once a case certified as exceptional has concluded the Agency will assess the reasonableness of the work undertaken and the hours claimed. Payment will be made on the basis of the approved hours, by a prescribed hourly rate. In developing the proposals for enhanced remuneration, the Department has been informed 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 2013². 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.

² See paragraph 17, together with the table following paragraph 24, in Schedule 1 (Advocates’ Graduated Fee Scheme); and paragraph 20, together with the table following paragraph 27, in Schedule 2 (Litigators’ Graduated Fee Scheme)

4. Process

4.1. An underlying principle of the standard fee approach is that it is administratively straightforward and it is not necessary for the legal representative to submit detailed records to the Agency in order to support their claim. However, when a legal representative applies for exceptionality for an individual case, the representative will be required to provide an estimate of the additional work that will need to be undertaken, which may include a costed case plan and periodic reports. Non-compliance with any of these requirements will result in the application being rejected or if already granted, the certificate of exceptionality being revoked.

4.2. As soon as the legal representative has a proper basis to suggest that a case has the potential to attract the exceptionality provisions, it is proposed that an application must be submitted to the Agency which sets out why the case, or aspects of it, is exceptional, and an estimate of the amount of additional preparation work that will be reasonably required. It is proposed that the application may be made by any or all of the legal representatives involved in that case. The proposed outline process which will be applied is as follows:

- (a) A representative may apply for consideration of an exceptional payment at any stage prior to the commencement of the trial, and should do so at the earliest reasonable opportunity. However, if satisfied that it was not reasonably practicable to do so, the Agency may accept an application after the commencement of the trial. The Agency will not accept applications after the conclusion of the case.
- (b) The application must include an undertaking to keep detailed records of work done as, in the absence of detailed contemporaneous records maintained by the representative involved, no additional payment to that representative will be allowed. The Agency will prescribe a form for keeping contemporaneous hours and will be empowered to require periodic reports, the frequency of submission will be determined by the Agency.
- (c) The Agency could have three responses to a request for exceptionality:
 - i. recognise the merit of the application and grant exceptional status at the outset; or

- ii. refuse to confer exceptional status on the case as the prescribed criteria are not met; or
 - iii. defer consideration of the application until the case has advanced (or concluded) to the point where there is clear evidence to allow the Agency to determine the application, either by granting or refusing it.
- (d) Agency approval of entry to the exceptionality provision will be conditional in that the sums payable to a representative can only be determined at the end of the case when the Agency will have access to the complete set of contemporaneous records maintained by the representative of the additional work done by them and can determine whether the work was both reasonably undertaken and properly done³. The Agency will advise in respect of each individual application whether a costed case plan and periodic reports will be required.
- (e) 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 determination could be for an amount which is greater or lesser than the preliminary approval granted.
- (f) If the application for exceptionality is refused early in a case, the representative can re-apply if further evidence supporting such an application becomes available.
- (g) Where the Agency consider it appropriate to do so, it may seek, in advance, a *Costed Case Plan*, on a prescribed template, from the representative(s) involved when considering whether or not to grant exceptionality or to inform the quantum of any preliminary approval granted. The Agency will require periodic reports of progress.
- (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

³ It is proposed that the relevant provision to be inserted into the 2005 Rules will be modelled on the rule 17 (Very High Cost Cases – Determination of representatives’ fees) provision which was substituted into the 2005 Rules by the 2009 Amendment Rules. See also *Kelly QC and Others v. Lord Chancellor* [2012] NIQB 70.

can only do so based on the contemporaneous records of work done as maintained by the representative involved.

5. Appeal Mechanism

- 5.1. The Department intends to make provision for appeals to be made to the Taxing Master against the decisions of the Agency in respect of exceptionality. Appeals will be possible to challenge the refusal of the Agency to entry to the scheme and also against the additional amount awarded. (It is proposed that there will also be provision for an internal redetermination / review mechanism, similar to rule 13 of the 2005 Rules.) Where an appeal is made to the Taxing Master, the Department proposes to introduce a fee to be paid by the Applicant.

6. Conclusion

- 6.1. The Department considers that it is appropriate to introduce amendments to the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 in order to make provision for a limited number of cases, in which, due to the circumstances of those cases, the existing scheme could not provide appropriate remuneration for the preparation of a defence. The Department considers that proposals in this document are proportionate, and, when set out in the 2005 Rules, they will ensure that remuneration is available for those limited circumstances which may not be appropriately remunerated under the existing provisions.

7. Consultation Questions

- 7.1. The Department would welcome comments from the professional bodies and the statutory consultees listed in Article 36(3) of the 1981 Order to the proposals in this document.

Questions

- 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?
- 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?
- Q.3. What are your views on the process which will be applied by the Legal Services Agency when applications are submitted for exceptionality?
- 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?
- Q.5. Is there any reason why the hourly rates should not be prescribed by reference to the comparable provisions in England and Wales?
- 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?
- Q.7. What controls should be introduced to ensure that the exceptionality provisions are not abused?
- 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?
- Q.9. Is there any reason why applicants should not be charged a fee for appeals to the Taxing Master?

8. How to respond

- 8.1. We would welcome your views on the proposals in this consultation and we would invite you to send your comments, in whatever format you choose, to:

Consultation Coordinator

Public Legal Services Division

Access to Justice Directorate

Department of Justice

Massey House

Stormont Estate

Belfast BT4 3SX

E-mail: publiclegalservicesdivision@dojni.x.gsi.gov.uk

Tel: 028 9016 9516

Text phone: 028 9052 7668

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Closing Date

- 8.2. Given the urgent need to introduce a provision for the payment of enhanced remuneration in the on-going case of *Michael Burns* referred to in paragraph 2.5, the consultation period for these proposals is limited to four weeks, to enable the 2005 Rules to be amended expeditiously. **Responses to the proposals must be received by 16.00 hours on Friday 9 October 2015.**
- 8.3. When responding, please state whether you are making a submission as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

9. Confidentiality of Responses

The Department will publish a summary of responses following the completion of the consultation process. Unless individual respondents specifically indicate that they wish their response to be treated in confidence, their name and the nature of their response may be included in any published summary of responses. Respondents should also be aware of the Department's obligations under the Freedom of Information Act, which may require that any responses not subject to specific exemptions in the Act, may be disclosed to other parties on request.

10. Consultation Process

If you have any queries about the information provided in this document please contact Public Legal Services Division. However, if you have any queries or concerns about the way in which the consultation exercise has been handled, you may raise these by contacting the Department at the e-mail address below:

Standardsunit@dojni.x.gsi.gov.uk

PARAMETERS / POINTS OF DIFFERENTIATION
CRAFTED INTO THE 2005 RULES, AS AMENDED

Main parameters – prescribed under Part 2 (Trials) and Part 3 (Guilty Pleas) of Schedule 1

- Category of representative (solicitor or counsel, and category of counsel)
- Mode of disposal of the individual case
- *Class of Offence* charged
- *PPE Range* – solicitors, for both *Guilty Plea Fees* and *Basic Trial Fees*; counsel, for *Trial Preparation Fees* only⁴
- For both *Basic Trial Fees* and *Refresher Fees* – they are stratified, into three bands for solicitors, and ten bands for counsel, according to the actual duration of the trial⁵

Additional Fees – prescribed under Part 4 of Schedule 1

- *Arraignment – Not Guilty Fee*
- *Standby Fee*
- Time-based *Application Fees* (incl. mentions) – for applications prescribed under paragraphs 12(2), 13 and 16, incl. the paragraph 22 provision
- Time-based *Public Protection Application Fees* – incl. the paragraph 22 provision⁶
- *Confiscation Hearing Fee*⁷
- *Sentencing Hearing Fees* – both deferred and other sentencing hearing
- *Sentence Hearing Preparation Fee*⁸
- *Compassionate Bail Hearing Fee*⁶
- *Court-ordered Youth Conference Fee*⁹
- *Consultation / Viewing Fee* (– payable to counsel only)

⁴ Provision inserted by the 2011 Amendment Rules, and then refined in the 2015 Amendment Rules

⁵ Provision introduced in the 2005 Rules, and then refined in respect of counsel in the 2011 Amendment Rules

⁶ Provision inserted by the 2015 Amendment Rules

⁷ Provision introduced by the 2005 Rules, and then refined by the 2015 Amendment Rules

⁸ Provision inserted by the 2013 Amendment Rules

⁹ Provision inserted by the 2011 Amendment Rules

- *Listening or Viewing Tapes Fee* (– payable to counsel only)
- *Skeleton Argument Fee* (– payable to counsel only)⁹
- *Late Sitting Fee*

Additional Fees / Miscellaneous Provisions – prescribed under Part 5 of Schedule 1

- *Multiple Case / Application Uplift* – paragraph 20(2) and (3)
- *Multiple Defendant Uplift* – paragraph 20(2)
- Provision re. solicitor advocacy – paragraph 21
- *Retrial Adjustment Fee* – paragraph 23
- *Newton Hearing Fee* – paragraph 24
- *Voir dire* provision – paragraph 25
- Provision re. discontinued / *nolle prosequi* cases – paragraph 26
- *Solicitors' Dismissal / Withdrawal Fee* – paragraph 27⁷
- *Counsel's Dismissal / Withdrawal Fee* – paragraph 28
- *Travelling Allowances* – solicitors (para. 29), counsel (para. 30)