



Department of
Justice
www.dojni.gov.uk

Consultation Document

Remunerating Exceptional Circumstances in Cases in the Magistrates' Courts

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Contents	Page
1. Introduction	2
2. Current Arrangements for Remunerating Magistrates' Courts Cases	3
3. The Department's Proposals	4
4. Process	9
5. Appeal Mechanism	11
6. Conclusion	12
7. Impact Assessments	12
8. Consultation Questions	13
9. How to Respond	14
10. Confidentiality of Responses	15
11. Consultation Process	15
 Annex	 16

REMUNERATING EXCEPTIONAL CIRCUMSTANCES IN CASES IN THE MAGISTRATES' COURTS

1. Introduction

- 1.1 The purpose of this consultation is to seek views on the Department of Justice's (the Department) proposals to introduce new provisions for aspects of the remuneration for solicitors and counsel providing legal representation for defendants in the magistrates' courts under Article 28 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order"). The current arrangements are set out in the Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009, ("the 2009 Rules"), as amended.
- 1.2 The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005, as amended, were successfully challenged by way of judicial review by several individual defendants, reflecting some very specific circumstances. The relevant Court found that the Rules were not sufficiently flexible to remunerate lawyers in the specific circumstances of these individual cases. The Crown Court rules have now been amended and there is the potential that similar circumstances could arise in the magistrates' courts. The 'principles' set out in this consultation, while specifically addressing the circumstances prevailing in the magistrates' courts, draw on those which were adopted in the Crown Court.
- 1.3 This consultation therefore brings forward proposals to provide remuneration outside the standard fee regime, for what the Department 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 8.

2. Current Arrangements for Remunerating Magistrates' Court Cases

- 2.1 Legal representatives appearing for defendants in the magistrates' courts in Northern Ireland are remunerated in accordance with the provisions of the 2009 Rules as amended by the Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) (Amendment) Rules (Northern Ireland) 2014, ("the 2014 Amendment Rules").
- 2.2 The remuneration system operates on the "swings and roundabouts" principle involving a matrix of standard basic fees which vary according to the mode of disposal of the case (guilty plea, contest or committal) and the nature of the offence charged, together with, as appropriate, a range of additional fixed 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 the 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 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 magistrates' courts as required by Article 37 of the 1981 Order.
- 2.4 The 2009 Rules, as amended, operate with standard basic fees supported by additional hearings fees and fixed payments, as appropriate. The system differentiates between offence types and methods of disposal with the remuneration available increasing according to the nature of the offence charged. 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. A list of the main parameters making up the standard fees and additional fees, prescribed in the 2009 Rules, as amended, is attached in the Annex to this document.

- 2.5 The Department is currently facing a number of challenges which suggest that the Rules do not allow for sufficient remuneration in some very specific circumstances. The proposals in this consultation seek to introduce exceptionality provisions which would address circumstances such as those outlined in the challenges and other potential circumstances as yet unforeseen.

3. The Department's Proposals

- 3.1 The Department is proposing to provide appropriate further remuneration for exceptional circumstances which cannot appropriately be remunerated within the provisions of the current fee regime. The Department considers that the 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 specific 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. 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.
- 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, reflecting on the arrangements put in place to remunerate exceptionality in the Crown Court, proposes to bring forward further amendments to the 2009 Rules to provide for the following circumstances:

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. 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. For example, if defendant 'X' is charged with committing an offence 'Y' on date 'Z', the case will – necessarily – involve novel or unique issues of fact. That is, that defendant will not previously have been tried with committing offence 'Y' on date 'Z'.

- 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. The Department's assessment is that this approach will address the sorts of situations that are currently being challenged, and a range of as yet unforeseen 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. It is not the intention of these proposed further amendments to the 2009 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 an assisted person's representatives, that is the assigned solicitor or counsel (where certified). Similarly, in a multiple-defendant case, it may only impact on the representative(s) of one of the assisted persons. 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 should also be noted the Department does not consider that approval of an application for exceptionality would transfer between court tiers. The Department contends that where a case, or specific element within the case, is considered to be exceptional in the magistrates' courts the exceptionality approval would not transfer with the case to the higher tier, and vice versa. In making this assertion, the Department is clear that what may be considered to be exceptional in the lower tier may not apply at a higher tier. However, this does not preclude the legal representative from applying for exceptionality for the same, or different, elements within the case when it transfers to the next tier. Any new application would be considered against the Rules governing that tier and not based on the assessment at the lower tier.

3.8 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. The Department expects that complex cases will not routinely be heard in the magistrates' courts but will normally be committed to the Crown Court for disposal. Therefore the types of scenario in which additional work would be required in the magistrates' courts are limited. By way of example these might include:

- Cases where a significant amount of investigative work is required at magistrates' courts level.
- A case involving an "assisting offender" under Part 2 of the Serious Organised Crime and Police Act 2005.
- Where the number of defendants in a case results in a significant increase in workload.
- Complex fraud cases.

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.

3.9 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. The Department has not yet developed this Guidance as it wants to fully consider the responses to this consultation before finalising the policy proposals and proceeding with the Guidance to the Agency. The draft Ministerial Guidance and the draft Amendment Rules will be subject to further targeted consultation in due course.

3.10 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 record contemporaneously the number of hours of preparation work, maintaining such records, as required by the amended rules, 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.

3.11 The Department considers the ex post-facto assessment of exceptionality, and the possible decision to disallow certain work, as an essential element of the new provisions. The Department is responsible for the governance and accountability of public funds and for ensuring the propriety and regularity of spend from the legal aid budget; as such the Department has concluded that ex post-facto assessment is necessary and proportionate. The Department considers it reasonable for the Agency to undertake an ex post-facto assessment to obtain the appropriate level of assurance over the spend. This is consistent with the duty imposed, in Article 37 of the 1981 Order, on persons determining the fees payable in any individual case. The amended rules will also allow these decisions to be subject to appeal to the Taxing Master.

3.12 Payment will be made on the basis of the approved hours, by a prescribed hourly rate. The proposed hourly rates, which are modelled on existing rates payable by the Public Prosecution Service, are set out below:

	Queen's Counsel	Junior Counsel
Hourly rate	£100	£80

	Senior Solicitor	Solicitor	Other Fee earner
Hourly rate	£100	£80	£40

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 the assigned solicitor or counsel (where certified) involved in that case. The proposed outline process which will be applied is as follows:
- (a) The application should be submitted by the representative at the earliest opportunity and not later than the commencement of the contest or committal hearing, as applicable. 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 done¹. 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 5(2)(b) of the 2009 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 considers 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.

¹ It is proposed that the relevant provision to be inserted into the Magistrates' Courts Rules will be modelled on the rule 17 (Very High Cost Cases – Determination of representatives' fees) provision which was substituted into the 2005 Crown Court Rules by the 2009 Crown Court (Amendment) Rules. See also *Kelly QC and Others v. Lord Chancellor* [2012] NIQB 70.

- (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.

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.
- 5.2 The Department does not consider it necessary, or appropriate, to provide a fee to the legal representatives for lodging an appeal to the Taxing Master. The operation of these arrangements will be broadly consistent with other provisions governing similar circumstances. For example, the Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015 require appellants to lodge their appeal in writing and do not provide for remuneration to lodge such an appeal. As appeals under these proposals will be required in writing also, the Department considers that no remuneration should be available under these provisions.
- 5.3 The Department does not intend to introduce a fee to be charged to the legal representatives for lodging an appeal to the Taxing Master at this stage. The concept of charging for appeals is however one that the Department considers to have merit and it may consider their introduction at a stage in the future, which would be the subject of further consultation.

6. Conclusion

- 6.1 The Department considers that it is appropriate to introduce amendments to the Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009 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 the proposals in this document are proportionate, and, when set out in the 2009 Rules, they will ensure that remuneration is available for those limited circumstances which may not be appropriately remunerated under the existing provisions.

7. Impact Assessments

- 7.1 The draft proposals were screened in accordance with the Department's Equality and Regulatory Impact Assessment procedures and it has been concluded that there are no significant issues that would require full assessments at this stage.
- 7.2 In screening the new provisions the Department recognised that they would be open to any legal representative undertaking work in the magistrate's courts which includes individual barristers and solicitors, regardless of the location or size of the firm. The Department recognised that, while having a positive impact on legal practitioners, it was envisaged that there will be a very small number of cases which exhibit such exceptional attributes. The Department's assessment was therefore that the overall impact on businesses would be largely positive for those businesses/individuals impacted by the amendments to the Rules, but as the totality of the changes will be minimal in relation to the spend on legal aid, the policy was screened out and a full regulatory impact assessment was not undertaken.
- 7.3 The Department would welcome any information from respondents in relation to the impact these changes may have, either positive or negative, to assist the Department in its further consideration of the proposed amendments to the 2009 Rules.

8. Consultation Questions

- 8.1 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 magistrates' courts?
- 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 set by the PPS for remunerating prosecuting counsel in respect of hourly rate work?
- Q.6. Is there any reason why the enhanced remuneration payable for exceptional cases should not be subject to the general provision in rule 5(2)(b) of the 2009 Rules?
- Q.7. 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?

9. How to respond

- 9.1 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

Fax: 028 9041 2357

Closing Date

- 9.2 **Responses to the proposals must be received by 16.00 hours on Monday 25 April 2016.**

- 9.3 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.

10. 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.

11. 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 2009 RULES, AS AMENDED

Main Parameters / Standard Fees – Prescribed under Part 2 of Schedule 1

- Category of representative (solicitor or counsel)
- Mode of disposal of the individual case
- Nature of the offence charged
- *Bail Application Fee*
- *Additional Hearing Day Fee*
- *Youth Conference Fee*

Additional Fees / Miscellaneous Provisions – Prescribed under Part 3 of Schedule 1

- *Arrest Warrant Fee*
- *Breach of Court Order Fee*
- *Fixed Application Fees* – Bad character, hearsay, disclosure, special measures, applications to stay proceedings, witness anonymity orders², severance applications³, third party disclosure applications⁴
- *Dismissal / Withdrawal of Representative Fee*
- *Limited Criminal Aid Certificate Fee*
- *Withdrawn or Discontinued Case Fee*
- *Deferred Sentence Fee*
- *Fine Default Hearing Fee*⁵
- *Newton Hearing Fee*⁶
- *Late Sitting Fee*
- *Senior Counsel's Fee*
- *Travelling Allowances*

² Provision inserted by 2014 Amendment Rules

³ Provision inserted by 2014 Amendment Rules

⁴ Provision inserted by 2014 Amendment Rules

⁵ Provision inserted by 2014 Amendment Rules

⁶ Provision inserted by 2014 Amendment Rules