THE BAR of NORTHERN IRELAND

Remunerating Exceptional Preparation Work 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's targeted consultation on the draft Amendment Rules and draft Ministerial Guidance to the Legal Services Agency in relation to remunerating exceptional circumstances in cases in the Crown Court. However, 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 disputed and the Bar Council and Law Society are currently appealing the judgement in the Judicial Review challenge to the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2015 delivered in November 2015. In light of this, the Bar's grave concerns around the standard fee scheme cannot be allayed through the provision of an exceptionality scheme alone. The Department must be mindful that we will not be content with the implementation of this supplementary scheme in the absence of fair and proper remuneration in all cases under the standard fee regime.

3. The Bar's response to the consultation is structured according to our comments on the substantive proposals outlined in the draft Ministerial Guidance to the Legal Services Agency which is cross referenced with the draft Amendment Rules where appropriate. We then go on to offer further comment on the prescribed hourly rates for exceptional preparation work contained in the draft Amendment Rules.

Guidance from the Department of Justice

4. Paragraph 3 of the guidance states *"the Agency will issue separate guidance to the legal profession in relation to this matter. Its guidance will deal with various operational aspects – including the form of applications for additional funding and the determination of representatives' fees under the Exceptional Preparation provisions, the internal review and appeal mechanisms, and the requirement to maintain contemporaneous records of any preparation work*

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done". This separate guidance has yet to be issued and therefore it is difficult for the Bar to comment in full on the directions to the LSA when it is still unclear as to how this will impact on practitioners.

5. The Bar is concerned at the wording of paragraph 4 contained in the guidance from the DOJ to the Legal Services Agency. This states *"I would expect it to extremely unusual for the Agency to authorise Exceptional Preparation funding to a representative in an individual case beyond that already provided for under the standard fee provisions"*. We consider that the use of the phrase *"extremely unusual"* is an attempt to fetter the proper exercise of discretion by the Legal Services Agency as to what constitutes exceptional under the proposed rules. We object to the restrictions imposed by the inclusion of *"extremely unusual"* in this context and believe that it should be removed.

Application for Exceptional Preparation

6. The draft Amendment Rules provide at 1(3) that:

> *The application shall be submitted by the representative at the earliest opportunity after the assisted person has been returned for trial and not later than the commencement of the trial; provided that, if satisfied that it was not reasonably practicable for the representative to do so, the Department may accept such application after the conclusion of the proceedings.*

7. The Bar contends that *"may"* in *"the Department may accept such application"* should be changed to *"shall"*.

8. We note that 1(4) goes on to provide detail on the form of the application which a representative must submit:

> *The application shall be submitted to the Department in such form and manner as it may direct, specifying –*
> *(a) the basis upon which the application is made;*
> *(b) the nature of the work which is the subject-matter of the application;*
> *(c) the number of additional hours sought for each piece of work which is the subject-matter of the application; and*
> *(d) the representative or other fee-earner who will be responsible for each piece of the work.*

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9. The Bar would reiterate that practitioners are yet to see the guidance to be issued by the LSA to the profession. We believe that our members must be able to review this guidance in advance and be consulted on the form that these applications will take before they are introduced.

Prescribed Criteria

10. The Bar welcomes the disjunctive approach outlined in paragraph 7 of the guidance which highlights that exceptional preparation can be triggered by a *"very unusual or novel point of law or factual issue"*. This is reflected in the test outlined in paragraph 8(a) of the guidance and in 1(a) of the draft rules. In our earlier consultation response we requested that the Department provide further guidance on what would satisfy part (a) of the test under a *"point of law or factual issue (not an issue of fact) that is very unusual or novel"* given that this is unclear. We welcome the clarification provided at paragraph 11 of the guidance with the example of *R v Ward-Allen* [2005] 4 Costs LR 745 from England and Wales. However, we remain concerned that there is the potential for confusion amongst practitioners given that guidance to the profession has yet to be issued. The Bar contends that clarification on this issue must be set out clearly in any separate guidance for the profession.

11. In considering paragraph 8, we have further concerns around 8(c) and the reference to work that is *"substantially in excess"* of the amount normally required for cases of the same type. This is reflected in the test outlined in 1(c) of the draft rules. We believe that the inclusion of this phrase is unnecessary as it sets the bar too high. Exceptional cases will necessitate additional hours but the requirement to show that this work is in fact *"substantially in excess"* may be difficult for a representative to demonstrate in practice. We would query whether the Department envisages setting a threshold at which extra work will be considered *"substantially in excess"* of the amount normally required.

12. We note the references at paragraph 9 to the Department's consideration of the 'Special Preparation' provisions contained in the Advocates' Graduated Fee Scheme in England and Wales in developing the prescribed criteria for Exceptional Preparation work. Furthermore, paragraph 10 highlights that the relevant decision-maker(s) under the 2015 Rules *"shall have regard to any relevant case law in England and Wales"* pending any decision by the Taxing Master or High Court as to the interpretation and application of the Exceptional Preparation provisions. We would caution that the graduated fee scheme in England and Wales is very different to the scheme in operation in Northern Ireland. Whilst there are certain procedural

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similarities between the jurisdictions in terms of how cases are run, they are not identical. This also fails to recognise the existence of the Very High Cost Case (VHCC) fee scheme in England and Wales which is not in place in NI. Consequently, we have concerns around the instruction to the LSA to *"have regard"* for case law emanating from England and Wales. This could potentially allow the LSA to rely upon decided cases from another jurisdiction which are only intended to be persuasive authorities and cannot be binding on the courts in NI.

13. The Bar welcomes the examples set out in paragraph 12 of the types of circumstances which might come together to make a case sufficiently complex to warrant consideration by the LSA. We have a number of points to make in relation to these examples:

- A complex terrorist case involving a large number of charges – The Bar takes the view that a terrorist can be complex even if it only involves a small number of charges, for example the Massereene Barracks case;
- A case where an unusual number of expert witnesses are required, and/or where there is a reliance on a new forensic approach – The Bar believes that an exceptionally complex expert issue should also be included in this provision. It should not be limited to "an unusual number if expert witnesses". In addition, we would submit that the reference to a "new forensic approach" should not relate exclusively to forensic science. It must be made clear that this can also apply more widely to a new expert approach in a case;
- A case where there is a high volume of disclosure, and it can be shown that it was relied on substantially by the applicant/assisted person – Procedural requirements dictate that when a disclosure is made this is done by virtue of the fact that it is of relevance to the defendant's case. Counsel is under a professional duty to properly consider all of the material in pursuance of the proper exercise of their obligations. The suggestion that it must be established that the disclosure was "relied on substantially" by the applicant is overly restrictive and would exclude many proper cases where counsel required and properly considered large volumes of disclosure. We would suggest that any complex trials with high levels of pages of prosecution evidence and exhibits should be considered by the Agency;
- The Bar believes that there are also other types of cases which are not detailed on this list but should be considered by the Agency. This includes complex fraud cases and cases involving multi-jurisdictional and multi-lingual elements.

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14. Paragraph 13 of the guidance lists a range of examples where an exceptional preparation payment may be appropriate where it is necessary for a representative to undertake additional preparation work in excess of what would normally be required for a case of the same type. We have a number of points to make in relation to these examples:

    - Complex confiscation proceedings – We would query whether complex proceeds of crime proceedings will be covered by this example;
    - An application for an indeterminate custodial sentence under Article 13 of the Criminal Justice (Northern Ireland) Order 2008 / An application for an extended custodial sentence under Article 14 of the Criminal Justice (Northern Ireland) Order 2008 – These two examples relate to the court determining an issue of dangerousness in relation to a defendant. We would point out that strictly speaking these do not involve an "application" by the prosecution.

Determination of Application

15. Paragraph 17 outlines that *"when considering an application in respect of any individual case against those criteria, the Agency shall also have regard to whether the Public Prosecution Service has approved the payment of additional remuneration to the prosecuting counsel instructed in that case under section 6 (Hourly Rate Work) of the Prosecution Fee Scheme (August 2015)"*. We consider that the absence of exceptionality on the prosecution side should not preclude it from being granted for the defence. The approval of an additional payment by the PPS may be a helpful indicator as to the existence of exceptional circumstances. However, the absence of this should not be taken as determinative in light of the fact that the work undertaken by counsel in the defence of a case is very different to the work required by the prosecution. This is particularly evident in cases involving a high level of disclosure.

16. We would point to paragraphs 4.10 of the post consultation report which highlights that the PPS recognises that *"prosecution and defence cases may be exceptional for very different reasons and, where a case may be exceptional for one side, it would not always be the same for the other"*. There is reference to 11 exceptional payments between June 2014 and June 2015 by the PPS at 4.11. However, we would dispute the assertion that it would be very likely that the degree to which exceptionality arises for the defence over the period of any year will be *"closely akin to the rate of occurrence for the prosecution"*.

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17. The Bar is concerned by the wording of paragraph 18 which states that *"if exceptionality is considered to apply to one or more representative of a defendant, or the representatives of more than one defendant in a case, the Agency shall seek to avoid unnecessary and inappropriate duplication of additional preparation work"*. We would query how the Agency will seek to undertake this. It must be recognised that defendants are separately represented and therefore it is important that each individual has access to proper and complete advice from their own counsel who has a professional responsibility to their client. A defendant cannot be reliant on work undertaken by another legal representative for a co-defendant given the difficult issues of conflict and professional privilege which impact on the sharing of information.

Grant of Application

18. The draft Amendment Rules provide at 3(7) that:

> *3(7) If a representative fails to comply with paragraph (5) without good reason, the Department shall revoke the Certificate granted to that representative, provided that the Certificate shall not be revoked unless the representative has been permitted a reasonable opportunity to show cause in writing why the Certificate should not be revoked.*

19. We believe that this should be amended to read *"the Department may revoke the Certificate"*.

Determination of representatives' fees for Exceptional Preparation

20. The Bar would query the Department's intention behind paragraph 24 of the guidance and whether it is intended to apply to circumstances where a case has been determined (for example, by way of a stay application) with counsel then being paid for the exceptional work required for the application but also being entitled to a brief fee. We believe it is incorrect to conclude that there is any form of double remuneration in these circumstances since counsel are required in any event to undertake full preparation of the brief in advance of any application and it is that general preparation that the brief fee relates to. We have significant concerns in relation to the overarching guidance in paragraph 24 and would welcome clarification from the Department as to the intention behind it.

21. Meanwhile we would also refer to Rule 5(3)(a) which states:

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> *5(3) When determining the fees payable to a representative under paragraph (2), the Department shall–*
> *(a) have regard to any standard fees payable to the representative under rule 8 or rule 11 [of the 2005 Rules], as appropriate.*

22. We would query whether it is appropriate for the Department to have regard to the standard fees payable in a case which has been granted a Certificate of Exceptionality and the exceptional preparation work has been completed to a satisfactory standard given that it has not been revoked under Rules 3.

23. Furthermore, Rule 5(6) states:

> *5(6) The Department may consult the trial judge and may require the representative to provide any further information which it requires for the purpose of the determination under this rule.*

24. The Bar would query what the Department envisages under this rule. How will the Department consult with the trial judge? Who will do this? Will it involve a written inquiry? Will counsel be entitled to be informed? What information will the trial judge provide?

Table of Prescribed Hourly Rates for Exceptional Preparation Work

25. The Bar welcomes the Department's decision to increase the proposed hourly rates provided for the draft Amendment Rules. Under the original consultation they were to be set at £74 for Senior Counsel; £56 for Leading Junior Counsel; and £39 for Sole or Led Junior Counsel which we were entirely opposed to. However, we contend that the new rates of £100 for Senior Counsel; £90 for Leading Junior Counsel; £80 for Sole Junior Counsel; and £70 for Led Junior Counsel are not acceptable and should be increased further.

26. We would point to the public funds being used for the Inquiry into Historical Institutional Abuse to pay rates of £200 for Senior Counsel and £100 for Led Junior Counsel per hour. Furthermore, Very High Cost Cases were still operational in the Magistrates Court up until last year under The Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009 with Schedule 2 highlighting preparation rates of £110 per hour for Senior Counsel and £80 per hour for Junior Counsel. There was also provision a decade ago for high cost cases under Schedule 2 of The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005: £110 to £180 for Queen's Counsel; £90 to £140 for

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Leading Junior; £70 to £100 for Led Junior; £80 to £110 for Sole Junior; and £90 to £140 for a Solicitor. These rates remain considerably higher than the ones being proposed by the Department presently for dealing with exceptional cases. The Department has essentially selected the lowest banding rate from 2005 for the current proposals with Senior Counsel being paid an even lower rate than that identified ten years ago.

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