

Fundamental review of Criminal Legal Aid in Northern Ireland

Terms of Reference

Background and Rationale

1. Remuneration for representation in criminal legal aid cases is governed by specific legislative instruments for each court tier, namely the Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009 ("the 2009 Rules") and the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 ("the 2005 Rules"). Both pieces of legislation were introduced in order to implement a standard fee approach to remuneration of defence costs in the relevant court tiers. The approach was intended to ensure, on a swings and roundabouts basis, appropriate remuneration for work undertaken. In addition there are various aspects of work in respect of criminal proceedings which are remunerated under the Civil Legal Services (Remuneration) Order (Northern Ireland) 2015 which will have to be considered as they form an important part of the criminal justice landscape.
2. The Department has a statutory obligation to carry out a formal review of the Rules at least every three years. In determining the levels of remuneration, the Department is required to have regard to the criteria in Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 as follows:
 - The time and skill which work of the description to which the Rules relate requires;
 - The number and general competence of persons undertaking work of that description;
 - The cost to public funds of any provision made by the Rules; and
 - The need to secure value for money.
3. Whilst there have been various amendments to both pieces of legislation, the core frameworks have remained largely unchanged.
4. The second statutory review of the 2009 Rules was initiated in 2016 and concluded in January 2022. The three-year period for the third statutory review of the 2009 Rules commenced in January 2022.
5. The third statutory review of the 2005 Rules was formally initiated in October 2020. The original scope of the review focused on the following areas:
 - The standard fees, in particular the Pages of Prosecution Evidence (PPE) thresholds, counsel basic trial fee, electronic evidence and the payment for additional PPE;

- The exceptional preparation provisions;
 - Remuneration arrangements for cases which do not resolve in the normal way; and
 - Miscellaneous issues and anomalies within the Rules.
6. The review encountered delays in gathering of evidence in the form of data and it also transpired that there were limitations in the availability of robust and accessible data to inform the review of exceptional preparation provisions. Therefore, the scope of the review was narrowed to remove the review of exceptional preparation provisions.
 7. A consultation on the initial findings of the review was launched in March 2022 and closed in August 2022. Consultation responses were received from PPS, the Bar and the Lady Chief Justice’s Office.
 8. The consultation response from the Bar was critical of the conduct and scope of the review. It drew particular attention to the removal from scope of the Exceptional Preparation (EP) provisions and also raised concerns regarding data provision and impact assessments, the impact of the rising cost of living on fees, changes to Crown Court casework and the impact of the pandemic. The Law Society did not submit a consultation response, however it set out concerns regarding the conduct and content of the review in correspondence. The Law Society concerns were similar to those of the Bar, including the removal of EP provisions from scope, the rising cost of living and the impact on solicitors’ business overheads. They also cited the need to take into consideration the changing nature of work in the Crown Court and changes in practice brought about by the pandemic and the associated backlog. The need to ensure that remuneration arrangements reflect the changing practices and the changing landscape of the criminal justice system was also raised in the LCJO response.
 9. Taking account of the consultation responses and the issues raised regarding the scope of the review, the Department has concluded it is no longer feasible to progress the review of the 2005 Rules within original scope.
 10. The Department has determined that it is more appropriate to incorporate the review of the Crown Court Rules within a wider, fundamental review of the criminal legal aid landscape. In adopting this approach, the wider Review will ensure the Department discharges its statutory obligation to review the 2005 and 2009 Rules. This review will determine whether the legal aid framework set out in the 2005 Rules and 2009 Rules meets current and future needs.
 11. The review will also include consideration of PACE remuneration and remuneration relating to parole proceedings. These fees are provided for under the Civil Legal Services (Remuneration) Order (Northern Ireland) 2015 (“the 2015 Order”) and must be considered in line with the criteria set out in Article

47 of the Access to Justice (Northern Ireland) Order 2003 (“the 2003 Order”) as follows:

- i. the time and skill which the provision of services of the description to which the order relates requires;
- ii. the number and general level of competence of persons providing those services;
- iii. the cost to public funds of any provision made by the regulations; and
- iv. the need to secure value for money.

12. An Independent Advisor will be appointed by the Department to conduct the Review.

Scope

13. The scope of the fundamental review will include:-

- i. The 2005 Crown Court Rules (and any subsequent amendments)
- ii. The 2009 Magistrates’ Court Rules (and any subsequent amendments)
- iii. Part 3 of Schedule 2 and Table 1 of Part 3 of Schedule 4 to the 2015 Order relating to advice and assistance provided to citizens by legal representatives attending police stations for PACE;
- iv. Tables 3-7 of Part 3 of Schedule 4 to the 2015 Order relating to providing legal representation in connection with parole proceedings

14. Reform of criminal appeal legal aid arrangements is not included within scope of the review at this stage, however may be considered in a further phase of review.

Objectives

15. The fundamental review has the following key objectives:

- i. To review the current legal aid framework within scope of this review in line with the criteria outlined in Article 37 of the 1981 Order and Article 47 of the 2003 Order, as relevant;
- ii. Where relevant to make recommendations on a proposed legal aid framework that:
 - i. Is sustainable, resilient and consistent with enabling wider criminal justice reforms (for example, Speeding Up Justice Programme, Modernisation Programme) as appropriate;
 - ii. Supports and enables efficient and effective case progression;
 - iii. Reflects appropriate levels of legal representation; and

- iv. Enables the efficient and effective administrative operation of the framework for LSA and practitioners
 - iii. Where relevant, to make recommendations on the appropriate remuneration levels taking account of the statutory criteria outlined in Article 37 of the 1981 Order and Article 47 of the 2003 Order;
 - iv. To consider and make recommendations regarding the applicability of the statutory criteria outlined in Article 37 of the 1981 Order and any need for change;
 - v. To consider and make recommendations for an achievable and proportionate mechanism for reviewing remuneration levels in the 2005 Rules and 2009 Rules in future to ensure the framework remains fit for purpose. This will include making recommendations on frequency of applying any proposed mechanism.
16. Recommendations arising from the review will be categorised, if and as appropriate, into those which could be considered for accelerated implementation and those for longer-term implementation.
17. All recommendations arising from the review will be subject to the consideration of the Department/Justice Minister and implementation will be subject to the budgetary position and necessary financial approvals.

Approach to the review

18. The fundamental review will be led by an independent advisor who will be accountable to the Senior Responsible Owner (SRO) for the delivery of the review.
19. The independent advisor will be supported by a dedicated team within Enabling Access to Justice Division (EAJD).
20. A structured approach to stakeholder engagement and data/evidence gathering will ensure a thorough understanding of the issues and a robust evidence-based approach to the compilation of the report and the development of recommendations.
21. The review will draw on existing data and evidence from a variety of sources as appropriate. A data package will be compiled with input from key stakeholders and will be submitted to the independent advisor. As directed by the independent advisor, further evidence sources may include qualitative interviews, surveys and focus groups.

Timing

22. The review will commence on 1 October 2023. The independent advisor will submit his/her final report to the Department no later than 30 June 2024.

Governance

23. Steven Allison (Deputy Director, EAJD) is the SRO for the fundamental review and is accountable for the governance of the review and ensuring the independent advisor delivers the review in compliance with these Terms of Reference.
24. The independent advisor will report to the SRO and will meet them on a monthly basis to provide an update on review progress.

Reporting and Outputs

25. The final output of the review will be a report setting out clear rationale and recommendations for reform of the criminal legal aid framework in line with the objectives set out in these Terms of Reference.
26. The report and recommendations will be considered by the Department and will be followed by a consultation on any proposed reform to the criminal legal aid framework.
27. Summaries of evidence gathered during the course of the fundamental review may also be published as annexes to the report.