



Department of
Justice

An Roinn Dlí agus Cirt
Máinnystrie O tha Laa

Post Consultation Report

Second statutory review of the Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009

April 2021

Contents	Page
Introduction	3 - 4
Review Objectives	4 - 5
Consultation Responses	6 - 12
Impact Assessment	13
Next Steps	14

1.0 Introduction

- 1.1 This document is the Post Consultation Report following a statutory consultation by the Department of Justice (the Department) on the Second Statutory Review of the Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009 – ("the 2009 Rules"). The consultation was launched on 20 November 2017, formally closing on 15 January 2018. Work on the review paused following the close of the consultation due to a reluctance to proceed with legislative change without the benefit of the views of the Law Society as a key stakeholder, as well as staff vacancies and other priorities.
- 1.2 The Department noted that no response has been received from the Law Society.
- 1.3 The consultation document and associated documents are available on the [Department of Justice](#) website.
- 1.4 The following consultees, in accordance with Rule 16 of the 2009 Rules, were asked for their views:
- The Lord Chief Justice;
 - The Attorney General;
 - The Magistrates' Courts Rules Committee;
 - The County Court Rules Committee;
 - The Law Society of Northern Ireland;
 - The Bar Council of Northern Ireland;
 - The Director of Public Prosecutions for Northern Ireland; and,
 - Relevant Section 75 representative groups
- 1.5 The purpose of this report is to:
- provide a summary of the views expressed by respondents together with a response from the Department; and

- outline the next steps planned regarding the drafting of amendment rules / further consultation.

1.6 A copy of this report will be placed on the [Department of Justice](#) website.

2.0 Review Objectives

2.1 Rule 16 of the 2009 Rules requires the Department of Justice (DoJ) to keep the general operation of the Rules under review.

2.2 The objectives of this second statutory review of the 2009 Rules, in accordance with Rule 16, are to consider:

- the levels of the prescribed fees and the rates of payment under the 2009 Rules (as amended); and,
- whether or not these fees and rates of payment within the 2009 Rules are consistent with the criteria set out in Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (“the 1981 Order”):
 - the time and skill which work of the description to which the rules relate requires;
 - the number and general level of 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.

In addition, the DoJ identified two further non-statutory criteria for inclusion:

- to identify any potential omissions in the 2009 Rules; and,
- to determine whether the operation of the 2009 Rules can be enhanced to further improve control and forecasting of spending.

2.3 The review team engaged informally with both internal and external stakeholders to take their views into account prior to consultation.

2.4 The consultation considered and sought views on the following issues:

- the fees payable to Counsel for appeals against sentence to the County Court;
- the fees payable at the Magistrates’ Court for children charged with indictable only offences;

- the impact of the Registered Intermediaries Scheme at the Magistrates' Court, and the need for adequate remuneration arrangements to account for this impact;
- the time and skill involved in providing representation for assisted persons at Newton Hearings at the Magistrates' Court;
- the value for money of remunerating work carried out by paralegals and "other fee earners";
- the provision for any new application fees at the Magistrates' Court or the County Court on appeal;
- the remuneration arrangements for hearings relating to certain prohibited behaviour orders during criminal proceedings at the Magistrates' Court;
- interim payment of disbursements within the Rules;
- the provision for pre-hearing reviews; and
- the appropriateness of the "review period" for the 2009 Rules.

2.5 A summary of consultation responses to these issues is set out within section 3.

3.0 Consultation responses

- 3.1 The Department received substantive responses to the consultation from the Attorney General and the Bar Council. The Public Prosecution Service, the Office of the Lord Chief Justice and Parenting NI acknowledged the consultation but made no comment on the policy proposals.
- 3.2 The Attorney General commented upon:
- Registered Intermediaries Scheme fee proposals; and
 - The use of paralegals and 'other fee earners'
- 3.3 The Bar remarked that the broad structure of the 2009 Rules functions effectively in respect of the standard fee approach and that the Rules generally provide certainty for practitioners. The Bar agreed with the consultation approach which recognised that the Rules do not require significant amendment. The Bar commented upon:
- Counsel fees for appeals against sentence to the County Court;
 - Registered Intermediaries Scheme fee;
 - Newton Hearings;
 - Use of paralegals and 'other fee earners'; and,
 - The Statutory Review Period.
- 3.4 **Issue 1:** Fees payable to Counsel for appeals against sentence to the County Court.

The Department, in the consultation document, indicated a willingness to increase the fee available to Counsel for these proceedings from £115 to £230.

The Bar reiterated their pre-consultation view that the current fee payable to Counsel of £115 for appeals against sentence to the County Court under the 2009 Rules does not adequately reflect the amount of time and skill required to complete this work. The Bar also highlighted the disparity in the current fee payable to solicitors (£115) and that payable to counsel (£265) for such appeals. They welcomed the intention of the Department to increase the fee payable to Counsel for these proceedings from £115 to £230 and indicated that this increased fee is a fairer reflection of the time and skill required of counsel to provide legal representation in these cases.

No other consultation responses or comments were received in relation to this proposal.

The Department, following careful consideration of representations made concluded that the fee payable to Counsel for appeals against sentence to the County Court should be increased from £115 to £230 (subject to the necessary financial approvals being obtained).

- 3.5 **Issue 2:** Fees payable at the Magistrate's Court for children charged with indictable only offences. The consultation document sought views in relation to standard fees payable for children charged with indictable only offences. This was included in the consultation in response to stakeholder feedback that the current fees payable do not adequately represent the added complexity of representing these clients. The review indicated that issues regarding the vulnerability of individuals involved and the necessary additional work had already been taken into account when setting the fees for these cases.

No response or comments were received in relation to this issue.

The Department has concluded that further fee enhancement to this class of fee is not required at this time.

- 3.6 **Issue 3:** The impact of the extension of the Registered Intermediaries (RI) Scheme to all cases heard in the Magistrates' Court, and the need for adequate remuneration arrangements to account for this impact.

In the consultation document the Department:

- Agreed in principle that remuneration arrangements are necessary for the extension of the RI Scheme to the Magistrates' Court;
- proposed that the hearing of applications for witnesses or the accused to be examined through a RI be remunerated by way of a fixed application fee of £75 under paragraph 14 of Schedule 1 to the 2009 Rules; and,
- sought the views of stakeholders regarding the additional work required in Magistrates' Court cases involving RIs, in particular in respect of Ground Rules Hearings.

The Bar in its consultation response:

- noted that the Department had agreed in principle that remuneration arrangements are necessary for the extension of the RI scheme to the Magistrates' Court and indicated that they looked forward to reviewing the fee structure proposal associated with RIs once it is established;
- welcomed the proposal that the hearing of applications for witnesses or the accused to be examined through an RI will be remunerated by way of a fixed application fee of £75; and,

- made no comment in relation to the Department's request for views regarding additional work associated with Ground Rules Hearings involving RIs.

The Attorney General in his consultation response:

- noted that the Department proposes to remunerate the hearing of applications for witnesses or the accused to be examined through an RI by way of the fixed application fee of £75 prescribed by paragraph 14 of Schedule 1 to the 2009 Rules; and,
- queried, whether there is a potential risk that this proposed amendment may condition behaviours going forward, generating an increased prevalence of this type of application, with the proposed fee being payable regardless of whether or not the application has a reasonable prospect of success.

The provision of a RI is based on need (a communication difficulty associated with the individual giving evidence) which is established at a pre-hearing stage. The Department is not aware of evidence that suggests that RIs are being unnecessarily granted. On this basis we do not believe that there is a risk that the provision of a fixed application fee as per this proposal would result in an increase in applications. No other comments were made regarding additional work required in relation to RIs in the Magistrates' Court.

The Department has concluded that a £75 fixed application fee should be introduced to remunerate the hearing of applications for witnesses or the accused to be examined through a RI. Introduction of the proposed fee is subject to the necessary financial approvals being obtained. The issue regarding any additional work required in Magistrates' Court cases involving RIs, in particular in respect of Ground Rules Hearings will be revisited as part of the next Statutory Review.

- 3.7 **Issue 4:** Concern that current fee arrangements do not reflect time and skill involved in providing representation for assisted persons at Newton Hearings at the Magistrates' Court. Currently under the 2009 Rules, Newton Hearings at the Magistrates' Court are remunerated by way of a 50% uplift on the relevant guilty plea fee.

The Department in the consultation document:

- noted that some stakeholders have suggested that Newton Hearings in the Magistrates' Court should be remunerated by way of a contest fee, similar to the remuneration arrangements at the Crown Court, and that this fee would more accurately reflect the time and skill involved in such a hearing; and

- invited views from stakeholders regarding the time and skill involved in providing representation for Newton Hearings at the Magistrates' Court.

The Bar in its consultation response:

- expressed the view that a Newton Hearing should be remunerated by way of a contest fee thereby reflecting the practice in the Crown Court;
- stated that practitioners have indicated that the number of Newton Hearings in the Magistrates' Court is extremely low and that remunerating these types of hearings by way of a contest fee would more accurately reflect the time and skill involved in such work.

No other comments or responses were received in relation to this issue.

The Department, following careful consideration of representations made, has concluded that the 2009 Rules should be amended to provide that Newton hearings be remunerated by way of a 75% uplift on the relevant guilty plea fee (subject to the necessary financial approvals). This acknowledges the concern that the current fee does not adequately reflect the time and skill involved in such work whilst taking into account the differences between proceedings in the Magistrates' Court and the Crown Court and maintaining the premise of the fee, which is predicated on a guilty plea fee.

3.8 Issue 5: The value for money of remunerating work carried out by paralegals and "other fee earners".

The Department in the consultation:

- noted that there is no provision in the 2009 Rules to remunerate any work done at court by non-qualified staff and stated that if it is appropriate for work to be undertaken by such staff, then more appropriate remuneration arrangements would be required.
- welcomed views from stakeholders regarding this issue, and in particular any available evidence regarding the involvement of paralegals or "other fee earners" at the Magistrates' Court or County Court on appeal.

The Bar in its consultation response:

- commented that their members had not raised any issues to date regarding paralegals attending the Magistrates' Court;
- acknowledged that there is no provision within the 2009 Rules to remunerate any work done at court by non-qualified staff;
- highlighted that barristers and solicitors play complementary but distinctly different roles in representing any client, each bringing unique skills and professional training to bear;

- stated that The Criminal Bar Association would be concerned by any move towards non-qualified staff potentially having rights of audience in the Magistrates' Court; and,
- expressed concern that providing remuneration arrangements for non-qualified staff to attend court could potentially frustrate the ability of a solicitor and barrister to act together in their distinct roles thereby reducing the clients' access to the level of legal representation that they should normally be entitled to rely upon.

The Attorney General in his consultation response:

- noted that the 2005 Crown Court Remuneration Rules include provisions which recognise the use of paralegals in place of a qualified solicitor; and,
- requested to place on record his concern about express provision being made for the remuneration of work by paralegals or "other fee earners", in place of a qualified solicitor, since it cannot reasonably be known what value for money is given by these persons in court.

No other comments or responses were received in relation to this issue.

The Department has concluded that no amendment to the 2009 Rules in this regard is necessary at this time.

3.9 **Issue 6:** The provision of new application fees at the Magistrates' Court or County Court on appeal.

The Department in the consultation document:

- stated that paragraph 14 of Schedule 1 to the Magistrates' Court Rules provides for a fixed fee of £75 in respect of specific applications;
- stated that it remains in favour of adding to the list of applications at paragraph 14 of Schedule 1 should the need arise, rather than introducing a general application fee within the Rules;
- invited feedback from stakeholders regarding any additional applications which they feel should be given consideration for inclusion; and,
- noted that in respect of applications covered by the fixed fee at paragraph 14, stakeholders have suggested that these fees do not currently apply to the County Court on appeal, and are only available for Magistrates' Court proceedings and that similarly stakeholders have also suggested that the fees for the hearing of certain bail applications at the Magistrates' Courts, provided for by paragraph 6, are not available at the County Court on appeal; and,
- confirmed that these fixed fees apply to applications made at the Magistrates' Court and the County Court on appeal.

No response or comments were received in relation to this issue.

As no additional applications have been identified, other than the separate proposal above to provide the application fee for the hearing of applications for witnesses or the accused to be examined through an RI, the Department has concluded that no further additional application fees are required.

3.10 **Issue 7:** Prohibitive Behaviour Orders.

The Department in the consultation document:

- indicated that it intended to make provision for a standard fee of £75 for hearings related to the following prohibitive behaviour orders in criminal proceedings at the Magistrates' Court:
 - Restraining Orders
 - Anti-Social Behaviour Orders (ASBOs)
 - Football Banning Orders (FBOs)
 - Female Genital Mutilation Protection Orders (FGMPOs)
 - Violent Offences Prevention Orders (VOPOs)
 - Sexual Offences Prevention Orders (SOPOs)
 - Slavery and Trafficking Prevention Orders (STPOs); and
- welcomed views from stakeholders regarding this proposal to remunerate hearings related to the prohibitive behaviour orders in question.

No response or comments were received in relation to this issue.

In the absence of a clear evidence base for this proposal, the Department feels that there is insufficient justification to support the introduction of a fee for these prohibitive behaviour orders at this time. However, the Department remains open to considering any evidence in this regard that is forthcoming during the targeted consultation on the draft amending Rules.

3.11 **Issue 8:** Interim payment of disbursements

The consultation document proposed placing the current arrangements for interim payments of disbursements in respect of experts on a statutory footing through amendments to the 2009 Rules. The interim arrangements are currently in place by way of Direction No. 4 of 2017.

No response or comments were received in relation to this issue.

After due consideration of this proposal the Department is no longer convinced that there is a need for such an amendment to the Rules at this time.

3.12 **Issue 9:** Pre-hearing reviews

In the consultation document the Department sought views on the prevalence of, and additional work required to prepare for, pre-hearing reviews at the Magistrates' Court. This was included in the consultation in response to feedback from stakeholders that such hearings are becoming more commonplace prior to the commencement of proceedings at the Magistrates' Court.

No response or comments were received in relation to this issue.

In the absence of any evidence to suggest that any changes to remuneration are required to provide for pre-hearing reviews the Department concluded that no amendment to the Rules is necessary in this regard.

3.13 **Issue 10:** The Statutory Review Period

The Department in the consultation document sought views on the appropriateness of the statutory review period for the 2009 Rules. The current provisions require the Department to carry out a review at least once in every "review period", meaning the period of three years beginning with 26th June 2014 and each subsequent period of three years.

The Bar in its consultation response:

- commented that it supports the regular review of legislative rules to ensure their operation best serves the needs of the justice system and that they remain fit for purpose; and
- confirmed that they are content with the review period for the 2009 Rules being three years and considered that this is an appropriate length of time to allow for any amendments to be implemented and data to be collected to form the basis of any subsequent review.

No other responses or comments were received in relation to this issue.

In the absence of any opposing views or comments the Department has concluded that the statutory review period should continue to be three years and that the statutory review period should start from the commencement date of the amending legislation.

4.0 **Impact Assessments**

- 4.1 The Department, prior to issuing consultation documentation, completed screening exercises for the equality, rural needs, regulatory, human rights and data protection impact of the 2009 Rules policy, in accordance with departmental procedures. The policy, in respect of each impact, has been screened out.
- 4.2 No additional information provided post consultation, therefore the position remains as stated above (point 4.1).

5.0 **Next Steps**

- 5.1 Implementation of the policy proposals outlined above are subject to the necessary financial approvals. Draft amending legislation to bring effect to the proposals will be subject to a targeted 4 week consultation, after which the necessary steps will be taken to finalise and lay the amending Rules in the Assembly.