Northern Ireland Assembly

Public Accounts Committee

OFFICIAL REPORT (Hansard)

Inquiry into Managing Legal Aid: Department of Justice, Legal Services Agency Northern Ireland, Department of Finance, Northern Ireland Audit Office

29 June 2016

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Robin Swann (Chairperson)
Mr Daniel McCrossan (Deputy Chairperson)
Mr Robbie Butler
Mr Trevor Clarke
Mr Gordon Dunne
Mr Alex Easton
Ms Michelle Gildernew
Mr Declan Kearney
Ms Carla Lockhart
Mr Trevor Lunn
Mr Oliver McMullan

Witnesses:

Ms Alison Caldwell	Department of Finance
Mr David Lavery	Department of Justice
Mr Mark McGuckin	Department of Justice
Mr Nick Perry	Department of Justice
Mr Paul Andrews	Legal Services Agency Northern Ireland
Mr Kieran Donnelly	Northern Ireland Audit Office

The Chairperson (Mr Swann): I welcome Nick Perry, accounting officer at the Department of Justice; David Lavery, head of access to justice in the Department; Paul Andrews, chief executive of Legal Services Agency NI, and Mark McGuckin, head of legal services division in the Department. Members, there are pen pictures of our witnesses in pages 79 to 83 of your pack. We have agreed our order of questioning. I welcome our witnesses here today. Gentlemen, you are welcome to this inquiry session, the first of our new Public Accounts Committee (PAC).

To set the context, the 2011 PAC report noted that there was a need for significant reform of the legal aid system in Northern Ireland to bring expenditure under control, but we have noticed that there has been a lack of traction, with a number of recommendations still outstanding. The most significant reforms implemented since 2011 have been reviews of the remuneration agreements for publicly paid legal representatives in criminal cases. The fees for Crown Court cases were subject to review in 2011 and 2015, and the fees for Magistrates' Court cases were reviewed in 2014. The reforms had the effect of limiting the rise of expenditure on criminal legal aid between 2000 and 2010. Looking at figure 1 of the Comptroller and Auditor General's (C&AG) report, it appears that the Department has failed to reduce the overall expenditure on legal aid.

I will move to questions. Nick, do you think it is acceptable that so many recommendations from the 2011 PAC report on legal aid are still outstanding?

Mr Nick Perry (Department of Justice): Thank you, Chair. I will begin by saying that the Department accepts the recommendations in the Audit Office report. I acknowledge the observations that there is still more to do, that some initiatives have been delayed and that we face challenges on the way, but a majority of the recommendations in the 2011 report have, I think, been completed, and all the others are being taken forward.

It is important not to lose sight of what has been achieved since 2011, because significant progress has been made. Through standardised fees, we have successfully stabilised criminal legal aid despite a significant rise in the number of Crown Court cases. That is something that the report recognises. In steady state, we will have reduced the cost of criminal legal aid by £15 million a year without impacting significantly on access to justice. We have also put in place a clear statutory foundation for the reform of civil legal aid. We will introduce standard fees in family cases in the first half of next year. That is a major change, with more significant reforms to follow, and it will, in addition, strengthen our ability to tackle fraud. We have reduced the use of two counsels in the Crown Court by almost two thirds. We have ended very high cost cases (VHCC) in the Crown and Magistrates' Courts. We have also agentised the Legal Services Agency to improve efficiency and tighten accountability. We have done that while protecting access to justice for the people in our society who need it. Against that backdrop, although we have not quite made the progress that we wished to make on one or two of the recommendations, I think that, in terms of the fundamentals of reform, a great deal of progress has been made.

The Chairperson (Mr Swann): As regards your last sentence, Nick, do you think it is acceptable that, after this period of time, we are still in the state that we are in?

Mr Perry: The legal aid system is in much better shape than it was five years ago. The reality has proved that the delivery environment for those reforms has been extremely complex in policy formulation and in implementation. There are a number of reasons for that, and I dare say that the Committee will want to explore them in detail as we go through. It was the criminal side of legal aid that was most in need of urgent and radical reform, and it has received that reform. We now have firm plans and laid the foundations for a similar fundamental reform on the civil side. As you say, Chair, there are one or two areas in which we have not quite made the progress that we wanted to make, but we are on the right trajectory to make progress.

The Chairperson (Mr Swann): It has been brought to the Committee's attention today that lack of action on those reforms is leading to the Department's accounts being qualified. Do you think that that is acceptable?

Mr Perry: No, I do not. This is the first year that the Department's accounts have been qualified. The commission's change of status to an agency of the Department means that the qualifications that exist in the agency's accounts now impact on ours. This is the first year that that has happened. It relates to a very specific area, and that is the calculation of provisions. There are qualifications connected to the agency's accounts, but we are working hard to put the mechanisms in place to have those qualifications removed. A great deal of work is being done on all those technical issues, and we can say more about that on the way through.

The Chairperson (Mr Swann): Paragraphs 1.4 to 1.8 of the C&AG's report examine the legal aid reform programme in England and Wales, which is expected to deliver savings of up to £250 million each year. What are the barriers to introducing a similar reform programme in Northern Ireland?

Mr Perry: We have used the system in England and Wales as a comparator and benchmark for the system here. Many of the reforms that have been introduced in England and Wales have been replicated here, but it is a different system. Our legal aid arrangements for the society we serve here are different, in some respects, from those in England and Wales. There is now a real sense that England and Wales have gone too far in making straight cuts to the levels of remuneration and in taking areas out of scope as far as legal aid is concerned. I think that the Audit Offices in England and Wales and PAC in Westminster have criticised some reforms for having gone too far and for not demonstrating value for money. We have used England and Wales as a benchmark, but it is not entirely appropriate for everything that we have done here. The arrangements we are putting in place here are, I think, bespoke for Northern Ireland.

Mr David Lavery (Department of Justice): May I say that some of the changes in England and Wales are likely to be politically unacceptable to the Assembly? For example, the previous Justice Minister decided that private family law would remain within the scope of the legal aid system. As you know, England and Wales removed private family law cases from the legal aid system. That appears to have been quite repercussive in displacing unmet legal need to other areas. For example, it has been damaging to the Law Centres Network in England, because that was reliant on the fee income from solicitors doing that work. It has been quite repercussive. At political level, it was felt that it was appropriate to give coverage for private family law cases in Northern Ireland, and there is no reason to think that the current Justice Minister will depart from that.

In answer to your question, a second example of a different approach is that we have looked at contracting for legal aid as a way of procuring services from lawyers a number of times; indeed, when we appeared before the Committee in 2011, it asked us to keep the possibility of contracting under review. Although we have looked at this, we feel that it would damage the structure of the network of small solicitors throughout the Province. We simply do not have the scale of practices in Northern Ireland that would allow for the benefits of contracting. In England, there are what are almost legal aid factories in the big conurbations; in Northern Ireland, we have a completely different structure to the legal profession, particularly the solicitors' profession. It would be difficult to give effect to contracting, and it would be quite damaging if, say, one firm in a particular part of the country hoovered up all the legal aid work.

The Chairperson (Mr Swann): OK, David, I think that we will cover that in some of the evidence sessions.

You said that there has not been the political will, but there has been a political directive to change some of the legislation for legal aid, which has been blocked a number of times. How many changes to the legal aid system that were proposed by either the Assembly or the Justice Minister have been blocked by judicial review or by other methods?

Mr Lavery: There have been challenges to some of the measures we introduced. As the Committee knows, there was a judicial review last year to changes that we introduced in the fee structure for lawyers doing cases in the Crown Court. We successfully resisted the greater part of that challenge. When that did not work, the lawyers withdrew their services and went on strike. As Nick said, we have encountered quite a challenging environment, but we have been able to deliver the greater part of the changes notwithstanding the challenge we encountered.

The Chairperson (Mr Swann): That is what I ask: how many changes that were either recommended by the Justice Minister or the Assembly through legislation have been blocked or challenged?

Mr Lavery: None has been blocked, but one was significantly delayed for the better part of nine months by disruption in the Crown Court, and we ended up going to mediation to sort that out. Thinking back, there was a similar legal aid strike a number of years ago, in 2012, that took months to resolve. Nothing has been blocked, but there certainly has been significant resistance by the lawyers who are the suppliers of legal aid.

The Chairperson (Mr Swann): After the nine-month period, when things were resolved, what were the cost savings from that change?

Mr Lavery: My colleague Mr McGuckin will perhaps give you the detail of that, Chair.

Mr Mark McGuckin (Department of Justice): The savings we expect to deliver from the rules when they are fully operational are about £4·9 million per annum. That is based on the level of spend in 2013-14, which was the base year.

The Chairperson (Mr Swann): Paragraph 3.23 on page 23 of the report states that the estimated savings were £5 million in the 2011 access to justice report. When do you think those will be in place?

Mr McGuckin: Sorry, I am not sure that I understand the question fully.

The Chairperson (Mr Swann): You mentioned savings of £4·9 million. That figure is in paragraph 3.23 on page 23 of the Comptroller and Auditor General's report. You are talking about recommendations and savings that may be made. I am asking you when they will be made.

Mr McGuckin: Sorry, the savings I referred to were those that will flow from the 2015 and, subsequently, the 2016 amendments to the Crown Court rules, which are the criminal fees. The £5 million per annum referred to in the report relates to savings against fees in civil remuneration. We are taking that forward on a phased basis, focusing initially on family matters in all court tiers. This is a complex process of introducing standard fees and augmenting the existing standard fees. We are in the process of finalising the arrangements. We will return to the Justice Committee and the Assembly in the autumn with our final proposals for that section, to implement the new fees scheme from 1 April next year; and phases two and three will follow. The first phase will be about 70% of the costs involved. We expect those to start to kick in from April next year.

The Chairperson (Mr Swann): Are you expecting any challenge to those?

Mr McGuckin: We have worked hard to ensure that we have a robust approach and agreement, as far as we can. Regarding the methodology, there may be some dispute over the level of fees because we are seeking to introduce standard fees to simplify the process and give clarity. As the report indicates, we will look to achieve some savings, which will mean cuts in fees, and there might be some disagreement over that. We hope to avoid challenges through the work we have done to date to get a degree of agreement on them.

Mr Lunn: Welcome. Nick, when you made your introductory remarks, you painted a picture of steady progress — "the laying of foundations", I think you said — but this appears to be a process that has been going on since about 2002. The reason we are here, in my opinion, is lack of progress not achievement levels. My questions are around remuneration rates and progress. Frankly, it seems to me — I will say it straight away — that the legal profession seems to be running rings around the Department. Regarding the agreement between the Bar Council, the Law Society and the Department around the 2015 rules, to what extent did that agreement impact on the reduction in fees intended by the 2015 rules?

Mr Perry: There was some reduction in the projected savings. Mark will keep me right in case I get this wrong, but there was a reduction from £7 million to around £5 million as a result of the adjustments we made as part of those discussions. Two important points are that the bulk of the savings were attained in the principle underlying the introduction of standard fees, which is the most fundamental change that was protected and that the court found in the Department's favour on three of the five grounds that it was considering. In both respects, it was a successful outcome from the Department's point of view.

The Chairperson (Mr Swann): Nick, Trevor is having trouble hearing.

Mr Lunn: We are all having trouble hearing each other.

Mr Perry: Sorry. Did you hear any of that? As I said, the reduction in the projected savings was from £7 million to around £5 million as a result of the arrangement or agreement that we came to with the professions. The important point from the Department's perspective was that the bulk of the savings were preserved as a result of that process, and the principle underpinning the reforms, particularly the use of standard fees, was endorsed by the court. They were important outcomes for the Department, and there was a public interest in seeing the courts resuming business.

Mr Lavery: Mr Lunn, when we were last here in 2011, the criminal legal aid system was still dominated by what is called "very high cost criminal cases". This was a special scheme in which a small proportion of cases were taking up a huge proportion of the budget. Obviously, we were encouraged to address that, and it was one of your recommendations. There was also a system where a lot of the fees for regular Crown Court cases were assessed after the work had been done by the taxing master, so there was a lack of predictability. In the last few years, that has all been addressed. The very high cost case scheme has been removed, and we have gone for a standardised fee system.

Mr Lunn: There is an exceptional cost —

Mr Lavery: Yes. There is an exceptionality scheme, but it is a very limited scheme. The threshold that has to be negotiated to have a case regarded as exceptional has been drawn based on the lessons learnt with the very high cost scheme.

Mr Lunn: You referred to the line that the integrity of the 2015 rules was maintained and you expect significant savings to be delivered. Will you explain that line to me? It comes off the tongue beautifully, but I am not sure what it means.

Mr Perry: It is really the point that David was making. Part of the challenge in that court case was to the whole concept of standard fees and their suitability for remunerating various kinds of legally aided work, and the court upheld the validity of that approach.

Mr Lavery: Indeed, the current report by the Audit Office explicitly encourages the use of that methodology going forward. It is a significant step change. It means that we will have cost control, budget predictability and, hopefully, value for money. The Audit Office has looked at it and said that standard fees is the right approach to use. That is why Nick said that, through a small compromise at the end of that strike, we were able to retain the standard fee system.

To some extent, the standard fee regime brings people into a lobster pot, if you like. You cannot get out of it.

Mr Lunn: A lobster pot?

Mr Lavery: Yes.

Mr Lunn: The agreed amendments seem to have, effectively, reduced the intended savings by about 35% — the deficit between what you meant to do and what actually happened. Is that reasonable, given that Great Britain's rates have been reduced in the meantime as well? The idea was to bring them closer together.

Mr Perry: We had achieved a degree of alignment or, at least, a closing of the gap between the two until the further round of cuts in England and Wales, which have been the subject of some criticism. As I mentioned at the outset, Mr Lunn, when the 2016 rules are fully in force, we will have taken something like £15 million a year out of the criminal legal aid baseline. Although we have forgone some savings in order to have the system working in a slightly modified way, we have preserved the structure, which is delivering major savings without impacting on access to justice.

Mr McCrossan: You are talking about the basic fee. There is a huge contrast between here and Great Britain, but you are talking about the exceptionality cases or the cases that stand out. Will you explain why it is so high here in comparison with Great Britain?

Mr McGuckin: There are a number of reasons for the difference. First, we have brought our fees closer to those in England and Wales, and, indeed, the most recent round of cuts that occurred in England and Wales were reversed by the Justice Secretary earlier this year. I think that that happened in January. They have had to pull back from the cuts that they introduced.

There are other reasons for the overall difference in costs in Northern Ireland. First, our court structures operate slightly differently. In the Crown Court, we have a higher proportion of more serious cases. In England and Wales, a variety of less serious cases would be heard in the Crown Court that, in Northern Ireland, would be heard in the Magistrates' Court, which drives up the overall cost in the Crown Court. There are slightly different approaches to how representatives operate and the attendance of solicitors with counsel in the Crown Court to ensure proper representation. The final point is that, because of the structure of society here and the number of people here who are on benefits, you tend to have a slightly greater proportion of the population entitled to free legal aid or legal aid of some variety. That is what helps to drive the overall costs.

Mr McCrossan: Even after reforms, it will still be significantly higher, but, in percentage terms, what is that?

Mr McGuckin: The significant —

Mr McCrossan: The overall cost. Remuneration rates in Northern Ireland, even after reforms, are likely to be significantly higher.

Mr McGuckin: They will be higher. I am not sure that we can say that they will be significantly higher. The structure of the systems as they operate are different, so it is challenging to do a direct

comparison on them. We are informed by the rates that are paid in England and Wales through their graduated fees scheme, but they are not directly replicable and comparable to the structures that operate in Northern Ireland. I do not think that there is a direct comparison in the report, in percentage terms, that people have been able to identify, because there are differences in the structure and in the schemes.

Mr Clarke: In your answer before the previous one, it seemed as if you were nearly making an excuse for the system that we have in Northern Ireland. I do not think that that was necessarily what Daniel was asking you. We are looking for the rationale behind why we have such a system in Northern Ireland. Part of the reform was that our system should be made different, but you just made an excuse for it rather than giving a reason why it is such a system.

Mr Lavery: But there —

Mr Clarke: Sorry, let Mark answer that. I was directing the question to Mark, David. Mark gave the last answer, so I would like Mark to answer that.

Mr Lavery: Yes, that is fine. Perhaps I might supplement his observations.

Mr McGuckin: The system in each jurisdiction has developed on its own basis through its own legislature and through its own analysis. Our system has developed in a particular way, reflecting the way that the court operates, the way that the legal profession is structured to a certain extent and the way in which government in Northern Ireland has decided that citizens should be supported when they need legal advice and assistance, should that be in the criminal courts when they face charges or in taking forward —

Mr Clarke: You are still missing the point. The idea behind reform was that we knew that the system had to change. The Department should have been driving that change. Why have you failed to turn the system round? I would like to know that rather than hearing the excuse that we have a different system from that on the mainland.

Mr McGuckin: I was asked for a comparison of how the systems operate in Northern Ireland and in England and Wales. We have driven down the average cost, and that is acknowledged in the report. A large focus of the report is on the Crown Court fees. We had a significant increase in the throughput in the Crown Court for a variety of reasons that we can talk about, but that 62% increase in the throughput in the Crown Court only resulted in a 20% increase in the costs. You can see that the steps that we took in 2011 had a significant impact on that, and the further steps that were taken in 2015 and 2016 will further assist and drive down those costs. We are approaching this from a standard fee approach and by simplifying the system as much as possible so that it is straightforward and clear for those who operate in it.

Mr Lavery: Might I be permitted to make one observation? Whilst we might like the look of the cost of the English system, I do not think that we would like the look of it in practice in Northern Ireland. With the way the fees are structured for the Crown Court in England, it is only economic for firms to take a Crown Court case if they send a clerk to attend the barrister at the trial. In Northern Ireland, it is a professional responsibility of the solicitor who is taking instructions in the case to attend the trial throughout to support the defence. With respect, I think that that is preferable, and I do not think that we would want a system like that in England, where you get stories of unemployed actors being sent to court to sit behind the barrister. It is just not an attractive system. We have a professional duty on our lawyers that the solicitor attends the trial. We could take more cost out if we changed that rule, but you, as an Assembly, will have to decide if that is a justice system that you want. I have practised as a barrister in the criminal courts, and the solicitor who instructed me attended throughout and made a valuable contribution. They will know the case inside out and will have met the client, in a criminal case, from when they were arrested until they go to the trial. There is an important role for the two lawyers. In England, that is gone now. What sort of justice system we want is a serious consideration.

The Chairperson (Mr Swann): We are trying to get an affordable one.

Mr Lavery: Yes, absolutely, I agree with that.

The Chairperson (Mr Swann): Mark, you referred to the average cost coming down. Figure 3 on page 16 of the C&AG's report shows that the average cost for legal aid and assistance increased steadily from 2012-13, that the average cost of the Children's Order increased steadily from 2012-13 to 2014-15 and that civil and legal aid average costs increased. I just want to put it on record that those average costs are not coming down when you take that table into consideration.

Mr McGuckin: There is a variety of reasons that some of those average costs are increasing on the civil side. I am sure that the reasons will come up later in the session, so we can go into them at that stage. We are taking steps through our work on civil fees to introduce standard fees, and that will help to address that, so it is identified.

Mr McCrossan: Paragraph 3.9 states that, following the settlement with the legal profession, the Department stated:

> *"despite these changes, 'the integrity of the 2015 Rules was maintained and expects significant savings to be delivered'."*

Trevor touched on that. How was it meant to be delivered without the intended reduction in legal aid fees? How was the overall integrity supposed to be maintained?

Mr Perry: The concept of having standard fees was protected. That is, I think, what we mean by protecting the integrity of reforms. Part of the challenge in the case was really to the entire concept of standard fees.

Mr McCrossan: What was the nature of amendments agreed with the legal profession to the 2015 rules?

Mr McGuckin: In the 2015 rules, we made significant reductions across the board to the standard fees that were already in place. We made some adjustments to how guilty pleas were operated, as well as other minor changes. In some areas, for example, we would have protected the fees that are paid for the more serious cases, because that is where the additional work was done, and for other areas. There are a small number of those cases, but there is a lot of work involved in them. In areas in which there is a high volume of cases but less work, fees were reduced.

Through the process of discussion during the strike, the judicial review and the mediation, we agreed to insert back into those fees a proportion of the cut that had been made. That brings us to the point that Mr Perry was talking about, where, in the 2015 rules, we were projecting a saving of about £6·9 million. That was reduced to £4·9 million through the mediated settlement. We maintained the overall structure of the fees that we had put in place and added some of the savings back into the fees again in order to resolve the situation, which, at that stage, had gone on for about 10 months.

Mr Lunn: I just want to clarify one thing. You talked about the exceptional costs system. I accept that it is probably tighter than the old system. Does that mean that you get a higher rate per hour for doing the work that is necessary, or does it mean that you get more hours at the same rate?

Mr McGuckin: It is important to set out the context of the intention of the exceptionality clauses. Standard fees are intended to address all cases on a swings-and-roundabouts basis. The standard fee is designed for cases that might be quite complex or less so. What has become clear —

Mr Lunn: Is it right that a standard fee is an hourly rate?

Mr McGuckin: No. It is a fixed amount of money. In certain circumstances, issues can come together, and that means that the standard fee, as it stands, will not properly remunerate that work. It is effectively the additional work that you provide an additional sum of money for, and that is carefully managed and controlled.

Ms Lockhart: You mentioned the movement towards using a standard fee. Very quickly, can you explain further what exactly you have been doing and at what stage you are with it?

Mr McGuckin: For criminal legal aid, which covers issues largely in the Magistrates' Court and Crown Court, we have standard fees now in place covering all cases going through those courts. In the civil courts, which represent cases in the Magistrates' Court, the County Court, the High Court and so on,

there is a wide variety of cases ranging from divorce and ancillary relief to private family matters and public family law, where a child is being removed from its parents. There is therefore a wide variety of cases. There are some standard fees already in place in that area, but we are carrying out a fundamental review of all those fees, including those that are currently paid on a time-and-line basis and are assessed individually, and developing a standard fee approach for those. As I said, our focus recently has been on family matters, because those make up about 70% of the costs, and we will move on to the others. We have already started some research, but we will complete that and move on to the others more fully next year.

Ms Lockhart: A fundamental review is being carried out. What stage is it at? When will we see fruits from that? Can you put some sort of timescale on it?

Mr McGuckin: Yes, I certainly can. We are about to put our final proposals to the Law Society and the Bar Council on the family and children cases that I talked about. We will come back to the Justice Committee with the details of those in the autumn, with a view to making the necessary legislative change to have the proposals implemented early in the next financial year. We will then finalise and take forward the work on other court-based cases as phase 2, which will be taken forward during the next financial year, with a view to having that in place at the end of that year.

Ms Lockhart: Ultimately, you are talking about at least another two years.

Mr McGuckin: Yes, and potentially three by the time we have tidied up the non-court-based cases. It is a complex set of cases that needs to be looked at. It is important that we invest the time in order to get it right.

Ms Lockhart: Yes. I recognise that it is complex, but it is public money, and we are keen to get a handle on it.

The Chairperson (Mr Swann): You have talked about the changes. Who is responsible for implementing them? We have heard from the three of you, but Paul, you are the chief executive of the Legal Services Agency, so I ask you.

Mr Paul Andrews (Legal Services Agency Northern Ireland): It is my job to give effect to the legislation that is brought forward. That is the role of the Legal Services Agency. We work closely with our colleagues in the Department on the development of the scheme and on providing information to support that development. There is a traditional fault line between the Department in developing policy and the agency in implementing the statute that is brought forward. Of course, because we have the information, we have to work closely with the Department on facilitating the development of its schemes.

The Chairperson (Mr Swann): Who is responsible?

Mr Perry: I will chip in there. The responsibility varies. The responsibility for the policy on legal aid and for the budget rests with the Department. The responsibility for awarding legal aid rests in some cases with the court on the criminal side and with the agency on the civil side. When it comes to implementation — the practical operation of the system — the agency is responsible.

The Chairperson (Mr Swann): Who is responsible for driving the changes?

Mr Perry: It is a team effort, but it is the Department and the agency working together that do the driving.

The Chairperson (Mr Swann): Are you ultimately responsible?

Mr Perry: Ultimately, it is the Department's responsibility to change the policy and to persuade the Assembly to make the legislative and statutory amendments to change the framework.

Mr Lavery: I would say that I have principal responsibility. Nick looks to me to deliver the Department's policy programme, including legal aid policy. Mark's team design the system and put it through the legislature.

The Chairperson (Mr Swann): It is all designed. It is all on paper. Is it your responsibility to deliver it, Paul?

Mr Andrews: To implement it, yes.

Mr McGuckin: May I add to that? I am doing all the legwork with the policy development and in getting the material through the Assembly. In that, I am directed and guided by what is called the legal aid strategy group, which brings us all together and is chaired by Nick. It ensures that there is an overall focus and drive in taking it forward.

Mr Kearney: Why is there a fault line?

Mr Perry: There is less of a fault line now that what was the Legal Services Commission has been changed into an agency and is directly part of the Department and its management structure. Even in agentising what was the commission, it was important to make sure that its independence of decision-making in the allocation of legal aid was preserved, and special provisions were put into the legislation to protect that and to provide that independence. In organisational terms, there is now much less of a fault line than there was.

The Chairperson (Mr Swann): But there is still a fault —

Mr Kearney: Is there a fault line or not?

Mr Perry: There is not a fault line.

Mr Kearney: He said that there is a fault line. You said that there is not as much of a fault line as there used to be. Now there is no fault line.

Mr Perry: I think that what we meant was that there was a fault line in the sense of a division of function and a responsibility of roles.

Mr Kearney: Sorry, I missed the last point.

Mr Perry: It is a fault line in the sense that the agency has a job to do in delivering but the Department sets the policy.

Mr Kearney: There is a fault line.

Mr Perry: There are different functions.

Mr Kearney: Are you joined up?

Mr Perry: Yes.

Mr Lavery: There is one fault line, and it is an important one. Paul, as well as being the chief executive, is the director of legal aid casework, so he decides who gets legal aid in a civil case. We cannot influence him in that at all, and that is desirable. The Assembly put that into legislation last year. Say our budget is under pressure: we cannot tell him to turn down the legal aid grants. He has independence in that role, and that is what I would call an appropriate fault line.

We are totally together on legal aid reform. We are all delivering the same programme. That is one important distinction, Mr Kearney. The Assembly said that the director of legal aid casework, who decides who gets civil legal aid, must not be influenced in any way by the Department. That is important.

The Chairperson (Mr Swann): Mark, what was the overall body that you mentioned?

Mr McGuckin: The legal aid strategy group.

The Chairperson (Mr Swann): Who chairs that? Is it Nick?

Mr Perry: Yes, I chair that.

Mr McGuckin: To add a bit of gloss to the other comments, Paul and I work closely together as the policy development and operational arms. For each of the reforms initiatives that I take forward, I will have a project board, and the agency will be represented on it to bring its experience and understanding of the practicalities and implications of the changes. From that perspective, we are joined up. Ultimately, that also helps with implementation, because the agency and its staff are fully aware of the changes that are coming down the line and what they are intended to deliver. That was not necessarily always the case. When the now Legal Services Agency was a non-departmental public body, it would certainly have been more difficult to have that relationship.

The Chairperson (Mr Swann): Are there the skills in the Department to drive those changes? Do you have the appropriate people?

Mr Perry: Yes, I think that we do. It a technical and complex area — I know that we have said that several times. You need to build up experience in the area, so you cannot just throw people at the problem and expand your capacity. We have teams that include lawyers, accountants and other professional people alongside the policymakers and those who have spent a long time working in the area. I think that we have the skill sets that we need.

Ms Gildernew: You are very welcome, lads. Like others on the Committee, I thought from your opening remarks, Nick, that you had wandered into the wrong Committee. We have figures in front of us that show that legal aid expenditure is not going down, and we are extremely worried about the amount of public money that is being spent and the confusion that there seems to be in the system.

One of the things that we are concerned about is the pilot exercise that you did. That showed clients' financial eligibility and high rates of non-compliance with legal aid legislation. That was a small sample, and it did not look good. Is there a serious level of non-compliance in the system?

Mr Perry: Paul might be able to answer that.

Mr Andrews: There is an important point to be made. There is an obligation on a solicitor to ensure that their client continues to be financially eligible to be in receipt of legal aid throughout the life of the case. The review showed that there was no evidence that that was regularly being attended to, and that was one of the lessons that we drew from that. As a result, we have been running a scheme for over two and a half years whereby we ask applicants to fill in a fresh statement-of-means form so that we can have them reassessed to ensure that the individual remains entitled to legal aid. The outcome of that has been that the vast majority of people remain eligible for legal aid, albeit some of them on slightly different terms. For example, they may perhaps not be on a passporting benefit but have a relatively low-paid job so are still entitled to legal aid. Please forgive me, because this is off the top of my head and I do not wish to mislead the Committee in any way, but we only found that people were ineligible in a handful of cases, and those cases have been dealt with.

Ms Gildernew: I know that you are looking at a formal registration scheme. Would that include audits of compliance and sanctions for non-compliance?

Mr Andrews: Absolutely. That is the nature of it. It is a compliance regime, and there is a detailed schedule of terms of engagement that we expect solicitors to adhere to. We do not think that there should be any philosophical issue with that, because most are standing requirements from the professional body, and we expect all firms to adhere to them. When we inspect a firm, as we did for the pilot scheme that you referred to, we effectively have a compliance checklist that asks, "Have the client's instructions been fully documented? Has the client been fully informed on the conduct of the case? Is there evidence that the client's financial eligibility is constantly under review?". We want to be practical about that. We expect there to be trigger points, and there were proportionate reviews of that, but that is the evidence that we expect to see on file.

In answer to the final part of your question, if there is non-compliance, the registration scheme provides that the ultimate sanction is that that provider of service will be debarred and will therefore not be able to provide publicly funded legal service work.

Ms Gildernew: Of the 12 that were investigated, five could be granted only limited assurance. Is that not worrying?

Mr Andrews: It is worrying to the extent that there was evidence that the practice was not as sharp as we would have expected it to be. That sent out a message to the practitioners that there needed to be evidence of things that are done. Oftentimes, people say, "I did that. Ask my client". Our reply is, "We do not want to ask your client. We want to see the evidence of it on the file". I expect there to be greater sharpness of focus on ensuring that the evidence is available to support what solicitors say was done.

Ms Gildernew: In the context of access to justice, David pointed out earlier and the Committee recognises that we have a different system here. I was concerned that registration might lead to a negative impact on small rural family firms. We do not want a system in which only the medium and large firms are able to access legal aid for their clients. You could easily put solicitors out of business if there were to be a differentiation. By way of comparison, what was the experience of that in England and Wales?

Mr Andrews: I will respond first, after which David may want to provide a supplementary comment. Fundamentally, we have no desire to shrink the network of providers. It is not our intention to shrink that for anyone in your constituency who has legal advice available to them in your constituency. We are saying that we would expect anyone who is providing the service to provide it to a certain standard and with certain evidence behind it. We are not expecting anyone to win Olympic gold at the high jump; we are not setting an impossible standard. We are talking about reasonable standards that, we believe and, I think, the Law Society accepts, experienced and competent practitioners should adhere to. A number of the mechanisms that we have in place are drawn from solicitors' own regulatory framework. In the agency, we have never been about shutting down small rural practices. We want access to justice to be available. We simply want it to be demonstrated to be providing an appropriate service.

England and Wales have adopted a different approach. They went primarily to tendering — competitive tendering — so you found that an awful lot of small rural firms simply did not have the volume of business to get a contract. They were lost in the system. I happened to meet someone who is originally from Northern Ireland, went to university in England and Wales, set up a legal firm in England and Wales and had a contract. He was primarily a criminal practitioner, but it is the same principle. Over a number of years, he found that he could not run a practice in the contract environment because he did not have the mass volume of cases that you need to churn through, which I think was Mr Lavery's point earlier. I think that we are not going down that road. Ours is an inclusive system of registration. It allows all practitioners who want to continue to do legal aid work that opportunity, but it also makes clear the standards that we expect to be adhered to. We are not expecting the impossible; rather, we are expecting standards that the professional body has recognised and had enshrined for some time.

Ms Gildernew: For the record, I am keen that not just my constituents or firms in my constituency but people who live in rural areas have the same access and are not put to the expense of driving to Belfast to access solicitors who might be registered. I think that that is all for now.

Mr Clarke: I will just take you back, Paul, to your response to Michelle. Given that the report highlights concerns, you said to Michelle that, over the past two and a half years, you have had fresh applications. You used words such as "majority of cases". I appreciate that you were saying that off the cuff. Can you supply information on how many of the applications that were rewritten in the two and a half years failed the test? You then went on to talk about individuals being debarred. Can you give us any information on how many people were debarred in those cases?

Mr Andrews: To the first part of your question, the answer is "Yes, we will provide that". I just do not want to give you a figure in case it is wrong.

Mr Clarke: I appreciate that. That is fine. No problem.

Mr Andrews: There was a handful of cases in which that happened.

Moving on to the second part of your question, I need to make a distinction. The debarring was the debarring of the solicitor for providing work and failing to apply the standard. There is no such power at this point in time. In fact, in some of the cases, it may well be that solicitors were taken by surprise because the client had not advised them. I therefore cannot answer the second part of your question, because there is no power for me to debar someone from legal aid work at the moment. That is part

of the package of measures that the registration scheme will bring forward. I will certainly provide the information that you have asked for, Mr Clarke.

Mr Clarke: To the Committee, yes.

Mr McMullan: You said that it is not only those on benefits who get legal aid but those on a low income. How do you set the bar for a low income?

Mr Andrews: At the risk of reading out the financial eligibility to you, that is probably the simplest way to describe it, Mr McMullan. There are three broad types of legal aid on the civil side of things. That is what I will address first. When someone walks into a solicitor's office and says, "I have a problem. Can you help me?", that is typically described as "advice and assistance" and is colloquially referred to as the "green form" scheme. To be eligible for that, individuals' disposable weekly income has to be less than £234. Their disposable capital must not exceed £1,000. That is for basic advice when you walk into a solicitor's firm.

When you move up the tier of advice to the point at which you enter the court arena and go to the lower-level courts, typically the Magistrates' Court, it is "representation lower", and the financial eligibility for that is similar. The disposable income is still at £234 a week, but the disposable capital increases to £3,000. If you then go to higher courts for representation — the County Court or the Court of Judicature — there is a ceiling for disposable income of £10,995. It would not be legal aid if there were not an exception. That exception is in personal injury cases, which have a ceiling of £9,937. Likewise, disposal capital thresholds are higher, at £8,560 or, if it is a personal injury claim, at £6,750. Those are the entry criteria for the statutory scheme for civil legal aid, Mr McMullan.

Mr McMullan: The £234 does not take into account whether you are single or married, have a family or anything else. It is just a statutory figure.

Mr Andrews: It is based on disposable income, so there is a tapering to reflect the number of children — "dependants", in the language of the statute — that someone has. The greater range of exemptions that you can disapply is for full civil legal aid or "representation higher", not for the green form, but there is a tapering effect.

Mr McMullan: Is the documentation to prove that put before the courts?

Mr Andrews: The court does not have a role in assessing financial eligibility in civil legal aid cases. Solicitors in the first instance will have to satisfy themselves that they have seen evidence, and we expect them to furnish us with the evidence when they submit their forms.

For the higher courts — the County Court and the High Court — that comes in a very dense document and is assessed by a body that is now part of the Department for Communities — the legal aid assessment office — which does an independent assessment of means. Again, that should be supported with various pieces of documentation — bank statements, wage slips and those types of things — to support an individual's eligibility.

Mr Clarke: I am curious. If I understand you correctly, it is £234 of disposable income. Surely that is almost anyone who walks into a practice. Am I reading that wrong or picking you up wrong? Is it that after everything is paid out, they have £234?

Mr Andrews: No, there are a limited number of things that you can claim for your disposable income. Some research was done. I confess that it is slightly dated, but it is a complicated area to estimate the percentage of the population that might be eligible, which, I think, is the burden of your point, Mr Clarke.

Mr Clarke: Yes.

Mr Andrews: Back in 2010-11, on the basis of the family income survey, which Committee members will be familiar with, it was estimated that 35% of the adult population would be eligible under the green form scheme. That probably provides a context.

Mr Clarke: May I ask —

The Chairperson (Mr Swann): I worry that we are straying into other areas.

Mr Clarke: We are talking about the reform of legal aid.

The Chairperson (Mr Swann): Briefly, Trevor.

Mr Clarke: Can we get information on what is counted as eligible to allow you to get to the £234? I am not asking for that now, but can that be supplied?

Mr Andrews: That is in statute, so we can supply it to you.

Mr Butler: Michelle touched on the statutory registration scheme and some information in and around that. The Committee received the report a number of weeks ago, and the statutory registration scheme was provided for in 2003. I do not believe that that has been put in place. Will you explain why it has not been put in place when it has been allowed for since 2003?

Mr McGuckin: You are correct that the enabling legislation was the Access to Justice (Northern Ireland) Order 2003. That was enabling legislation for a range of reform across the legal aid environment, including the creation, as it was then, of the non-departmental public body the Legal Services Commission, which took over responsibility for driving forward a range of those things. It was largely an operational body aimed at providing and delivering legal aid and paying bills. There was also a very small policy hub to take forward a range of things, including reform of fees and a variety of issues. Given that there was a range of other priorities, it was not a priority for the organisation to address the registration scheme at that time. Some work was done on it, but it was quite easy for it to get diverted as other pressures and priorities came along.

Work started in earnest on it towards the end of 2010. The commission, as it was then, launched a voluntary scheme, but, again, it was a bit stop-start. The commission started a pilot exercise in late 2012 and into 2013, which was referred to earlier. That provided some valuable information that allowed the code of conduct that Paul referred to to be refined. At the end of 2013, my division in the Department took responsibility for driving that forward. We developed the codes of conduct at that stage. We refined the solicitors' one and developed one for barristers, and we consulted on that in the second half of 2014.

We have not moved on with it as quickly as we would have liked, and there are a variety reasons for that. We need to work along with both branches of the profession in taking that forward because, while we are adopting and adapting the current codes of practice and the current regulatory envelope that they oversee, we are introducing additional regulation for the profession. We will require a compliance regime, which was referred to earlier, and that has an overhead. It has to be a full-cost recovery model, and the compliance regime will result in fees being paid.

Over the last period, we have been spending some time refining the code of conduct, getting the draft legislation in place and looking at the cost recovery models and how the fees might be charged. The rules and regulations necessary to implement that fully have been drafted, and we have proposals for the charging methodology. We will consult with the profession on that over the summer, with a view to bringing it to the Justice Committee in the autumn and introducing the scheme next year.

I will go back to your original question. I think that it is fair to say that it was a priority among a range of priorities, and it was very easy for the organisation to get diverted away from that because of other operational things that came to the fore.

Mr Butler: Thank you for that. If I picked it up right, it was allowed for in 2003 and was noted on the risk register as red/amber. Obviously, there was a myriad of issues that needed to be addressed and risk-assessed appropriately. However, it was 2010 before any measures were taken to address it robustly. In light of that, from 2003 to 2010, what measures were in place to monitor that and give assurance?

Mr McGuckin: I am afraid that that is beyond my remit.

Mr Andrews: I will pick that up, Mr Butler. There is an existing regulatory framework for barristers and solicitors because they are self-regulatory bodies. There are regulations that pertain to solicitors: the code of conduct, the communication regulations, and the financial regulations, all of which have been

in place throughout that period and continue to be in place. Likewise, the Bar has a code of conduct for individual barristers. If there was a concern or a complaint from a member of the public who was dissatisfied with the service they received from their solicitor or barrister, there was a referral mechanism under the complaints procedure of the Law Society and the Bar, and that is exercisable whether you are a legal-aided client or a privately paying client.

Those mechanisms were in place. The Law Society and the Bar then have a range of sanctions that they can impose. In a number of instances, something may have come to the attention of the commission that it will also have referred to the Law Society or the Bar as the regulatory body to say that this practice, if it is correct as described by the individual, seems to be at variance with the regulations, and it will invite them to investigate that. There was, if you like, the regulatory side of things, which continues to be in place from the professional bodies.

Mr Lavery: The other thing to note, Mr Butler, is that Paul can send for files from any firm at the minute, but the difference that registration will make is that he will be able just to walk in and do a spot check. If Paul asks you for a file, you can, obviously, doctor the file if you are minded to do so. This power will allow Paul to send his inspectors into a firm, so that will be on top of the Law Society's own regulatory regime.

Mr Easton: I will move on to counter-fraud. Paragraph 5.5 notes that the measures that the agency has introduced to counteract fraud are mostly focused on fraud prevention by assisted persons. When does the agency intend to develop a more balanced approach that will look more successfully at addressing issues of potential fraud by legal representatives?

Mr Andrews: Thank you, Mr Easton. I will start on this. The agency takes any suggestion of fraud, whether by an applicant or a practitioner, equally seriously. The difficulty for the agency when faced with this report is that the weight of evidence that comes by way of referral to us is almost overwhelmingly in respect of applicant fraud. We have to recognise the referrals that we receive and deal with them accordingly. It is not that there is any less vigilance on practitioner fraud. The C&AG also fairly indicates that the staff are a useful resource on practitioner fraud, but he goes on to say that it is not an adequate resource in itself. There are two things significantly at play. We have the reference to the counter-fraud strategy, which is embedded in the organisation, and we have ongoing training and development. We have the increasing reliance on standard fees, which significantly reduces the prospects of someone who is a practitioner committing a fraud. That is because the standard fee is for the work done, and the work that is done, certainly in criminal matters, is directly verifiable because the payment is triggered by a court-based offence, which can be vouched for. There are sampling texts to vouch for that from the court records. In addition, the introduction of the fees that Mr McGuckin was talking about on family law will also provide greater assurance.

The two other points that are particularly important are the advent of compliance and of registration, which we were talking about earlier. While the compliance scheme is not a counter-fraud measure per se, it has significant additional value in counter-fraud because it allows us to look directly at the billing mechanisms in a solicitor's firm. It enables us to see how that is translated into claim forms. The introduction of the statutory scheme is, as Mr McGuckin said, scheduled for the next financial year. We are already gearing up to have people recruited and trained so that we can be effective on day one. That is an important tool.

The second tool is a digitalisation programme so that bills will be submitted and itemised online. The great advantage of having that facility, which, we confess, we do not have at present, is that it provides a greater analysis that you can undertake at the point of entry so that you can double-check whether, for example, a practitioner was in court A and court B on the same day. That is physically possible if you are running between courts in Laganside, but it can be somewhat more problematic if it is in different parts of the jurisdiction. The digitalisation platform provides a very important supplement to the vigilance of staff, and the C&AG has already recognised that that takes us on to another level.

Mr Easton: Are those mechanisms being put in place?

Mr Andrews: Yes.

Mr Easton: That is good: 10 out of 10. Is it not remiss of you that there were no mechanisms up to now?

Mr Andrews: There have been mechanisms up to now. The argument that the C&AG presents is to do with the adequacy of those arrangements. We have, for example, two cases that relate to practitioners that are currently before the authorities because of our assertion that there has been fraud. Those cases were identified by our staff.

Mr Easton: Are they with the police?

Mr Andrews: Yes.

Mr Easton: Before now, was there any mechanism for investigation in the legal profession for claims?

Mr Andrews: We have a counter-fraud unit. We recognise that we need to skill that up, and that will happen as part of the compliance regime. That is an important context in which to place it. There have been investigations into practitioner fraud, and the difficulty has been that they have not provided sufficient evidence to allow us to bring them forward as referrals to the police.

Mr Easton: Up to now, have there just been the two cases? Have there been any others?

Mr Andrews: Predating my tenure, there were a couple of other cases, but I can directly speak to the two cases that I have personally referred.

Mr Easton: Did any of those cases appear in the courts?

Mr Andrews: They appeared in reports —

Mr Easton: In the courts.

Mr Andrews: Sorry — in the courts. We are in the hands of the authorities as to how they are progressing, but those are the matters that are with the police at the moment.

Mr Easton: OK.

Mr Lunn: To clarify, Paul: is there any liaison between your organisation and the Law Society in those circumstances? I know that you are constrained in what you can do if you suspect practitioner fraud, but, as you negotiate with the police or the Public Prosecution Service to see whether it is worthwhile to take a case, is the Law Society involved at all?

Mr Andrews: Yes, as would be the Bar if the individual concerned is a barrister. The issues are timing and the release of information. In the two cases that I referred to, for example, once they have been referred to the police, I will refer them, because I also consider it a professional conduct issue. The police will do whatever the police do, and it is their independent assessment as to what the Director of Public Prosecution does. In a scenario in which there is not a prosecution, I will already have a complaint with the professional body. The professional body will inevitably await the outcome of the police investigation before it launches into the midst of it. The information that I provide to the police will, at an appropriate time, be provided to the regulatory body.

Mr Lunn: Yes, but there could be circumstances in which the professional body — the Law Society or the Bar Council — might consider temporary action, perhaps suspension, pending the outcome of the police inquiry.

Mr Andrews: That is why I seek to refer the material to them at the earliest possible opportunity. You will appreciate that the police will want the information available to them before anyone else is alerted to it. It will be referred to the professional body, and it can take action if it deems that appropriate.

Mr Easton: Are cases of fraud in the legal profession referred on by the taxing master, or is it some other —

Mr Andrews: These cases were identified by our staff. Neither case was before a taxing master.

Mr Easton: Has the taxing master ever referred any cases of fraud for investigation?

Mr Andrews: I think that the taxing master has a discrete statutory responsibility to assess whether work was reasonably and properly undertaken. If the taxing master suspects a fraud, she is under an obligation, like any other citizen, to report it to the authorities — to the police, I suspect, in the first instance — but there has to be evidence of fraud. The taxing master, to my knowledge, has not reported such a case to the agency, but I think that there is probably a rationale behind that. The taxing master receives a significant body of evidence on the work that has been done. Many solicitors — I am reluctant to say "all" because I am sure that there is one somewhere who does not do this — will engage a cost drawer to prepare their bill for taxation before that goes before the taxing master. It will be scheduled, and there will time records and court orders to support it. So there will be a body of evidence that suggests that the work has been done. If there is such evidence that the work has been done, the taxing master's role is to decide, "Did you need to take that long to do the work? Did you deploy the appropriate resource in undertaking the work?" Given the weight of evidence that is available with the drawn bill of costs, the taxing master will, therefore, be satisfied — I am not speaking for her but I am assuming this — that the work was done. It is the reasonableness of the work that exercises the taxing master under statutory duties.

Mr Easton: Paragraphs 5.10 and 5.13 illustrate a need for the agency to develop better collaborative arrangements with other public bodies in order to prosecute frauds properly. Will the Department explain what the agency plans to do to achieve that?

Mr Andrews: I will start, and colleagues can comment as appropriate. We have had a dialogue for a number of months now with what used to be the Social Security Agency (SSA) and is now the Department for Communities, because a parallel can be drawn between the two systems. Not everyone who is in receipt of legal aid will necessarily be on a benefit, but there will be a considerable overlap of clients. Therefore, we want to draw on its experience of counter-fraud measures. We had a constructive presentation from it at our audit committee meeting recently, and that is part of an ongoing dialogue. Some of my colleagues who are staring at me at the minute are actively engaged in meetings with counterparts in the Department for Communities to help to work through a calculation mechanism.

There is then a separate issue — I think that this is also touched on in the report — and that is the ability to prosecute. As you will appreciate, the SSA had a stand-alone power to prosecute benefit fraud. That does not extend under legislation to prosecuting, for example, a legal aid fraud, which could, in fact, be a consequence of someone being fraudulently in receipt of benefit. You will have noticed from the report that, in the vast majority of cases, people prosecuted for fraudulently being in receipt of benefit were not in receipt of legal aid at the same time, so we are talking about a small number of cases. In principle, we have invited the conversation with colleagues from the Department for Communities to see whether there is a mechanism to change the legislation so that there is one prosecution if there is a benefit fraud and a consequential legal aid fraud at the same time. I think that there is a willingness to engage with us in that area, and we are very keen to pursue that.

Mr Easton: Paragraph 5.14 indicates that the agency has not recovered £25,000 of legal aid wrongfully awarded due to a committee required to authorise those recoveries not having ever been convened. What progress has been made to clarify what is meant by the expression "work is in hand"?

Mr Andrews: First, it is only right that I apologise that that is the case; it should not have been the case. A number of cases fell through a net when an external committee was being stood down and an internal committee was being set up. Colleagues have been working through those cases, and we will have completed our review of them by the end of the summer, taking whatever appropriate action emerges from the review.

Mr Easton: What about the £25,000?

Mr Andrews: When I say "appropriate action", I mean that, if we can recover the funds, we will do so. The difficulty is that some people may be on benefits, and it would be an unenforceable debt. That is why, as I say, we have to work through the process and find out where those people are in terms of financial eligibility, and then, when possible, we will seek to recover the cost.

Mr Easton: Basically, a committee was stood down, and it slipped through the system. Is that it?

Mr Andrews: Unfortunately, to my embarrassment, yes, Mr Easton.

Mr Easton: Do you want me to embarrass you some more? *[Laughter.]* I will leave it there.

The Chairperson (Mr Swann): When did that committee last sit?

Mr Andrews: I think that it was two years ago. I say that in round terms.

The Chairperson (Mr Swann): When was it stood down?

Mr Andrews: That is when it was stood down: two years ago.

The Chairperson (Mr Swann): How often did it meet before that?

Mr Andrews: It met as and when required. There would have had to be a sufficient body of work to bring together an external panel of people. It probably sat every four to eight weeks, depending on the volume of business for it to consider. That was part of trying to move away from people outside the commission or agency determining the fee levels that were approved. That was the primary function of the committee. The other function was delegated to it subsequently.

The Chairperson (Mr Swann): The committee was stood down two years ago.

Mr Andrews: Yes.

The Chairperson (Mr Swann): It has not been reconstituted since.

Mr Andrews: An internal committee was established. The difficulty is that those cases were not put to the internal committee.

The Chairperson (Mr Swann): Just because they were not, Paul.

Mr Andrews: You are exposing my embarrassment, Chair. Yes, they were put aside and were not brought forward in the way that they should have been.

The Chairperson (Mr Swann): That was £25,000 for two years.

Mr Andrews: Yes.

Mr McCrossan: I want to go back to what Mr Easton said on the questions asked by the taxing master when a bill comes before her. What is the reasonable time frame for a case in consideration of the bill? There are cases that go on for a long time before payment.

Mr Andrews: That applies particularly to civil cases, such as clinical negligence cases. They can go on for many years, and then the bill is drawn. I think that, by statute, the bill should be submitted within six months of the case being concluded. In appropriate circumstances, the taxing master has the power to extend that time. My experience of the current taxing master is that she is proving somewhat unpopular in trying to drive through the principle that bills should be submitted much more quickly than they were.

Mr McCrossan: I think that you picked me up wrongly. What I mean is this: if a case is prolonged excessively, who is responsible for saying that it should have been completed a lot sooner?

Mr Lavery: That is, if they drag the case out.

Mr McCrossan: Yes. Who determines that and what happens?

Mr Lavery: There are two answers. Under standard fees, it would not happen. If you drag a case out, you work to your own disadvantage. That is really the best solution. When a case goes to the taxing master, as Paul said, there are three things that she has to decide: was the work done, was it reasonable to do it and was the time spent on it appropriate? The taxing master looks at that specifically.

Mr Andrews: I apologise for picking you up wrongly, Mr McCrossan. If the taxing master sees that there have been a number of court hearings and there is evidence of that from court orders, she does not dispute the necessity of the hearings, because the judge who had oversight of the case deemed them necessary. What she asks is whether the surrounding work was necessary and appropriate in the greater scale of things.

Mr McCrossan: I am just trying to get my head round this. When the time allowed by the minimum fee is out, the case may go back to court and the judge allows for legal aid to be awarded again. How many times can that go on? How is that monitored? I am aware of cases that have been ongoing for years and have been reconsidered for and re-awarded legal aid. This has gone on and on. Who monitors that? Who says that it is reasonable or not reasonable?

Mr Andrews: I want to try to answer your question this time rather than misunderstand it. When we award a certificate for legal aid in a civil case, that certificate either says on its face that it is to take certain steps, to get to a certain point in the procedure or to run the case — it could be unfettered. We would not be re-examining that unless the limitation on the certificate had been reached, and someone says, "Here's the evidence that I can go further". It is not a new certificate; we are simply extending an existing certificate. There can be a variation when a case has been decided in court, and then the court order is ignored or disobeyed, and someone has to come back to get legal aid to try to enforce their right. Those are two separate and distinct procedures and two separate certificates.

I cannot immediately think of a scenario, Mr McCrossan, in which we stopped legal aid and granted it again for the same case. That would probably be because the legal aid certificate was suspended for some reason. That suspension is more likely to be about financial eligibility than the case. If there is a stop-start, it will be because we had a limitation on the certificate to satisfy ourselves that it was appropriate to fund it further, or there was a suspension because there was an issue about financial eligibility.

If there are cases, we could take them up in a way that I could talk about them individually rather than generically.

The Chairperson (Mr Swann): Before I go back to the fraud issue, I will mention the taxing master. Who is the taxing master accountable to?

Mr Lavery: The taxing master accounts to the Chief Justice as head of the judiciary. The taxing master is a judge and has a legal duty to protect the legal aid fund. That is one of the established principles. The taxing master's job is to determine the appropriate remuneration for undertaking work and, when there is some element of doubt, must always decide in favour of the person paying. In the case that we are talking about this afternoon, that is the legal aid fund. If there is a benefit of a doubt, the taxing master must decide in favour of the legal aid fund.

I do not think that the taxing master would ever discuss individual cases with the Chief Justice, but, ultimately, every judge is accountable to the Chief Justice as head of the judiciary.

The Chairperson (Mr Swann): What relationship does the taxing master have with the Department or the agency?

Mr Lavery: The taxing master is an independent judge, so the relationship is simply that the legal aid legislation has provided in the past for the taxing master to assess the fees for certain categories of work. The taxing master does not account to us for how she goes about that. Cases in which a legal aid fee is being assessed by the taxing master are, as we explained, increasingly rare because we are standardising fees. In cases in which the taxing master is required by law to assess the fee that should be paid, we have, as a Department, a right to intervene, and we have done that. If we are concerned about a particular case, we can send someone to make representations.

The Chairperson (Mr Swann): How often have you done that, David?

Mr Lavery: We did it more in the past when we had those very high cost cases (VHCCs).

Mr McGuckin: We have not done it recently. As David said, it applied mostly to the very high cost cases under the previous scheme.

Mr Andrews: On a practical point, the power to intervene, when it has been used historically, has been in cases in which there is a precedent to be set or something is repercussive. Perhaps an issue or approach is being discussed for the first time. The taxing master tended to say that there was, to use that general expression, a public interest as to how it should be conducted. That is where a right of engagement is involved.

To be perfectly honest, the vast majority of taxation cases will be done on the papers that are available to it. The Department has to read all the papers and understand all the issues to make representations on an individual case. That is why, historically, interventions in civil cases were aimed at strategic issues that would have a repercussive impact on civil remuneration.

The Chairperson (Mr Swann): Is it more to do with the workload than the value?

Mr Andrews: It is about the value of the point being assessed. If you have a taxation bill for £5,000, that may have no repercussive implications whatever because it is just a standard case with standard factors. I am suggesting that, historically, the cases with novel factors have created a new financial precedent in how cases are assessed and remunerated.

I can give you a practical illustration of that that shows this is a matter that is in the public domain. A number of years ago, a not-for-profit organisation that was entitled to do legal aid work had been refused its profit costs — its uplift on its basic running costs — by the then taxing master because it was effectively a charity. The taxing master's view at that time was that it could not get a profit-cost uplift. The Department at that time intervened and said, "The point is that there are non-governmental bodies that are very experienced in certain types of law that take test cases and they should be encouraged to do that". There was an intervention on the taxation that went before the High Court, and there was an order that effectively created a rate for non-governmental bodies that are entitled to do legal aid work. That is the sort of structural precedent issue that has been engaged in in the past.

The Chairperson (Mr Swann): Is there any interaction between either the accounting officer in the Department or the agency — Nick or Paul — and the taxing master?

Mr Perry: The taxing master is an independent judicial figure, so there is no direct interaction with me. It is the structure of the legislation that governs the relationship.

Mr Andrews: The interaction with me is operational. When the taxing master assesses a civil legal aid case, she effectively sends me an order that I should treat as an order of the High Court and should pay out money based on that. There are other contexts in which we will provide information to the taxing master if she requires it. On occasions, we might refer a case to the taxing master and invite her to look at it because it appeared to us that there was some issue that had not perhaps been drawn to her attention or we had been surprised at the way it had been dealt with. It is for clarification that we send her a referral.

The Chairperson (Mr Swann): What sort of financial figure is the taxing master responsible for?

Mr Andrews: Each year will be different, because it just depends on the volume of cases that go through and their value. In the last financial year, the taxation cost through the payment to the fund was approximately £19 million.

The Chairperson (Mr Swann): Is that standard?

Mr Andrews: It will be within that range, Chair.

The Chairperson (Mr Swann): Right. Is there any appeal for the non-performance of the taxing master? If there are any queries about the work she does, is that referred to the Lord Chief Justice or anyone else?

Mr Lavery: If somebody is dissatisfied with the decision in an individual case, they can ask for a review by a High Court judge, so there is another more senior judge involved.

Mr Lunn: David, I think you said the taxing master is an independent judge.

Mr Lavery: Yes.

Mr Lunn: Does that mean that a judge has been removed from normal judicial work to do the job of taxing master, or is it a part-time job?

Mr Lavery: The taxing master in our system is what is called the master taxing office and the master enforcement of judgements. The same judge is in charge of the Enforcement of Judgments Office and the taxing office. I think I am right in saying that, up until the most recent appointment, it has tended to be solicitors in private practice who applied for that post. I do not think any of them have served as judges in a different court. It tends to be at the grade of High Court master, so it tends to be the entry level for several judges, I suppose you would say.

Mr Lunn: Could the taxing master, in a different capacity, be involved in court work as a judge?

Mr Lavery: I suppose in theory they could, but I am not aware of any ever being asked to do other court work apart from their work in the Enforcement of Judgments Office, where they have powers to issue warrants for the arrest of people and things like that. I say, "in theory", but all masters are interchangeable, so the Lord Chief Justice could say to any master, "I want you to come in and do some work in the High Court". Because it is regarded as a specialist expertise, I have never known that to happen.

Mr Lunn: Is there a selection of masters that could be called on? Is that what you are saying?

Mr Lavery: There are other masters; indeed, when we were last before the Committee we explained that, in the past, because of a backlog in criminal legal aid assessments, the Lord Chief Justice had assigned another master to be an additional taxing master. Normally, there is one of those people. For a while we had two, but the normal complement is one. If that person needed assistance, another master could be drawn in. That has happened from time to time because of pressure of work or because somebody is ill or unavailable.

Mr Lunn: Is it a job that has to be done by somebody with a sharp legal brain, such as a judge, or could it be done by somebody who is independent of the judiciary completely?

Mr Lavery: It is important that they are independent. That is clearly right. I think the expertise required would tend to be a familiarity with the practice of the law. The logical people to look to, if you were recruiting into that specialist post, would be solicitors or cost drawers, which is the other sector with a small number of specialists who prepare bills of costs. That is your candidate pool, but you have to be a solicitor or a barrister of seven years' standing. Cost drawers, with very few exceptions, are not lawyers.

Mr Andrews: The other thing to say is that a number of these cases will not be going to the taxing master in future because the introduction of standard fees obviates the need for that. You touched on exceptionality, which may be a different issue in truly complex cases, but the standard cases can be administered without reference to the taxing master.

Mr Butler: I have two questions, Paul; I think they will be directed to you. I will ask them together, if that is OK. They will not be terribly taxing, I do not think. Has the Department assessed the value of reductions to claims by the taxing master? Where does the Department draw the line between amounts that are over claimed — obviously, the taxing master has found they were over claimed — and when it is fraud? What is the distinction from the Department's perspective?

Mr Andrews: Taking the first question, I will say that there was a sample done for a period of time for a purpose that has nothing to do with this issue. It was just to monitor bigger cases that were coming through for payment. That was in 2014-15 into early 2015-16. About 190 payments were made on foot of taxing master certificates at that time. We had a look at it, and it appeared that the taxing master had taxed off something in the region of £2 million of the claimed value as a result. The claimed value was around £15 million. There was a technicality to do with a 5% deduction, which I will not bore you with, but if we take it as a general figure of about £15 million, we see that the taxing master would have taxed off about £2 million of that and we would have therefore paid out the resultant £13 million.

The greater majority of those cases were taxed off at under 20% of the claimed value. Again, this goes back to the point Mr Lavery and I made. The taxing master can look at a piece of work and say, "Yes, I see evidence that you did it, but I am not convinced that, if I was a privately paying person, I would have told you to go ahead and do that". That is where the safeguard of the fund comes in. It is not to say that the work was not done; it was just that the taxing master could take a view that she was not convinced that was necessary work. The solicitor can go back and challenge that and can say to the taxing master, "Here is why that was necessary", and the taxing master may be amenable to heeding that. That is, generically, an answer to your question. The second issue is quite problematic because the taxing master said that the work was done, and she allowed what she considered to be a reasonable amount to reflect the work that should have been done. If she was saying to me, "I saw no evidence that that work was done", that, to me, is an evidence of fraud. What she was saying on her certificate was, "I am not convinced that that was necessary work", but if the individual can establish that the work was done, I think that is the difference.

Mr Butler: Just to finish that one, basically, it is the taxing master who values the work. Is there no standardised fee? This is the difference between criminal and —

Mr Andrews: For the cases that the taxing master deals with, by definition, there is no standardised fee. As my colleague Mr McGuckin was saying, for example, in family law, all the High Court actions that involve children, divorce, ancillary relief or moneys after divorce go to the taxing master for determination of the proper bill, whereas the proposals that are being brought forward — they will be before the Justice Committee in the current year — are that the greater majority of those cases will be a standard fee model. They will not then go to the taxing master.

Mr Lavery: To the extent that there is a standardisation at the minute, it is the hourly rate. The taxing master has a rate that she would allow for a senior or junior solicitor. There is a rate for the amount of time spent. Once satisfied that the work has been done and that it was reasonable to do it, the taxing master might say, "You should have had a junior solicitor do that, so I will just pay you the junior rate for it". That is what they might decide. There is a standard hourly rate that the taxing master sets for different categories of fee earner.

The Chairperson (Mr Swann): Paul, bore me with the 5%.

Mr Andrews: You should never ask an anorak a question like that, Chair.

There is a provision in the 1981 Legal Aid Order that says that, if you do legal aid work, the taxing master will assess the work you did. Let us say you did 10 hours at £100 an hour. You might think that you multiply 10 by 100 and that is what you get paid. You multiply 10 by 100, and then you reduce that by 5%. That is a statutory deduction that has been made in all legal aid payments almost from time immemorial in Northern Ireland. It used to be a higher percentage, but it has been at 5% since the 1980s. I suppose the concept, although it is hidden the mists of time, is that it is almost like a block buyer's discount, in that you get legal aid work and the guarantee of funding. You know who is going to pay you and you do not have to go to enforcement against that body, so there is a discount applied to it. That is what the 5% is.

The Chairperson (Mr Swann): That is a 5% discount since 1980. Are you sure that 5% is not just added so that it can be taken off? What is the point of it?

Mr McGuckin: It is set in statute as a statutory deduction against tax cases that are paid from the legal aid fund. As part of our work in setting standard fees, we will be eliminating it. Our standard fees are going to be based on the research, so they are the amount of money that was paid after the 5% has been taken off, not before that.

The Chairperson (Mr Swann): Paul, you mentioned the figure of £15 million. Was £2 million of that taxed?

Mr Andrews: Taxed off, yes. It was reduced on taxation.

The Chairperson (Mr Swann): What would be the main reason for doing that? It is a 13% reduction of a legal bill every time, on average.

Mr Andrews: Each case will be determined by its facts as presented to the taxing master, Chair. Forgive me for generalising, but that is all I can do at this time. The taxing master may look at a piece of work and decide, "Yes, I accept that you should have done that piece of work. I think you could have done it in a shorter period of time, so I am taking off a number of hours for doing it". Mr Lavery gave an illustration of where the type of work that was done did not require a senior lawyer.

The Chairperson (Mr Swann): I will ask the question another way, then. For that £2 million that has been taxed off, is there any work done to look for repeat offenders?

Mr Andrews: Effectively, I will get an order from the court, which I pay at that point in time. I would not see the full rationale behind the taxing master's decision, so I would not be in the ideal position to decide what a repeat offender is in that context.

The Chairperson (Mr Swann): It is somebody who continually gets their bills taxed. How does that do for an explanation?

Mr Andrews: Everybody who does the case has to get their bill taxed.

The Chairperson (Mr Swann): Sorry, reduced, then. Obviously, given the look of the four at the end of the table, no, there is not. Is that something that the taxing master would look at? Does she look at repeat offenders?

Mr Andrews: I cannot speak for the taxing master. My understanding of the legislation is that she will look at each case on the facts presented against the taxation authorities that are before her.

Mr McMullan: Is there a situation where you could put your price up 5% to allow for that deduction of 5%? I am not saying that fraudulent billing is going on, but is it a possibility that you know you will get 5% off, so you put it up 5%?

Mr Andrews: I think the honest answer is that you have to provide the taxing master with the evidence of the work you have actually done.

Mr McMullan: But if she is taxing you and saying that you should have a junior instead of a senior or she has taken hours off where you have too many hours in, your argument does not stack up. There is nothing to stop you putting it up 5%.

Mr McGuckin: The 5% comes off what the taxing master has finally settled the bill at based on the number of hours considered appropriate in the circumstances of that case and the level of the fee earner who should have undertaken those hours. If you inflated your hours, it will be brought back down to where it should be with the amount of work that was appropriate for the case. The 5% will come off it after that.

Mr Andrews: I did not want to go into the 5% because it is going to be removed by the standard fees. As the Chair invited me to humour him, I did so. In reality, we are not making a defence for the 5%. We are just saying that it is part of the regime at this point in time, but it will not be under the standard fees that are being brought forward.

The Chairperson (Mr Swann): Mark, you made a comment about hours being inflated. Is that not fraud?

Mr McGuckin: The suggestion coming from Mr McMullan was to inflate the hours to do it, so I was articulating that the assessment the taxing master makes is on whether the bill being presented and the number of hours' work involved is considered appropriate or whether a lower number of hours would be more appropriate for whatever reason.

The Chairperson (Mr Swann): To go back to my previous question, is somebody who may continually have their hours reduced by the taxing master not considered a repeat offender?

Mr Lavery: One might imagine that, over time, a taxing master will look more critically at bills presented by someone who might do that.

The Chairperson (Mr Swann): Do you have any idea whether they have done that, David?

Mr Lavery: I have no idea whether they do that. I would be very surprised if they do not look more critically at some bills than others. There is no published information on it. The way the system is meant to work is that, whatever happens at the claiming of payment stage, the taxing master makes sure the payment that is actually made — not the amount that is claimed — is correct. That is why Paul said it is an order and he pays it without questioning it further. We do not look behind the court order to the process that led up to it. All I am speculating, Chair, is that I imagine that a taxing master, over time, might be inclined to look more critically at some fee earners if they found that they habitually have to reduce amounts of work claimed or if it appeared the bills were being inflated in any way.

Mr Clarke: Being the taxing master sounds like a nice job. It is a very subjective test they apply. I am curious about what their new role is going to be once we go to standardised fees. I am sure people are envious of the role the taxing master has.

Mr Lavery: It is an onerous judicial post, and it is —

Mr Clarke: I am sure it is well paid.

Mr Lavery: I think taxing masters, like any other High Court master, are paid about £106,000 a year. That may have changed by about 1% recently, but all masters of the High Court are paid a salary recommended by the Senior Salaries Review Body, which advises the Government at Westminster. Judicial salaries are the same throughout Scotland, England, Wales and here. They are at grade 7. All masters are paid the same, and district judges are paid that as well.

Mr McMullan: I see that there are 30-something cases still not paid and that legal aid is something like £22 million. Is that £22 million before or after that 5%?

Mr McGuckin: Sorry, where are we? Which paragraph, Mr McMullan?

Mr McMullan: I have it here somewhere.

Mr Andrews: It is paragraph 5. I think that is a different document, Mr McMullan, to the one we are looking at.

The Chairperson (Mr Swann): It is the PAC report from 2011.

Mr Andrews: I think that refers to old very high cost cases (VHCCs) in the Crown Court. They have, effectively, been discharged from the system. I think that was the burden of the 2011 hearing. They would not have been subject to the 5% because they were criminal cases. The 5% applies only to civil cases. Those cases have been discharged. We are not engaged in the civil taxation process at all.

Mr McMullan: So, there are no unpaid legal cases?

Mr Andrews: That particular reference concerned very high cost cases. I have no very high cost cases that I am awaiting bills for. There are a couple of cases where counsel was clearly in it and stepped out because it was disposed of years before and a bill was not submitted. I have a small number of the residual cases in the Magistrates' Court that were abolished in 2009, but the ends of them are coming through the system. It is a very modest sum of money in the system.

Mr Lavery: Now that you have drawn it to our attention, I remember that exchange. It was, as Paul said, about very high cost criminal cases that we had abolished. We told the Committee that, and it said it was concerned that there were still some in the pipeline. Those were assessed then by the taxing master, but they were not subject to the 5% statutory deduction. That did not apply to criminal legal aid. They are all out of the system now.

Mr Andrews: I have a figure, if it is of any assistance to you, Mr McMullan, that shows that in 2015 the sum total paid for old very high cost cases in the Crown Court was £300,000. That was the drain of the old cases — the final ones coming out for payment.

Mr McMullan: So, are there no cases outstanding not paid in any of the courts? Forgive my ignorance of the courts.

Mr Andrews: If I step back and draw breath, I can say that, at the end of the financial year at March, we had paid practically every case that came into the legal services agency. The difficulty is that there was a strike and cases are ongoing, but we have not received bills for them. When we receive bills, we will pay them. There are other cases that have finished and are being prepared for taxation. There are cases that are just in the normal churn of business. That was a very discrete point about high-value cases that were outstanding for payment. That principle does not apply. What we have now is just the normal run of business. When somebody finishes a case and prepares their bill, it is submitted, and it will be paid.

Mr Kearney: I do not intend to dwell on this, but, for the record, the answers to the previous questions were largely based on supposition about the taxing master. They have control over a budget of up to £20 million. There is no mechanism in place to provide what I consider the necessary line management required in any form of administration of public funds. So, there is actually a "fault line", to come back to a term we used earlier, between all of you and the taxing master and on how we would assess the performance of the taxing master through her onerous responsibilities in this matter. I am just marking that up so that, if we are to continue to have a taxing master, it seems to me that we need to get a bit more joined up about what the function and the accountability of the taxing master are, particularly when we are talking about very significant amounts of public funding.

You are all very welcome, by the way. Let me draw your collective attention to paragraph 5.2, which talks about the ongoing qualification of the accounts since 2003. We referenced that earlier. That section of the text in the C&AG's report also notes the absence of a documented counter-fraud strategy up until 2009 and 2010 and the introduction of an improved strategy in 2015, which remains to be properly embedded. That to me suggests there are significant flaws in the management systems within the agency. This is probably a question for Paul and Nick. Do you find that acceptable? It is probably appropriate to tap this on to that question on the acceptability of that situation: why in paragraph 5.4 does the report find that there is no robust counter-fraud culture within the agency?

Mr Perry: I will respond on the point of acceptability. No, it is not acceptable if appropriate fraud arrangements are not in place and the agency's accounts are qualified and, on a slightly different point, the Department's accounts are qualified but not on the specific point. I know that the agency and, before that, the commission, has been doing a lot of work on its anti-fraud capability on the practitioner side and the claimant's side. The creation of the agency was also the opportunity to bring in this new and benchmarked counter-fraud strategy. It is an improvement on its predecessor, but there had been improvements in the intervening period. Paul can speak in detail about the specific measures being taken, but I am making the point now that it is not acceptable.

Mr Andrews: I am not comfortable with it either, Mr Kearney. There has been a considerable amount of work done within the commission, as was, and now the agency, to address fraud. I think the C&AG recognises that but says we still have a way to go. I accept that. The new policy is being embedded. I think the C&AG was commenting at the point of his review. As other reviews continue with our annual accounts, I trust there will be increased confidence in the culture that is being developed, the documentation that is there to support it and the work that is done and that we will move that on in a constructive manner. I think colleagues within the agency are very alive to fraud, and they are diligent in trying to establish fraud. I will go back to a comment that was made to, I think, Mr Easton and Mr Lunn. What we really need to move us forward is the implementation of a digitalisation strategy that will enable information to be trapped and analysed in a way that, to be candid, it is not possible to do in a paper-based system with the volume of claims we currently receive.

Mr Kearney: It is certainly not possible when you have reduced the number of staff available to be involved in fraud detection.

Mr Andrews: I accept the observation in the report and your reference to it, Mr Kearney.

Mr Kearney: Is it an observation, or is it a fact?

Mr Andrews: It is a fact. Certainly, I have not disputed the fact that it is so. As I said, we need to target resources. We are doing that in a way that tries to break us out of a small team that gets

inundated with referrals. They have to be investigated, and they cannot get on the front foot and into a proactive mode. That is why I referred to the development of the compliance and registration scheme to give us a greater span and perspective of what is going on, as well as greater resource to address these issues, albeit, perhaps, in a different way to how we have done it historically. That is a commitment that I give to the Committee. We are working hard at that, and we are determined to move forward.

Mr Kearney: OK. Systems are one thing; culture is another. You do not have the systems, but where is the dynamic coming from in the agency and the Department to create the culture, change the mindset, and get the focus right?

Mr Andrews: It is coming from me, and it has to come from me because I have to give leadership in this. My colleagues are aware of the issues and want to be able to deal with them properly. We are going through a programme of work at the moment whereby we are looking at how our documentation can be improved. We have had discussions with colleagues from the Northern Ireland Audit Office about that. We are putting that in place and are tracking it. It goes to the issue of establishing an estimate of fraud and error in the system, and there is an active programme of work to drive that forward. That will continue with our current complement and will be enhanced when we have the registration scheme to supplement it.

Mr Kearney: Can you give us a time frame for that, Paul? We have been at this a brave wheen of years, by the look of things.

Mr Andrews: We have, and no matter what we do, we will still be at it because things change, and we need to change. Accepting that principle, we are working, as Mr McGuckin said, to introduce the compliance and registration scheme in early 2017. We will, as part of that, visit solicitors' offices and do our initial round of inspections. I think that that directly goes to the culture in the organisation, because we will be sharing information with the compliance and registration scheme about the payments and concerns that staff may have about individual firms.

We are also refreshing our staff complement; that is being actively done at the present. We will look to grow that capacity in different ways and have more people available to the team who are trained and accredited in fraud investigation. Hence, my reference to the joint working with the Department for Communities, which has a significant body of trained investigators, and we want to tap into that resource with others.

The other thing we have done is contact the central counter-fraud unit. While the majority of cases that we look at can be dealt with by properly trained staff in the agency, there may be cases that emerge for which we need additional experience and capacity, so we will refer those cases and help to take that forward with the central unit.

Mr Kearney: I want to stay with the issue of culture, if you can indulge me for a couple more minutes, please, Robin. Paragraph 5.5 asserts that the eligibility controls that exist with reference to the detection of fraud focus mainly on the public. I want to tie that to my observation about culture and mindset. Your staffing and resource levels might have gone down, but there was the absence of a strategy, and the strategy that was introduced still has not been embedded. We have been at this a number of years. The strategy introduced in 2015 is still to be embedded, and, if I understand you correctly, it will be 2017 before we see some headway. My concern is that that indicates, or at least leaves the question of, some form of institutional bias about whether and how the agency addresses potential fraud by legal representatives if we already have a cultural skew and more focus on the public than on the profession.

Mr Andrews: I will try to address that point. I want to be absolutely clear that, as far as I am concerned, there is no prejudice or bias. In fact, the greater majority of my staff deal with the remuneration of practitioners; only very small number is engaged in any way with financial eligibility matters on applicant fraud. I made the point earlier that one of the factors that we have to address is that the volume of referrals are from people whose opponent is in receipt of legal aid and they are not, and there are allegations made that the person is inappropriately in receipt of legal aid. Those allegations need to be investigated. Often, they prove to be hearsay or there is no evidence to support them, but they need to be investigated. There are other controls that look at fraud of practitioners that seek to document things. I confess that the documentation is being enhanced. It is not a perfect world, but it is being enhanced and seeks to drive home the issue of practitioner fraud to

give a visibility to the work that is done. There should not be a difference. There should be an appropriate response that enables us to detect practitioner fraud, as it does with applicant fraud.

Mr Kearney: Earlier, Mark was explaining the fact that after 13 years, the statutory registration scheme is still not in place and has not moved on from 2013 because we have to work with the profession. Do we have effective firewalls between the operation of your agency and the Department? Do we regulate the relationships appropriately so that what you have just said can be embedded in clear, transparent terms?

Mr McGuckin: First, can I put my comment into context? The context in which I said that is that we had taken things so far with the development of the codes of conducts and our engagement with the Law Society and the Bar Council when we had the strike and the judicial review and there was a —

Mr Kearney: I absolutely get the context of your remarks; I am not trying to mix apples and oranges. I was conscious that you made the point that it is important to manage the relationship with the profession. I want to make sure that, in this particular matter, we are not blurring the boundaries in ensuring that there is a balanced, impartial and objective approach taken to the detection of fraud, not only in the public but also in the profession.

Mr Andrews: From my point of view, there is no blinker: fraud is fraud. I do not have friends in the legal profession; I have people whom I do business with in the legal profession. I expect the same of my staff, if that is of assistance to you.

Mr Kearney: Thank you, it is. I will finish on this point, and I will give way to others at that stage, Robin.

From everything that I have heard in the meeting so far, it appears that we are dealing with a systemic failure in the Department and the agency around management information, which has been touched on in the report, the absence of culture, the fact that we still have an extant and effective strategy to detect fraud, and all in the legal aid system. I am astounded that it has been allowed to continue for so long. We are talking about significant lapses in time; we are still talking about a further year and a half to two years to make headway in some of these matters. I find it difficult to understand how all that has become embedded in the system and why it has been allowed to go on for so long. I am keen to hear from you, Nick, because you are at the top of the tree here. What are the big-ticket remedies to address this, and what is the time frame that we can realistically expect to see this global issue dealt with? When will we see fraud effectively addressed in a balanced, impartial and objective way so that we do not come back here in a year's time to hear that we are making headway, making progress, but are lacking definitive time frames on outcomes?

Mr Perry: I will pick that up, if I may. You are inviting me to comment on some of the big-ticket items. As I said at the outset, criminal legal aid has been a major focus of effort and is an area in which significant progress has been made. We have been talking about any kind of bias or skewing, but the impact of those reforms has been on the profession, not on the applicant. We have protected the ability of vulnerable people and others to access justice. I think that the professions think themselves quite hard done by as a result of the changes that we made, both on the criminal and civil sides. In terms of timescales, however, the next wave of reform, which Mark touched on, on the civil side, will comprise three phases. An important phase on family law will come into effect next year, and the subsequent two phases will take another 18 to 24 months beyond that. We are looking at 2019 or 2020 for those to come fully into effect.

Governance across the system is stronger than it was five years ago. There are some measures to come into effect, I hope, by this time next year, one in particular being the registration scheme, which is an important additional weapon in Paul's armoury in tackling practitioner fraud and providing assurance on that. There is still a bit of a distance to go, and, of course, sometimes new areas open up, but we have made a lot of progress on the criminal side and are about to accelerate into significant progress on the civil side also.

The Chairperson (Mr Swann): Paul, may I ask a point of clarification? How long have you been in post as accounting officer of the agency or its predecessors?

Mr Andrews: I was appointed as the substantive chief executive in February 2010.

The Chairperson (Mr Swann): 2010? So you have been in position for over six years?

Mr Andrews: Yes.

The Chairperson (Mr Swann): OK.

Mr Clarke: I think Gordon was before me. I was just going to say that I am surprised that Paul has no friends in the legal service.

Mr Dunne: I want to go back to the point about controls. Various questions were asked about fraud. Under recommendation 8 in the report it says:

> *"Internal controls are inadequate to prevent and detect fraud."*

I know that we have covered some of it, but it goes on to say:

> *"Internal controls in the Agency have been relatively weak in detecting frauds. The primary control remains the vigilance of staff who process claims identifying anything suspicious, plus a small number of sample-based checks which are largely undocumented."*

How can you assure us that the system is now working when we read this in the report?

Mr Andrews: There is an extensive range of checks on claims that are submitted. I can give you an indication of them that may be of assistance to the Committee. In criminal case in the Magistrates' Court and Crown Court, 15% of the bills that are received are checked against the integrated court operation system (ICOS), so there is a complete validation of all the court-based transactions that happen in that context. Likewise, for the advice and assistance, there is a 15% check of those cases as well.

Across civil cases, once each individual case is assessed, there is a 10% check of those. Along with that, there is a 1% sample of files called in, which Mr Lavery referred to earlier.

Mr Dunne: A 1% check? It says in the report:

> *"A one per cent sample check is applied to all payments. In 2013 the Agency determined that this testing 'should cease, it has not proven to be effective.' Despite this, it continues to perform these checks."*

What sort of assurance is that to the public that you have a system that is robust and effective and, at the end of the day, is value for money? It is not giving the public any assurance or any real sense that your system is in control. There is evidence that the system is out of control. Would you accept that?

Mr Andrews: Before I come to whether I accept your question, Mr Dunne, the 1% sample is not the only check that is done; it is the final check that is done. Each individual claim is subject to an assessment, and then a percentage check is performed by a senior manager on the appropriateness of that check. I accept the C&AG's comment that there needs to be greater evidence of those checks, because many of them, as I said, on the criminal side, are done from the ICOS system. We are addressing that at the moment, and that evidence will be available for the next annual review that is undertaken. That evidence will be there. I personally decided not to stop the 1% sample because, until there was the ability to go into solicitors' offices, the next best proxy available to me was to call in the files. It is imperfect, but it is the next best solution.

Mr Dunne: Have you thought about increasing the percentage of the sample? Generally, anyone involved in audit would increase it when there is a risk.

Mr Andrews: At the moment, we are looking at adjusting the percentage in individual cases. There are certain cases that we may call in more than 1% of, but we had to establish a platform originally to identify the risk. It took us longer to do that than we would have liked, Mr Dunne; I readily admit that. There are extensive controls in place for payment. We want to supplement those controls by going to the source of the information, which is the solicitor's office, and not relying on bills coming into us. There is an array of controls in place and I —

Mr Dunne: The report is hot off the press. I am new to the Committee, but the report of 21 June states:

"Internal controls in the Agency have been relatively weak in detecting frauds."

It also says:

"Internal controls are inadequate to prevent and detect fraud".

Do you accept that? Is that a reasonable point?

Mr Andrews: I have to accept the professional opinion of the C&AG, and I have to work to address that. I want to provide an evidence base that shows that there can be confidence in the public money that is spent on the provision of access to justice.

Mr Dunne: And that evidence is not there to do date.

Mr Andrews: That evidence is not sufficiently documented to enable the C&AG to reach a different conclusion.

Mr Dunne: I find it unacceptable that it says that your organisation carried out checks that were largely undocumented. Do you find that unacceptable? If something is undocumented, what evidence is there? It is little wonder that you do not have the evidence, because it is not documented.

Mr Andrews: There are two aspects to the point about it being undocumented, as I understand the report. One is that the checks were performed against an independent IT system with the Court Service to validate it. We then need to show a printout of the state of play when that check was performed. You can re-perform the check, but I accept that it is our responsibility to have that evidence available when the auditors ask for it. That is being addressed. The second point is about an assessment. Where someone is assessing a claim and they reduce the hours, the C&AG's staff commented on the fact that there were no documented reasons as to why that was being reduced. That is the twofold aspect of the lack of documentation. Both of those are being addressed as we speak, and, in the latter case, that was based on the experience of staff who have oftentimes assessed cases for a number of years and have a view of what is typically reasonable in those cases. The question has been put: say why that is on a form. That is being done.

Mr Dunne: Lastly, is there a fraud awareness training system in place for all staff?

Mr Andrews: Yes. Absolutely.

Mr Dunne: Are you assured that it is in place and is being carried out?

Mr Andrews: Absolutely, and it will be carried out again because it is a rolling programme. You do not get trained once and forget about it; you get trained when you come into the organisation and then there are periodic refreshers. We are due another refresher during the current financial year.

Mr Dunne: The point has been well made about driving the culture. Is there a fear from yourselves at the top level of driving that culture?

Mr Andrews: No.

Mr Dunne: Is there a fear of all the repercussions —

Mr Andrews: No.

Mr Dunne: — and the kickback and the risk of disruption to the court system? Deep down, is that what is wrong here? That there is a fear?

Mr Andrews: No. I have to administer a system. What we are talking about in this section is when the case has gone through court, the bill has come out the other end, and we are assessing it. It is not, I can assure you, Mr Dunne, a concern about that.

Mr Dunne: But why is change in the culture so slow?

Mr Andrews: I think that it is slow because we have been in a state of regular change, and we have regular changes to legislation —

Mr Dunne: Not much change in the procedures, or from the findings of a number of years ago. The change is slow.

Mr Andrews: I think, in all fairness, that there have been changes to the whole body of legislation that has changed remuneration and strengthened the controls by virtue of standard fees and the criteria. There has been a significant body of that in the Crown Court: 2005, 2009, 2011 and 2014 and 2015. I have to say that there is a body of change there, Mr Dunne.

Mr Dunne: OK. I have just one other issue. It is in relation to the management of expert witness costs, paragraph 3.23 on page 24. Can you explain why the Department failed to develop a set fee structure for the engagement of expert witnesses? I understand, as a layman, that the engagement of expert witnesses is extremely expensive.

Mr Perry: Work is ongoing on developing a standard approach to expert payments, and that will come into effect in the course of next year. Mark has been working on that.

Mr McGuckin: It is probably slightly longer than that. Experts are an essential ingredient in the justice system, both civil and criminal. They are frequently and necessarily employed, either as a single expert witness, or by both sides of the case. It is fair to say that it is our intention to introduce standard fees where appropriate and where we can do that because a body of evidence has been built up and there is a similarity between the work that is being done. We also intend to introduce hourly rates on a statutory basis.

However, I do not think that it would be fair to say that expert witness fees are not controlled or that expenditure on experts is not properly controlled. Where experts are appointed, it will come to the agency's attention that an expert is required, and agency staff will look and determine whether that is the case. Where an expert is to be appointed and the agency is involved in that, it may seek three estimates for the cost. They look to some competition between experts. There are certain bits of work where the organisation has set a general authority, because it is a low-level piece of work: getting an A&E consultant's report, or something like that, which is relatively standard. So there are standardised elements. When bills come in, they are checked in detail by the agency to ensure that they meet the original criteria. If the proper authority has not been sought, the agency has the power to refuse it.

We are going to put that on a firmer footing, and our plans are based on rigorous examination of the history of where experts have been used, how they have been remunerated, and the types of work that they are doing to try to standardise the fees so that they are more readily identified. If you do work necessary for the court, there will be a standard fee set for it, although it will not be possible to do that in all cases. In some cases, the work may be variable, and in those cases we plan to put in place hourly rates. In relation to that, we will be looking at experience in England and Wales, which recently went down that route.

Mr Dunne: Is it possible to go out to tender for such work?

Mr McGuckin: The practice that the agency has undertaken is to require solicitors to get a number of estimates, which is a similar process to that. In any given year, you might have 150 different types of expert involved, ranging from psychologists and psychiatrists through to ballistics or whatever it happens to be. There is a wide variety. To do a tendering process for that would be quite challenging, because there may be only one or two experts in a particular field or you might call on them for only a small number of cases.

Mr Andrews: The other practical point is the availability of experts. If a court, for example, in a public law children's case, where a child has, perhaps, been dislocated from its parents, and whether that should be a permanent feature or they should be returned to the parents, is the issue, one of the things that the court will ask when an expert is being engaged is how quickly the expert can take up the case. If they are not available to take it up promptly, the court will not allow them to be engaged because that would be to the detriment of the child.

I am not saying that it is impossible, but there are practical issues about the promptness of availability of experts, particularly in vulnerable things like public law children's cases.

Mr Dunne: Do you feel that there is support in the legal profession for changing to a system of set fees for expert witnesses?

Mr Andrews: As long as the experts have the standing to represent their client. That is the issue that the legal profession will have. The legal profession hates the fact that we ask them for three quotes because that slows down getting their case going.

Mr Dunne: Sorry, but even as MLAs if we want some work done in our offices, we have to produce quotes.

Mr Andrews: Absolutely.

Mr Dunne: It is public money; it is accountability.

Mr Andrews: That is why we do it.

Mr Dunne: That is the evidence that we talked about.

Mr Andrews: That is why we do it.

Mr Dunne: Yes, they may hate it, but —

Mr Andrews: They have to do it.

Mr Dunne: They seem to have a lot of flexibility in the way they do business. Perhaps they have to start complying with regulation.

Mr Andrews: I want to make it clear: they have to provide three quotes. As long as we have a system that ensures that we have the breadth of experts that we need to undertake the range of cases. Mark referred to 150 types of experts. You will not use the same 150 types of experts every year, but there is a wide range of experts required across the justice system.

Mr McGuckin: Going back to your original question, Mr Dunne, I think that you will find mixed views in the legal profession and among the expert community. Some will see the advantage of standardised fees that they might obtain expert evidence and expert witnesses more easily. Others, depending on the type of case they are dealing with, might find it a challenge because the expert may not be available for the standard fee.

There will be mixed views on that, but many will welcome it, I suspect.

Mr Dunne: The report says that the auditors examined a number of legal-aid case files and found that different experts charged different rates for reading and reporting. For example, medical reports are a real risk.

Mr Andrews: It is an issue for us to deal with. One of the issues about a standard fee is that you have to identify the appropriate rate for it. The example quoted is a senior consultant acting as an expert and someone who is much more junior charging a lesser rate. In a sense, that is no different from a senior solicitor being charged out to you as a privately paying client at a different rate from a junior solicitor. There is a logic behind where people pitch their fees as they come into the marketplace, and the standard fee approach will remove that. There is another side to the introduction of a standard fee.

The Chairperson (Mr Swann): Paul, who conducts your fraud training?

Mr Andrews: A senior member of staff who was a trained investigator and had a background in investigation did it. We will outsource that in the next iteration as part of a refresh to get a different pair of eyes to assist us with it.

The Chairperson (Mr Swann): When was the last time that training was done?

Mr Andrews: I think that it was early 2015.

The Chairperson (Mr Swann): Early 2015. When will the independent training be introduced?

Mr Andrews: We envisage that happening in the last quarter of this year.

The Chairperson (Mr Swann): That will be the end of 2016.

Mr Andrews: Yes.

The Chairperson (Mr Swann): You mentioned continual refreshment, but that is not in place at the minute.

Mr Andrews: The person who trained has, unfortunately, retired, so we need to find an alternative source of expert training.

The Chairperson (Mr Swann): That was not part of the succession planning within the agency.

Mr Andrews: It is part of the succession planning, and there is a recruitment exercise going on. The person decided to go a little bit earlier than was anticipated.

Mr Clarke: Following on from Gordon on the standardised fees or tendering, is there a resistance from someone within the Department to go down that route?

Mr McGuckin: The standardised fee route?

Mr Clarke: Yes.

Mr McGuckin: Absolutely not, no.

Mr Clarke: Paragraph 3.27 of the report talks about a piece of work. A consultation with the stakeholders began and then was suspended for two years because of other priorities. What other priorities would have overtaken something that could have reduced costs?

Mr McGuckin: Reducing costs. The attention at that particular time was on looking at the Crown Court fees. The review of the 2011 rules was being undertaken, and that was identified as something that would save significantly more, because it was a bigger budget.

Mr Clarke: So why did you start the process, Mark?

Mr McGuckin: To be honest, it was me who stopped it. It had been started by my predecessor. A piece of work had been done on it. When I came in, we needed to divert the resources into the other piece of work. We had to prioritise the things that we could do. Indeed, at that stage, I went to the legal aid strategy group, which we referred to earlier, and identified the priorities that I would take forward in the next 12 to 18 months.

Mr Clarke: So it was nothing to do with pressure coming from stakeholders?

Mr McGuckin: Absolutely not, no. It was purely down to how best I could utilise the resource that I had to address the range of issues that needed to be addressed.

Mr Clarke: In paragraph 3.26, reference is made to an "Unusually Large Expenditure Panel". What can you tell us about that, Mark?

Mr Andrews: It is in my bailiwick, so maybe I will take this one. Effectively, if an expert comes forward with a proposal for cost that is outside the norm, we convene a panel of senior officials to look at the reasonableness of it. That typically happens when you have a very complicated public law issue. Perhaps an expert on shaken baby syndrome, or something like that, from another jurisdiction is

suggested, and their rates are outside what we normally pay. You get a panel of more experienced officials within the agency to come together and ask, "Is it appropriate in this type of case? Does this person have a unique expertise that is merited in the case?". The panel will then look at the cost of that. It is to do with those cases that sit very left field of the day-to-day business of experts. The vast majority of experts will just be administered by staff, because they tend to be the same type of people coming back with comparable rates and hours. That is in the round, but you have cases that are very unusual.

Mr Clarke: How often have they met?

Mr Andrews: They meet as and when required. If I was to give you a ballpark figure, I would suggest that they may meet every two or three months.

Mr Clarke: It is maybe unfair to ask you this, but I will be happy with the information provided. I am trying to gather how often they meet, the cost of the expert panel — because there will be a cost applied to that — and how much it has actually saved.

Mr Andrews: We can certainly look to provide you with the information. The cost of it will be internal staff time.

Mr Clarke: Yes, but you will have applied a cost to that.

Mr Andrews: We will know how long they met, and there can be a cost attributed to that.

Mr Clarke: Yes, there will be a cost attributed to that. I would like to see how much they have saved. Obviously, that will have been the purpose of their work.

Mr Andrews: I hesitate at that. They are there to see whether the fee is reasonable. It may well be that, on reflection, they will have considered that the fee is not disproportionate to the complexity of the case. In other cases, they may say, "We don't think that we could allow that amount of money." It is not to save cost per se, although that might be the outworking of it; it is to satisfy ourselves on whether the expert is required at that cost, if you allow my distinction.

Mr Clarke: I understand the point you are trying to make. For me, as a layperson, like Gordon, there is an assumption that when you go to the lengths of setting up a panel called the "Unusually Large Expenditure Panel", something unusually large is being referred to. So there is a cost to that panel, and I hope that when you demonstrate this to us, we will see that there is actually worth in them meeting. I will leave that one hanging for you.

Mr McGuckin: It is part of the internal control mechanisms within the organisation about the regularity and propriety of expenditure, and —

Mr Clarke: Well, you will have no problem with disclosing it to let us have a look at it, unless —

Mr Andrews: Absolutely not.

Mr Clarke: That is fine. Paragraph 3.24, then. We are still on costs here, and I am alarmed. Maybe I can get your view on the last paragraph, which talks about:

> *"In some areas, for example cases involving family care centres, expert witness costs often account for a high percentage of the total cost of the case."*

The C&AG has indicated that those were hard to investigate because there was no information. Why do you not have something that the likes of the C&AG can quantify?

Mr Andrews: In effect, any expert who is authorised by the commission — am I missing —

Mr Clarke: I think that you are missing the point. The last sentence says:

> *"We were unable to investigate these issues further as the Agency was unable to readily supply information on the costs of expert witnesses."*

Mr Andrews: Sorry. Thank you for your clarification. The IT system does not currently capture the cost of experts. I enquired, and it was exactly the same when my colleagues in England and Wales did the exercise that Mr McGuckin referred to. We have looked at this, being conscious of the C&AG's observation on it. We have derived a figure that suggests that, on average, the cost of experts is around £4·6 million. We can strip out known costs, such as court fees, that are in the same pot, so we can estimate that. As part of the digitalisation programme, that will be addressed, and there will be specific reports available on not only experts but types of experts.

Mr Clarke: Again, I am a layperson. Does your organisation have an internal audit function?

Mr Andrews: Yes, we receive an internal audit service.

Mr Clarke: Was that ever identified as a weakness?

Mr Andrews: It was identified as a weakness in a report. I honestly cannot remember the date of that report, Mr Clarke.

Mr Clarke: So if it was identified as a weakness and you have an internal audit and you actually have that function, why was it not addressed?

Mr Andrews: Because it is endemic in the IT system. It will be addressed as part of the digitalisation system.

Mr Clarke: For the benefit of the report, I would like to know when that was flagged up by internal audit. As my colleague said, it is public money. Something has been identified. Whilst you, Paul, do not have any friends in legal services, I am sure that others in your organisation have. Suspicious minds can make us wonder all sorts of places. It alarms me that, for something as serious as that, given that legal aid has been a hot potato for such a long time, there is no way for anyone, in terms of the audit procedure, to drill into that to find out what the value of that is or whether fraud can actually be carried out in that part of your organisation.

Mr Andrews: I assure you that I do not have friends in the legal profession, Mr Clarke. I do take the serious point: the system requires there to be a proposal setting out the detailed costing of the expert. That has to be approved, and there has to be an authorisation for an expert to be engaged. Once the expert has discharged their engagement, they have to submit an invoice, which comes in with the bill to be paid. The document trail is there on the individual case basis. What we do not have in place is a mechanism to bring that together by way of a report that allows the auditors to do an analysis of that, as opposed to looking at individual cases. That is the distinction that I am making.

Mr Clarke: I am probably making a slightly different one, but I look forward to seeing what you provide us with on that.

The Chairperson (Mr Swann): Paul, you said that you receive an audit service. Who from?

Mr Andrews: It is a shared service. It is the departmental internal audit function that provides our service.

The Chairperson (Mr Swann): DOJ?

Mr Andrews: Yes.

The Chairperson (Mr Swann): Has that always been the case?

Mr Andrews: No. It was a bought-in service from an independent house that provides internal audit functions, but this is the third year that we have received that service.

The Chairperson (Mr Swann): So, for three years it has been internal?

Mr Andrews: Yes.

The Chairperson (Mr Swann): OK. Declan, you were looking in.

Mr Kearney: Just briefly. How many staff do you have under your management, Paul?

Mr Andrews: In total, it is about 120 at this point in time.

Mr Kearney: Earlier, I referenced the absence of management information with regard to fraud. Now we clearly do not have a sufficiently embedded audit function. It seems to me that the entire approach to management information — how it is harvested and processed — is entirely absent within the agency.

Mr Perry: The internal audit function provided by the Department carries out something like four or five reviews each year within the agency as part of its programme of audits, which is set by the departmental audit and risk committee (DARC). The entire area of legal aid and the risk it represents to the Department is considered not just by the DARC, but by the departmental board also. So there is a high degree of interest and visibility in the work of internal audit and what it does for the agency.

Mr Kearney: By the Department?

Mr Perry: Yes, but —

Mr Andrews: And also by the agency's audit and risk committee. Not only do colleagues from the Northern Ireland Audit Office attend those meetings, so does the head of internal audit within the department.

Mr Kearney: So what is wrong? Take a layman's approach: what is wrong that you cannot gather information?

Mr Perry: I think there is a weakness —

Mr Kearney: At the heel of the hunt, this is ABC stuff. You are a very well-heeled Department. It seems to be an adequately resourced agency. There is a significant quantum of funds for which both the Department and agency are responsible, and yet we do not seem to be able to get the basic information processing functions right, if indeed they are in place at all.

Mr Andrews: We do have management information systems in place, and they do operate. Our difficulty — let me be candid with you — is that oftentimes the original design of the system, which is over 16 years old, is not user-friendly to the extraction of information that we want. We have to work around that. That is why I said that we "derived" a figure for the expert witnesses. The digitalisation programme which we are currently undergoing will address those issues so that we will have better tools to investigate and have real-time reviews of matters, so that we do not have to spend inordinate amounts of time trying to extract information from it. It is a legacy issue that we are dealing with.

Mr Clarke: Sorry, I will just come back to that. This has been going on since 2011. Read the whole paragraph: it is basically saying that, provided all the supporting documentation was there, you just paid the bill. I am simplifying paragraph 3.24. Except, when it comes to auditing that, the information is not there for anyone to audit.

Mr Andrews: If there is evidence that the work was done in accordance with the authority that was given to them, we pay the bill. Then it goes onto the system, but currently in a way in which the Audit Office cannot extract a file which enables it to see the totality of the disbursements —

Mr Clarke: Sorry, it goes further than that, because you have indicated today that was actually flagged up by your own internal auditors. Obviously they cannot see it either.

Mr Andrews: Sorry. I was not trying to say that only the external auditor —

Mr Clarke: You only actually referenced the external auditor.

Mr Andrews: Sorry, I was just making reference in the context of this, Mr Clarke. Forgive me.

Mr Clarke: For me, what makes me more alarmed is that the external auditor is your belt and braces, but your internal auditor cannot even view this. So, as far as that goes, there is no audit at all.

Mr Perry: I think that the weakness here is extracting information from the existing IT system. You can do it manually, but it takes a long time. The design of the new IT system will specifically allow this and other types of report to be —

Mr Clarke: Nick, this report refers back to 2011. We are in 2016.

Mr Perry: The hope is that the new IT system will be in place, but I am not sure what the timescale is for that.

Mr Clarke: A timescale would be useful at this stage.

Mr Andrews: We are working towards getting that introduced in 2018.

Mr Clarke: Seven years.

The Chairperson (Mr Swann): Nick, you referred to the internal audit from the Department and to four or five departmental reviews per year.

Mr Perry: Internal audit looks at different aspects right across the Department, but in this agency it will look at three, four or five different areas of the business each year. It is part of the audit programme, and Paul can speak to that. It will look at creditors and other aspects.

Mr Andrews: Approximately 90 audit days are spent on the audit and the risk in the financial year.

The Chairperson (Mr Swann): How is the risk register that comes out of each of those audits actioned?

Mr Andrews: The audit recommendations from internal audit are brought to the audit and risk committee. They are brought with a management response and a timescale to action that, and then the audit and risk committee will monitor that. In fact, at the end of each year, the head of internal audit will do a review of it and give an indication as to whether —

The Chairperson (Mr Swann): Who makes up the audit and risk committee, Paul?

Mr Andrews: The three independent board members of the agency constitute the audit and risk committee. I attend as the director of corporate services, Mr McGuckin attends as the departmental rep, and a representative from —

The Chairperson (Mr Swann): Who are the three independent members?

Mr Andrews: The three independent members of our board are Mr Allen McCartney, who chairs the audit and risk committee, Mr Stephen Wooler and Mr John Morison.

Mr Clarke: Can we get their background, as well, for the benefit of this?

Mr Andrews: We can provide that, if that is of assistance.

The Chairperson (Mr Swann): Who is on your legal aid strategy group?

Mr Perry: I chair it. It has David, Paul and Mark, but also representatives from finance and other parts of the Department. It is an internal operational group as opposed to an oversight group.

The Chairperson (Mr Swann): So it is not strategy; it is operational.

Mr Perry: It is strategic in the sense that it is discussing the strategic direction of legal aid but, unlike an audit committee, it is not an accountability body.

The Chairperson (Mr Swann): Can we have the make-up of that as well?

Mr Perry: Certainly, yes.

Ms Lockhart: How often does the legal aid strategy group meet? It was maybe touched on before.

Mr Perry: Quarterly, I think. It sometimes meets —

Ms Lockhart: Are there clear terms of reference for that group?

Mr Perry: Yes.

Ms Lockhart: And you lead that group.

Mr Perry: Yes, I do.

Ms Lockhart: Can we get sight of some of the things that you have recommended for implementation?

Mr Perry: Certainly.

The Chairperson (Mr Swann): And the audit and risk group feeds into that legal aid strategy group.

Mr Andrews: The audit and risk committee's reports will go to the departmental audit and risk committee per se.

Mr Perry: That route is from the agency audit committee to the departmental audit committee, which goes to the departmental board. The strategy group is a kind of working policy development group.

Mr McMullan: I want to deal very quickly with the recovery of defence cost orders. The report says that only one recovery order has been issued and, to date, nothing has been received.

Mr Andrews: That is correct, Mr McMullan. On the order that was secured for the £100,000, the individual appealed their conviction, so that could not be executed until the appeal had been determined. That appeal has been determined, the person's conviction was not overturned and that is now in the enforcement process.

Mr McMullan: What date was that?

Mr Andrews: I think that the order was secured in 2015. I have May 2015 in mind.

Mr McMullan: How long does it take enforcement to do its job?

Mr Andrews: This is the first one to go through the system, so I have no history to rely on. In this case, the individual has assets. Those assets have been identified and the individual will pay with them, but we have to go through an enforcement route to do that.

Mr McMullan: Surely you must know what the road map is for doing that, even though this the first one. After all, the system was put in place in 2012.

Mr Andrews: The enforcement goes to the Enforcement of Judgments Office, which then executes it as a debt.

Mr McMullan: But there must be a road map for that. In this whole thing I have heard today, we are just limping from one thing to another. It is said, "If I have the time, I will do it", or "Throw it in here, and we will get it done some time, depending on which department it is put into". There is no road map here for this. If the man in the street owed a debt, he would know exactly what was happening. If you really want to look at it, look at the programmes on the TV — they will tell you how to do it. This court system is all over the place. There is a man sitting with £100,000, but we have to put it into another department for enforcement. Where does it go after that?

Mr Andrews: It then becomes a civil debt, which is enforceable.

Mr McMullan: What is the road map after it goes to enforcement?

Mr Andrews: The Enforcement of Judgments Office will effectively interview the individual, deem that he has the means to pay the funds, because that is not in dispute, and then make arrangements to collect the money from him.

Mr McMullan: What is the problem?

Mr Andrews: The problem is that that could not go to the Enforcement of Judgments Office pending the individual's appeal against his conviction, because if he had been acquitted he would not have had to pay the funds.

Mr McMullan: So how long will it take to get the funds off him, once everything is done?

Mr Andrews: That is outside my control, but I am expecting to get that money in very quickly indeed because there is no reason for that not to happen. If it is not available, we will simply have to go through debt proceedings.

Mr McMullan: Why is it outside your control?

Mr Andrews: Because I have no power to enforce debt other than in a civil context, just as anyone does not have that power; they have to go to the Enforcement of Judgments Office. If there is a debt owed to you, you simply have to go and enforce it through that means.

Mr McMullan: Do you not see that as a flaw in your system to speed up the process to get money back in again? If you bring in these orders but you do not bring in the mechanics to deliver them, that makes a bit of a nonsense of having them. There are people out there who can work the system.

Mr Perry: The original intention behind the order was to provide a mechanism in circumstances where it became clear that a convicted defendant in receipt of legal aid had assets that had not been declared, and the intention was then to allow the court, the prosecuting authorities or the police to refer that case to the agency. That was the mechanism and the policy intent, and the presumption was that there would not be very many of those cases. I think that there have been 28 referrals to the agency using that order, of which 27 have been found, on investigation, to have no significant assets to seize or recover.

Mr Andrews: In the instance case, the mechanism to recover the money is there and is being applied.

Mr McMullan: It is not working. You have 27 orders put out, and those 27 —

Mr Lavery: No, that is not right, Mr McMullan. There were 28 cases referred for investigation.

Mr McMullan: Sorry, 28, and 27 —

Mr Lavery: No, in 27 of them, it was found that there were not any assets.

Mr McMullan: Well, this gentleman said 27, did he not?

Mr Perry: Twenty-seven were investigated, but it was found that there were no means to be seized. As I say, the purpose behind this order was to allow people to refer cases to the agency.

Mr McMullan: Who gave the order to have a look at those assets, then?

Mr Perry: In that particular case, I think that the recommendation came from the court itself.

Mr Andrews: It came from the court, and it was investigated. An application was made to the court.

Mr McMullan: By who?

Mr Andrews: By counsel on behalf of the Legal Services Agency.

Mr McMullan: And the same counsel would have given the same order for the other 27?

Mr Andrews: No, it is the judge who gives the order. What we found is that statutory criteria have to be engaged to seek an order and, in the other cases that were referred, the statutory criteria were not met. For example, one of the criteria is if you are on certain benefits.

Mr McMullan: I got that all right.

Mr Andrews: Some of the cases that were referred to us where cases where people were on benefits, so there could not be an order made against them.

Mr McMullan: Why are we not looking at means testing?

Mr Andrews: For criminal cases more generally?

Mr McMullan: Any case. Why not means testing to find out if they have the means to pay?

Mr McGuckin: There is an element of means testing in all cases. We are planning, in response to the access to justice review part 2, to look at that to see whether or not it is appropriate to introduce a hard means test in criminal cases and to improve the effectiveness of it.

Mr Lavery: On civil, Paul earlier read out at some length the financial eligibility test. There is a very explicit means test for civil cases, and that is the one that, I think in answer to Mr Clarke, we said we would right to the Committee with the full details of. That was the one about disposable income. In the criminal courts, both Crown Court and Magistrates' Court, it is the court that decides whether someone is eligible for legal aid, and an assessment-of-means form is submitted. The court makes that determination. What Mark is saying is that we will now look at whether we should introduce a statutory means test. That is what we mean by a hard means test, equivalent to the one for civil cases.

Mr McMullan: We should look at that. Why has that not been done, if this is not working? Why are we looking at it now, four years after?

Mr Lavery: I think it has always been the case that the convention in our law is that the grant of legal aid for a criminal case is made by the court, not by the legal aid authorities. That seems to me to be desirable. If you in the Assembly tell us to change it, we can change it, but up until now it has been thought important that the decision on whether you get legal aid in a criminal case should be made by the court that is going to try you, not by a civil servant in the legal aid authority. The responsibility for applying the means test that applies in criminal cases lies with the court at the minute, and it applies a legal formula. The law says that if it is in the interests of justice that the person receives free legal aid, the court makes an order to that effect.

The access to justice review that Mark is referring to has recommended that we look again at replacing that with a statutory means test or eligibility test, and we will do that, but it is likely to slow the throughput of cases — that is the first thing — because cases would first have to be referred to the legal aid assessment team or some other body to undertake the means test. My experience is that the preponderance of people coming before the criminal courts who apply for legal aid tend to be on benefits or something else that will automatically qualify them for legal aid.

Mr McMullan: What would slow up the system, if the majority coming before your courts —

The Chairperson (Mr Swann): Oliver, could I bring you back to just some of the things in the report? We are getting down the road.

Mr McMullan: I am coming to one part of the report here, but I have been sitting very patient all evening. The report states:

"In March 2013, the Agency received instruction from the Department to stop this practice as the legislation allows the Agency to investigate an individual's means only if they merit further investigation."

Can you explain that?

Mr Lavery: Yes. The Legal Services Commission at that time had introduced administratively an arrangement that, when someone was convicted of a criminal offence, required it to undertake an assessment of their financial means. It did so, I think, with the best of intentions so that it could identify cases where a convicted person, although they had got legal aid, had assets that should have been disclosed. We advised it to stop that, because there was no legal authority for it to do that. The way that this recovery of defence costs legislation is designed is what Nick called a longstop. The main test to see if people have means or not is conducted by the court that grants the person legal aid at the beginning. This is a longstop that has been put in by the legislature so that if there is a belief that someone convicted of a criminal offence may have some assets and that is brought to the attention of the commission — now the agency — it can undertake an investigation. It is a reserved power — a sort of belt and braces arrangement — but the main test is the one applied by the court when the person applies for legal aid in the first place. With respect, it should be a reassurance to you that of the 28 cases investigated, there was no substance to the suggestion that the person had the means to pay. Some were bankrupt and some were on benefits. There was only one, and that is subject to enforcement proceedings.

Mr McMullan: It says here that they are looking at subordinate legislation.

Mr McGuckin: What we said was that we would undertake to review the procedure, and if there were to be a change in it — if we were going to change the practice — it would require subordinate legislation to make that change. This will form part of the work that we are taking forward during the course of this year.

Mr Lavery: The first recommendation that the Audit Office has made in the report is that the existing arrangements for recovery of defence costs should be examined by the Department to determine whether they can be enhanced to achieve greater impact, and we are undertaking to do that. I want you to understand that it is operating and seems to bear out our expectation that most people do not get legal aid in criminal cases who have the means to pay for them. That must be a reassurance to the Committee that the test applied by the court is working. In 27 of the 28 cases examined, there was no basis for any recovery.

Mr McMullan: Do you have any contact with the assets recovery services?

Mr Lavery: The assets recovery people? Paul can take that question.

Mr Andrews: In effect we do, by saying to them, "Here is a power, you can come to us if you have any information on a case". What we do not have is any role in their investigations or their statutory responsibilities. Our role is to go to the court and say, "This person has got assets."

Mr McMullan: Do you swap information? Do you talk to each other if there is a case?

Mr Andrews: I think that we can receive information from them. We would not have any information to give them, because we have no information about the individual.

Mr McMullan: Do you ask them for information?

Mr Andrews: No. That is the point; the legislation envisages us receiving information, not asking for it. We have said to people that we are open for business, but we cannot go and ask them about it.

Mr McMullan: So, the legislation allows you to take information but not ask for it?

Mr Andrews: That is why we could not request the information about people's means.

Mr Lavery: What has been done is that Paul's people have been to the Public Prosecution Service and said that if there are cases where it suspects that a person has assets that they have not

disclosed, it can bring those to our attention and we can investigate them. We said the same to the police, and they have issued a circular to investigating officers to alert them to this power. It is not as though we are doing nothing. The people most likely to pick up the fact that somebody has assets would be those such as the police investigating the crime or the Public Prosecution Service. The same would apply to an asset recovery agency situation as well. We will review this and see whether further, more proactive steps are required, but it is working the way it is designed to work, and it works as a reserve power.

Mr McMullan: When it comes to the assets you are talking about and the individual, do those assets have to be in the individual's name?

Mr Lavery: I am pretty sure that is right, but Paul is across the detail of that.

Mr Andrews: In effect, that individual has to have the claim on the asset, although there would be an argument if someone had divested themselves of the asset for the purpose of avoiding the order and we could say that that was what was happening. That is a standard provision in legal aid; you cannot deny yourself assets that you have to get legal aid. The same principle would apply here. You cannot give your dwelling to someone else simply to avoid the charge.

Mr McMullan: You have somebody living in a house; his name is not on the house. Is the house his asset, if he is living there?

Mr Andrews: It is not his asset if he has never owned it. I suspect that that is the short answer. He would have to have a claim to the asset.

Mr McMullan: You could drive a coach and horses through this. There are people sitting out there rubbing their hands.

Ms Lockhart: I think we are getting near the end. I welcome you to the Committee meeting. I draw your attention to paragraphs 4.2, 4.3 and figure 6. At the outset, I will make a few general comments. I am new to the Committee. What I have heard today has been alarming and enlightening. I have to make the point that you are all very educated individuals, but, from what I am seeing, you are not getting the basics right. It is slightly embarrassing. There needs to be a degree of humility around the fact that the basics are not right, particularly around information systems and the processing of data. Data is key in today's society, and information is power. The report continually highlights the lack of information and data to back things up. So, I think there needs to be a degree of humility around that. Paragraphs 4.2 and 4.3, along with figure 6, illustrate that there has been a consistent underfunding of the legal aid system in Northern Ireland. My first question around that is this: why were the resources allocated to fund the system not more closely aligned to the expenditure levels? Figure 6 shows very clearly that the budget is consistently different from the actual spend. Will you give us more information around that?

Mr Perry: Certainly. I can make two points at the outset. First, you are right; there has been a gap between the opening position in terms of the budget allocated to the commission, or the agency as it now is, and their forecast demand. At the same time, though, legal aid has been funded to appropriate levels, despite major pressure on the Department's budget and fluctuating demand levels in each of the years over this period. The reason for that gap is that, when the budget for the Department of Justice was set in 2010 at the devolution of justice, it was set for a four-year period and it was ring-fenced. Ring-fencing did not mean that it was protected. It meant that the DOJ, through the Barnett consequentials, took the full hit of cuts to the Home Office and the MOJ. We were ring-fenced to prevent that from impacting on the rest of the Northern Ireland block. That is the background to it.

Within that ring-fenced budget, the legal aid component was on the downward trajectory from 2010 to 2014, although demand was rising. As a result, the Department was not in a position, at the beginning of every year, to give the commission what it said it needed. Instead, we moved funds into the agency, or the commission, in the course of the year. We did that for four reasons. First, to establish that what they said they needed at the outset was actually what they were going to end up paying out and to see what the trend of spend was. Secondly, it gave us time to drive out savings from elsewhere in the Department, because, within the budget, the policing element, which is two thirds of the budget, was also ring-fenced, so we could not move money out of the policing side. We had to drive out savings from the rest of the Department. Thirdly, in each of the years, we needed to wait

until the marching season was over to see whether the police needed urgent additional resources for operational reasons. Fourthly, we were waiting to see if the Department of Finance might be able to help us in monitoring rounds. For that reason, we allocated additional resources to the agency in the course of the year. We managed successfully to do that so that it was able to meet its obligations with regard to paying legal aid. I accept that that caused some administrative inefficiency and inconvenience to the agency, but, under the circumstances, when the DOJ budget reduced by well over 7% between 2011 and 2015, the fact that we were able to meet the legal aid requirement, despite major fluctuations in demand, was a very pragmatic and, in the end, successful way of managing the budget.

Ms Lockhart: Thank you. Going back to the data issue — as a body, were you not able to see that the demand was increasing, and take that back to the Department or to the Justice Minister?

Mr Perry: We could see that demand was rising but we had limited flexibility to deal with it, except over time, because there was a double ring-fence. We were ring-fenced from the rest of the Northern Ireland block, and policing was ring-fenced in the Department's budget, so we had to gather up enough money to meet the demands that developed. The demand would have been greater if our reforms had not started kicking in about halfway through the period. There were some issues early in the period about the accuracy of the commission's forecast and that was one reason to wait and see what the actual spend was developing into, in the course of the year. We had the information during the year to take the necessary adjusting action with the budget but it took quite a lot of effort in each of those years.

Ms Lockhart: How, in this mandate, is it different? Is it formulated differently?

Mr Perry: No, it is better because the gap between the forecast this year for the agency and the allocated budget is less than 7%. I hope that the reforms that we have been discussing this afternoon will help to close that gap further. That reflects better forecasting and additional funding that we got from the Executive. It reflects the impact of the reforms that we have already introduced. That gives us a more manageable situation.

Ms Lockhart: I have a general question around case management. Some work was done, or it was mentioned somewhere in an action plan, around the implementation of a case management system to have better information and maybe that goes back to the digitalisation of the system. Where are you with that? Who is responsible for it and what way are you taking it forward? I would have thought that it should have been implemented by now.

Mr Andrews: I would have liked to have had it implemented but we did not get to that point. We were one of the 16 by16 digital transformation projects within the Executive's arm. We are actively working on this with digital transformation services from the Department of Finance. We are finalising a business case and have already gone through the process of identifying requirements with our suppliers. We have articulated those and, subject to the business plan being approved, we will enter what they refer to as "alpha stage" which is the first actual mock development stage, in this financial year.

Ms Lockhart: Are you heading that?

Mr Andrews: I am the senior responsible owner for that. Yes.

Ms Lockhart: Do you have a team of people around you?

Mr Andrews: We do, and we are supplementing that to make sure that we can deliver that aggressively because it is vital to all of the things that we have talked about today.

Ms Lockhart: I am conscious that we need to invest in the system and ensure that we have a system that works. In the interim, the things that have gone on are very alarming and measures need to be taken.

The Chairperson (Mr Swann): What is the figure of the 7% difference between your allocation and your forecasting?

Mr Perry: Mark or Nick might have those in their head? It is about £7 million.

The Chairperson (Mr Swann): Sorry, what are your figures? What are you allocating and what are you forecasting?

Mr Andrews: The figure is, roughly, from £94 million to £101 million.

The Chairperson (Mr Swann): Is there an allocation of £94 million?

Mr Andrews: Yes.

The Chairperson (Mr Swann): That is up from £75 million for the past two financial years.

Mr Andrews: Yes. I think last year the opening allocation was —

The Chairperson (Mr Swann): Sorry, is there an allocation of £94 million for years 2013-14 and 2014-15. How much did you say your forecasting was?

Mr Andrews: The figure is around £101 million against the £94 million.

Ms Gildernew: Following on from that, it is not really bridging the gap between the departmental allocation and the actual cost. Your departmental allocation has gone up considerably; I think that it is more in line with what the actual cost is. The question is this: why has the allocation not —

Mr Perry: The requirement will come down.

Ms Gildernew: The requirement has come down a wee bit, but the allocation has gone up an awful lot.

Mr Perry: Paying for the sort of legal aid system we will have when the current reforms have worked through, which appears to have the support of the Assembly, will cost somewhere between £80 million and £90 million a year. The original allocation in 2010 had driven the legal aid baseline well below that. The top-up this year from the Executive has brought the core baseline back to a reasonable level, and we are closing the gap between that and the requirement through these reforms.

Ms Gildernew: How was the top-up managed? Was that done through monitoring rounds? How did you do it?

Mr Perry: There was an allocation on the baseline in this year's allocation at the outset from the Department of Finance.

Ms Gildernew: OK. I will take you to paragraph 4.5, on weekly payment limits. It does not make an awful lot of sense to me that there was a limit set on what you could pay out. All claims received were processed, but a backlog was created in claims getting paid. I know that you have brought the limit up, but why do you still do that? It is really inefficient.

Mr Perry: We did it at that particular time simply to make sure that the agency did not bust its budget nor that of the Department while we were trying to free up resources to put into the agency to pay what it needed. So, it was simply about setting a regulating rate for payments going out while we found the additional resources to allow the pace to increase. I think that that is what happened.

Mr Andrews: To go to the end of your question, we do not have that system in place in this financial year. The increase in the allocation at the start of the year has enabled us to process bills according to our capacity and pay them. So, there is no artificial gap in the expenditure in this financial year.

Ms Gildernew: On the historical cases of un-billed work — I know that we had a bit of a discussion about this earlier — does the Department know how many certificates have been issued and how many are still live?

Mr Andrews: The answer to the first question is yes. At the risk of going back into management information, the answer to the second question is that that is one of the works in progress. What we have found is that a legal aid case can be settled in such a way that the legal aid fund will never have to pay a bill. I should explain this. If you have a road traffic accident, for example, and win your case, the other side will pay your costs, including your legal costs. So, the legal aid fund will not have to pay for that case. However, what happens is that the solicitor may not advise us that the case has been won, so that case is still open as a live case in our system. We are going through the cases and effectively trying to purge these ones from the system. That comes into the qualification for provisions to ensure that we know only the live cases that are there. There is an extensive programme of work in hand for that. To go back to your earlier question about whether there is a compliance regime in the registration scheme; when we go in, we ask, "Why were we not informed that the case was closed? This has been left as an open liability for us", I think the solicitor basically takes the view that he will never ask us for any money. This is true, but there is another side to it, which is that is that we need to close the case down so that we do not have to provide for the possibility of having to pay for it.

Ms Gildernew: Can a timescale be requested? If there are live cases outstanding, surely to God there is something you can do to put a lid on them and say, "OK. That's it. If they are not dealt with by such a date, you are forgoing the money for that". Surely, administering all of this is taking up departmental resources.

Mr Andrews: It is. I think that we are trying to come to the same conclusion that you have articulated. I do not think that we can do it just as you have articulated, if I may say so, because cases may still be before the court. We have to distinguish between things that differ. There are cases that are before the court and are truly live cases; those that have closed and where we are awaiting the bill, and there needs to be a shortening of that timescale; and those that are closed and where we will never get a bill and where we need to be told about that by the practitioners so that we can close them down. So there are three distinct areas that we are addressing.

Ms Gildernew: And we must not confuse them. Cases in the third category need to be guillotined and taken out of the system. I accept the first category; there may be cases in family law or relating to children that are going to be live over a period of years. One of the things I was thinking about earlier, when we were talking, is that this is taxpayers' money, and quite a bit of it. It is in the region of £100 million per annum. Earlier, Paul, you said something about clinical negligence cases, which tend to take an awfully long time. Now that the DOJ is at the Executive table with the Department of Health, can any work be done to close down clinical negligence cases, which drag on for ever? The Department of Health seems to keep pushing them back to avoid payment. As a result, the taxpayer is paying the costs of the Department of Health and the defendant. It is a double whammy, where a person has been very badly treated in a hospital or by health professionals and is then engaged in a legal battle that takes for ever. I know such cases — I deal with them in my constituency — where families are waiting years for them to be closed, yet the taxpayer is paying twice. What work is being done to ensure that this ends?

Mr Lavery: I am not aware of a reason why you would not allow someone to seek compensation in that situation. Lawyers tend to take longer over a clinical negligence case because they want to see the medical condition stabilised; so, inherently, these cases are just going to take longer. The more fundamental point is that they are acknowledged to be a challenging type of litigation. The Chief Justice has set up a review of civil justice which, I understand, will look at this type of litigation among others. It is being led by one of the senior Court of Appeal judges and we are expecting to see a report on that. I do not know what it will say about this, but it is one of the aspects of civil justice that the review led by Lord Justice Gillen will be looking at. There is a review and we, as a Department, look forward to see what the recommendations are. I know that the judge has acknowledged that the conduct of these cases is prolonged and problematic.

Your question is really whether the Government should, in some way, get behind all this and look at the "double whammy", as you call it. Our responsibility is to ensure that a person who has perhaps sustained a life-changing condition as a result of alleged medical malpractice has the ability to access justice. We regard that as our job. It is important that they have that opportunity. There might be a case for reviewing the medical defence approach but, as I said to you, I would prefer to wait and see what the review of civil justice says about that. If it gives us some suggestions about improving the process, well and good. It will be looking at aspects such as more effective case management. I really do not know what the recommendations will be. Our job, on this side of the government machine, is to make sure that people who have sustained life-changing conditions because of medical malpractice are able to access justice.

Ms Gildernew: I accept that there is such a thing as human fallibility. People make mistakes. However, surely there are cases in other jurisdictions and in other parts of the world where similar things have happened. If the Department of Health were prepared to put its hands up and say, "A mistake was made. We accept that, and we know, from precedents set already, what the financial package needs to be", things could be settled a lot more quickly. It is bad enough that your life is destroyed by a mistake, first of all, never mind having a court case that can take 12, 16 or 18 years and a family being put through all that. It is an incredible situation that cannot be allowed to continue.

Mr Lavery: There are probably countries where it is even worse. The United States is probably the classic example of extensive expensive medical litigation. Other countries have a no-fault system in which fault is not disputed. What slows cases down is people not admitting fallibility and that a mistake was made and, therefore, the case is defended and fought ad infinitum. In the past, countries such as New Zealand have introduced a no-fault system. All the person has to establish is that their health was —

Ms Gildernew: Adversely affected?

Mr Lavery: — changed adversely. The case then goes to an assessment of the appropriate compensation. They have taken dispute out of the case; but, with respect, that is as much your job as it is ours. That needs a change in the law. It is an option. Our system is based on contesting liability. We need to change that. Our Department is responsible for legal aid; it is not responsible for that issue —

Ms Gildernew: But the point I am making — I will close on this — is that taxpayers are paying twice.

Mr Lavery: I understand entirely.

Ms Gildernew: They are paying for the Department to defend its practitioners and for the legal case. It is a double whammy for the taxpayer.

Mr Lavery: And probably all the associated costs of supporting somebody —

Mr Andrews: Not to frustrate the Chair, but, if the legally assisted person wins, Health pays for it twice. We do not pay for it, which is the other significant thing.

Ms Gildernew: Taxpayers still pick up the bill.

Mr Andrews: Yes, but there is a motivation to look at how the system works through that prism.

Ms Lockhart: Going back to management information, paragraphs 4.9 and 4.11 describe how, since 2003, the methods used to estimate the total value of outstanding legal aid certificates have been inadequate. Paragraph 4.11 states:

> *"The key assumptions used in the forecasting model are undermined by the quality of data available".*

I do not want to labour that point, but I want a few headline points about how you are going to improve it. What can we expect to improve it?

Mr Andrews: There is an active working group in which finance colleagues in the Department and the agency are working very closely. We have made progress. In other contexts, the C&AG has recognised the progress that we have made. The difficulty is that legal aid is a complicated area. I will not say that again in the course of this session. We need to try to simplify the assumptions we make to enable us to have an evidence base to support it and do so in a way that does not compromise the accuracy of the forecast. We have a programme of work going on that, in provisions, deals with the points that Ms Gildernew was talking about in removing the tail of cases. There is a programme of work looking at refining the lifecycle. By closing down cases, we clean up the lifecycle issue. We are looking at the average costs in a way that tries to bring things together that are the same and keep things separate that are different. We also have a programme of work to examine how we strip out the cases for which we do not expect to receive bills for legitimate reasons and make that part of the process. You will start to see that coming through in our next forecast, but it is an

iterative process; we need to simplify the complexity of the process but do so with transparency so that it can be audited and its accuracy assessed.

Ms Lockhart: When can we expect to see this transformed system?

Mr Andrews: For financial forecasting, we are going to have our first effort in the October monitoring round. Then, we are going to build on that. The provisions will be enhanced so that there will be work done to address the provisions for the current financial year. Some of the work will extend beyond that into the next financial year to deal with the tail of cases that Ms Gildernew was talking about. That will be a programme of work in the next two years, but there will be progress made on each iteration of it.

The Chairperson (Mr Swann): Is everyone content? I am generally still concerned, gentlemen, I suppose even more concerned on hearing that the Department's accounts are being qualified because of the ramifications from legal aid. I can assure you that this is something that we will be taking a closer look at. We will go into closed session after this session to see whether we need to expand on this evidence session.

Is there anything that the Comptroller and Auditor General would like to add?

Mr Kieran Donnelly (Northern Ireland Audit Office): Just to elaborate on the provisions issue, that has been a problem for years and years. I will be absolutely honest: I have not seen much progress on it. The acid test of improvement is when I lift my qualification. It is not rocket science; it is capable of being cracked. Carla is absolutely right: it is about basic management information. It can be done; it is doable. It needs a bit of work.

The Chairperson (Mr Swann): OK, thank you. Accounting officer, do you have anything?

Ms Alison Caldwell (Department of Finance): No, thank you, Chair.

The Chairperson (Mr Swann): OK, gentlemen, thank you very much for your time.