EXPLANATORY MEMORANDUM TO

The Criminal Aid Certificates Rules (Northern Ireland) 2012

SR 2012 No. 135

1.0 Introduction

1.1 This Explanatory Memorandum has been prepared by the Department of Justice to accompany the Statutory Rules (details above), which are laid before the Northern Ireland Assembly.

1.2 The Statutory Rules are made under Article 36 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order") and are subject to the negative resolution procedure. Before the Department of Justice can make rules under Article 36 it is under a statutory requirement to consult with the Lord Chief Justice, the Attorney General, and, where appropriate, the Crown Court Rules Committee, the County Court Rules Committee and the Magistrates' Courts Rules Committee.

2.0 Purpose

2.1 The new Rules make provision regarding the granting of free legal aid under Part III of the 1981 Order and section 184 of the Extradition Act 2003 ("the 2003 Act"). They also act as a consolidating instrument to replace the Legal Aid Certificates Rules (Northern Ireland) 1966, the Legal Aid (Defence Certificates) Rules (Northern Ireland) 1966 and the Legal Aid (Appeal Aid Certificates) Rules (Northern Ireland) 1966, which are to be revoked. The only substantive change being made is to prescribe new criteria for the assignment of counsel in Crown Court cases.

2.2 Rule 2 provides for the manner in which applications for the grant of a criminal aid certificate are to be recorded. Rules 3 to 6 prescribe the manner in which solicitors and counsel are to be assigned in pursuance of such certificates. Rule 7, together with the Schedule, prescribes the form of criminal aid certificates to be used when free legal aid is granted: for proceedings in the magistrates' court under Article 28 of the 1981 Order; for diversionary youth conferences under Article 28A of the 1981 Order; for proceedings in the Crown Court under Article 29 of the 1981 Order; for appeals to the county court under Article 30 of the 1981 Order; and for extradition proceedings under section 184 of the 2003 Act.

3.0 Background

3.1 The legal aid system here has it origins in the Legal Aid and Advice Act (Northern Ireland) 1965 ("the 1965 Act"). Using powers provided by that Act, separate rules were made governing the granting of legal aid for defendants in the magistrates' court [the Legal Aid Certificates Rules (Northern Ireland) 1966], the Crown Court [the Legal Aid (Defence Certificates) Rules (Northern Ireland) 1966] and the County Court [the Legal Aid (Appeal Aid Certificates) Rules (Northern Ireland) 1966].

3.2 The 1981 Order repealed the 1965 Act and put in place a new system for legal aid. Articles 28 to 30 of the 1981 Order provide for the granting of a criminal aid certificate, while Article 36(3) provides the power to make rules to prescribe the form of criminal aid certificates and the manner in which counsel and solicitors are to be assigned in pursuance of such certificates. On the basis that no separate rules for this purpose were ever made under Article 36, the three sets of rules made in 1966 remain the pertinent pieces of legislation in Northern Ireland.

Assignment of counsel in the Crown Court

3.3 Rule 2(4) of the Legal Aid (Defence Certificates) Rules (Northern Ireland) 1966 provides that where the charge is one of murder, or the case appears to present exceptional difficulties, the court may certify that in its opinion 'the interests of justice' require that the person charged shall have the assistance of two counsel. In Northern Ireland, it is usual for the magistrates' court to apply this test following the making of an order committing the defendant for trial at the Crown Court.

3.4 Consideration of the legislative position in England and Wales indicated that the regulations applied there were more prescriptive than in Northern Ireland. This in turn led the Northern Ireland Courts and Tribunals Service ("NICTS") to carry out a comparison of the incidences of the assignment of two counsel between the jurisdictions. This indicated that for indictable only offences 58% of cases in Northern Ireland were assigned two counsel, compared to 5% in England and Wales.

Main conclusion reached

3.5 In light of the results of the comparison exercise, NICTS concluded that it would be appropriate to make statutory rules amending the criteria for assigning two counsel in the Crown Court and requiring that decision to be taken by a judge of the court before which the assisted person is to be tried. The new rules would also consolidate and replace the three sets of rules from 1966.

4.0 Consultation

4.1 The NICTS issued a consultation document on 25 September 2009 entitled "Reform of legal representation provided by way of criminal legal aid at the Crown Court", The consultation closed on 26 February 2010. NICTS received three written responses: from the Police Service of Northern Ireland, the Democratic Unionist Party and the Bar Council of Northern Ireland. Subsequently, the Attorney General wrote to NICTS about its proposals.

4.2 In general, the Bar Council did not support the proposals and pointed out certain criteria where the proposed new rule could lead to a potential breach of Article 6 of the European Convention on Human Rights. The Bar made the point that if a case could not be adequately presented except by a certain combination of two counsel then prescribing any further conditions which would reduce that representation, would in effect mean that a defendant would not be adequately represented; and this would therefore be in breach of Article 6 of ECHR. NICTS accepted this point and made changes to the criteria to address this.

4.3 In line with the statutory requirement placed on the Department under Article 36 of the 1981 Order, NICTS consulted the Lord Chief Justice, the Attorney General, the Crown Court and the Magistrates' Court Rules Committees. As part of this consultation, the Crown Court Rules Committee suggested a number of changes to the criteria. The main concern was that the proposals were overly-prescriptive and restricted the discretion of the trial judge to certify for the appropriate level of representation in meritorious cases. Again, the NICTS accepted these points and altered the criteria. To meet these concerns, the requirement for the case to be "exceptional compared with the generality of cases involving similar offences" was removed from the proposed criteria. In addition, the criteria in respect of the number of prosecution witnesses and the pages of prosecution evidence were removed.

4.4 The criteria as set out in the consultation document and the post consultation position are set out in **Annex A** to this document.

5.0 Equality Impact

5.1 The proposed changes have been the subject of an equality impact assessment (EQIA). NICTS sought information from interested parties in an eight week public consultation exercise that closed on 19 November 2010. The Equality Commission and the Committee on the Administration of Justice both submitted responses.

5.2 The final report arising out of the EQIA was approved by the Minister and sent to the Committee for Justice on 27 January 2011. A copy of the report is attached at **Annex B** to this document.

6.0 Regulatory Impact

6.1 The Rules do not impose any restrictions on businesses. They make provision regarding the granting of free legal aid in the courts. They also act as a consolidating instrument to replace the Legal Aid Certificates Rules (Northern Ireland) 1966, the Legal Aid (Defence Certificates) Rules (Northern Ireland) 1966 and the Legal Aid (Appeal Aid Certificates) Rules (Northern Ireland) 1966, which are to be revoked. A copy of the Impact Assessment undertaken in August 2009 is attached at **Annex C**.

7.0 Financial implications

7.1 The proposal is part of a programme of legal aid reform with the principal aim being to reduce legal aid expenditure to £75m by 2013/14. It is anticipated that the proposal, when implemented, will generate savings of between £0.6m and £0.8m annually. There are no costs associated with implementing this proposal.

8.0 Section 24 of the Northern Ireland Act 1998

8.1 The Rules are considered to be compatible with section 24 of the Northern Ireland Act 1998.

9.0 EU Implications

9.1 Not applicable.

10.0 Parity or Replicatory Measure

10.1 Not applicable.

11.0 Additional Information

11.1 None.

Annex A

CRITERIA FOR ASSIGNING TWO COUNSEL IN CROWN COURT CASES

1.0 Existing position in Northern Ireland

1.1 Rule 2(4) of the Legal Aid (Defence Certificates) Rules (Northern Ireland) 1966 provides that where the charge is one of murder, or the cases appears to present exceptional difficulties, the District Judge (Magistrates' Court) or a Crown Court Judge may certify that in his opinion the 'interests of justice' require that the assisted person shall have the assistance of two counsel.

2.0 Initial consultation position

2.1 The Department's initial consultation position was as follows:

"A criminal aid certificate may be granted in respect of a Queen's Counsel with a junior counsel if and only if:

(a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact which could not be adequately presented except by a Queen's Counsel assisted by a junior counsel; and

(b) either:

(i) the case for the assisted person is exceptional compared with the generality of cases involving similar offences; or

(ii) a Queen's counsel has been instructed on behalf of the prosecution and either the number of prosecution witnesses exceeds 80 or the number of pages of prosecution evidence exceeds 1,000."

2.2 "A criminal aid certificate may be granted in respect of two junior counsel if and only if:

(a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact which could not be adequately presented by one junior counsel; and

(b) either:

(i) two or more counsel have been instructed on behalf of the prosecution;

(ii) the case for the assisted person is exceptional compared with the generality of cases involving similar offences;

(iii) the number of prosecution witnesses exceeds 80; or

(iv) the number of pages of prosecution evidence exceeds 1,000."

2.3 A decision to grant a certificate for a second counsel would only be made by a judge of the court before which the assisted person is to be tried. Applications must be in writing and specify the grounds relied upon for the assignment of a second counsel. A court may require written advice from junior counsel already assigned by the District Judge.

3.0 Post consultation position

3.1 The Department's post consultation position is as follows:

A criminal aid certificate may be granted in respect of two counsel where the charge against the assisted person is one of murder or where the case appears to present exceptional difficulties. For these purposes the term "exceptional" means that the case for or against the assisted person involves substantial novel or complex issues of law or fact, such that it could not be adequately presented by one counsel.

3.2 Every application for two counsel must be in writing specifying the grounds of the application and the relevant judge shall record, in writing, the reason for granting or refusing the application.

3.3 Where a judge of the court before which the assisted person is to be tried is of the opinion that in the interests of justice a criminal aid certificate in respect of two counsel must be granted in order to protect the assisted person's rights under the Human Rights Act 1998, the judge shall grant such a certificate and shall record his decision in writing.

Annex B

REFORM OF LEGAL REPRESENTATION PROVIDED BY WAY OF CRIMINAL LEGAL AID IN THE CROWN COURT

EQUALITY IMPACT ASSESSMENT (EQIA)

1.0 Introduction

1.1 Under Section 75 of the Northern Ireland Act 1998, the Northern Ireland Courts and Tribunals Service (NICTS) is required to give consideration to whether a policy has a differential impact:

- between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- between men and woman generally;
- between persons with a disability and persons without; and
- between persons with dependents and persons without.

1.2 In addition, consideration has to be given to the nature and extent of that impact and whether such impact is justifiable.

1.3 In line with the NICTS's Equality Scheme the changes proposed in the Reform of Legal Representation at the Crown Court consultation documentation have therefore been the subject of an equality screening exercise. In this case, the NICTS concluded that a full EQIA should be carried out on the proposals and sought information from interested parties in an 8 week public consultation exercise that closed on 19 November 2010. The equality consultation document for the proposed changes and the completed screening form are available on the NICTS's website at www.courtsni.gov.uk.

2.0 Overview of proposed changes

2.1 It is proposed that new criteria governing the level of representation in Crown Court cases should be introduced in Northern Ireland. At present when a court in Northern Ireland certifies that a defendant should have the assistance of two counsel, in practice this means a senior counsel assisted by a junior counsel. The new provisions would provide for the certification by a court of:

(i) a senior counsel assisted by a junior counsel; or

(ii) two junior counsel.

2.2 The provisions in England and Wales contain criteria in respect of the number of prosecution witnesses and the number of pages of prosecution evidence. The NICTS considers that such criteria are not appropriate in this jurisdiction on the basis that they would rarely be

met. Accordingly, these criteria have been excluded from NICTS's proposal.

2.3 In respect of certifying for a senior counsel assisted by a junior counsel the following criteria are proposed for Northern Ireland:

(1) a criminal aid certificate may be granted in respect of a senior counsel with a junior counsel if and only if:

(a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact such that it could not be adequately presented except by a senior counsel assisted by a junior counsel; or

(b) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact and a senior counsel has been instructed on behalf of the prosecution.

2.4 In respect of certifying for two junior counsel the following criteria are proposed for Northern Ireland:

(1) a criminal aid certificate may be granted in respect of more than one junior counsel if and only if:

(a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact such that it could not be adequately presented by a single counsel; or

(b) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact and two or more counsel have been instructed on behalf of the prosecution.

.

3.0 Summary of EQIA consultation responses

3.1 The NICTS received 4 responses to its EQIA consultation from the following bodies, namely:

- the Equality Commission;
- the Committee on the Administration of Justice;
- Disability Action; and
- Newtownabbey District Policing Partnership.

3.2 Summaries of the responses are set out below with NICTS views provided in italics.

The Equality Commission

3.3 The Equality Commission advised that NICTS should take care in the use of terms when publishing consultation documents to avoid any misunderstandings. Moreover, NICTS should refer back to the commitments in its equality scheme to ensure that the appropriate process is followed and that decisions are taken accordingly. The Commission advised that that scheme would commit NICTS to undertaking a screening exercise to decide whether a full EQIA is required.

3.4 In line with the NICTS's Equality Scheme a screening exercise on these proposals was completed that concluded that, on balance, it would be appropriate to conduct a full EQIA on the proposals.

3.5 The NICTS is aware that EQIAs are conducted in seven separate elements, as follows.

(1) Defining the aims of the policy.
(2) Consideration of available data and research.
(3) Assessment of impacts.
(4) Consideration of
- *measures which might mitigate any adverse impact; and*
- *alternative policies which might better achieve the promotion of equality of opportunity.*

(5) Consultation.
(6) Decision by public authority and publication of report on results of EQIA.
(7) Monitoring for adverse impact in the future and publication of the results of such monitoring.

3.6 The NICTS's position is that the conduct of the EQIA on these proposals has been in compliance with the elements set out above and that the consultation entitled "Consultation on Section 75 Equality Impact Assessment of the Proposals on Reform of legal representation provided by way of legal aid at the Crown Court", that closed on 19 November 2010, forms part of the consultation process in element (5) above. The publication of this report complies with element (6) above and the NICTS will monitor and report on any adverse impact in the future in line with element (7) above.

The Committee on the Administration of Justice

3.7 The Committee on the Administration of Justice (CAJ) welcomed NICTS's decision to conduct a full EQIA but expressed concerns that there is insufficient data within the consultation document to consider fully the impact of the proposals on the section 75 groups. CAJ commented that where data has been provided it found an impact on young males but that NICTS has neither taken action to assess how

this may impact on the promotion of equal opportunity, nor considered mitigating measures or alternative policies which might better achieve the promotion of equal opportunity.

3.8 NICTS accepts that young males who are defendants may be affected more than any other Section 75 category. However, the impact will only be on defendants - not on young males as a category. While many defendants may be innocent this group includes those young males who chose to commit crime. NICTS cannot mitigate, nor promote equal opportunity among a self-selecting group of individuals.

3.9 CAJ suggested that NICTS should address gaps in the data in relation to Crown Court Defendants and legal representatives, and recommended that NICTS consider how such data could be collected in the future.

3.10 The NICTS accepts that it has little data on which to conclude this EQIA. The NICTS would point out that data on each section 75 category is not routinely available in relation to criminal justice matters. There are sensitivities around collecting personal characteristics such as religion, political opinion, sexual orientation etc within the criminal justice process. There are also issues associated with confidentiality and data protection and concerns about the use to which such information might be put. It was with these difficulties in mind that the NICTS designed and issued its consultation document in an attempt to obtain further information. In addition, the NICTS actively sought data on solicitors and barristers from the Law Society and the Bar Council. However, this proved unsuccessful. Attempting to collect such data, without any guarantee of success, would be a time-consuming process which would delay the implementation of several proposals on the reform of criminal legal aid.

3.11 In terms of assessing the impacts on legal representatives, the NICTS has considered and determined the following questions, in line with the guidance issued by the Equality Commission.

- *Does the quantitative data reveal any differential impact on any of the groups?* ***Yes***
- *Does the qualitative or evaluative data reveal any differential impact on any of the groups?* ***Yes***
- *In there a difference in the conclusions reached using quantitative and qualitative methods?* ***No***
- *Is the differential impact an adverse one?* ***Yes***
- *Is the policy directly or indirectly discriminatory?* ***Yes, indirectly***
- *Is the policy intended to increase equality of opportunity by permitting or requiring affirmative or positive action or action to redress disadvantages?* ***No, but NICTS consider it is lawful***
- *Is there any alternative measure which would achieve the desired aim without the adverse impact identified?* ***No***

- *Is there any measure which would mitigate the adverse impact identified?* ***No***
- *Are there additional measures which would further equality of opportunity in the context of this policy?* ***No***

Disability Action

3.12 Disability Action expressed no specific view on the policy.

Newtownabbey District Policing Partnership

3.13 The Newtownabbey District Policing Partnership responded as follows:

Is there any evidence of higher or lower participation or uptake by different groups in relation to the scheme within any of the nine categories? This would appear not to be the case.

Is there evidence or indication that different groups have different needs, experiences, issues and priorities in relation to the scheme? Again this would appear not to be the case.

Is there an opportunity better to promote equality of opportunity or better relations by altering the policy or working with others in Government or the larger community? It is considered that this would not be necessary.

The NICTS agrees with the view of Newtownabbey District Policing Partnership.

4.0 The Way Forward

The NICTS has noted the concerns raised by the Equality Commission and the Committee on the Administration of Justice, in particular the lack of specific data on the Section 75 make up of both the defendant base and legal representatives. However, to meet the aim of the proposal, that is, to bring legal aid spending within the budget of £74m by the 2013/14 financial year, it is necessary to reduce spending on legal aid. This necessitates the making of new rules setting out the circumstances in which the court may assign more than one counsel. While the NICTS accepts that the proposed rules do have a differential effect on young male defendants and Roman Catholic members of the legal profession it is satisfied that there is no way to mitigate the effects of the policy.

ANNEX C

IMPACT ASSESSMENT SUMMARY: INTERVENTION & OPTIONS

Department/Agency:	**Title:**	
Northern Ireland Court Service	Impact assessment on the reform of representation provided by way of criminal legal aid at the Crown Court.	
Stage: Initial consultation	**Version:** 1	**Date:** 25 August 2009

Available to view or download at : http://www.courtsni.gov.uk/

Contact for enquiries: Chris McGregor **Telephone:** 028 9041 2241

What is the proposal under consideration? Why is government intervention necessary?

It is proposed to introduce a new set of rules which seek to prescribe the circumstances in which two counsel may be assigned to cases at the Crown Court in Northern Ireland. These rules, which are based on current regulations in England and Wales, seek to ensure appropriate levels of representation for defendants charged with criminal offences while reducing the cost of providing criminal legal aid in Northern Ireland. Government intervention is needed to reduce unnecessary expenditure and bring greater control over the funding required to meet the fees payable to members of the legal profession.

What are the policy objectives and the intended effects?

At present total expenditure by the Northern Ireland Legal Services Commission on legal aid exceeds the Comprehensive Spending Review settlement (agreed under CSR 2008) by some £25m per annum. Historically, there has been a higher instance of more than one counsel in cases disposed of in the Crown Court in Northern Ireland. The higher instance of the use of two counsel in Northern Ireland adds to the overall cost of criminal legal aid. The new rules should assist the Northern Ireland Legal Services Commission in remaining within the CSR settlement.

What policy options have been considered? Please justify any preferred option.

1. No intervention.

2. Introduce new rules in line with England & Wales.

The preferred option is to introduce new rules prescribing the circumstances in which two counsel may be assigned to defendants in cases at the Crown Court. The higher instance of the use of more than one counsel in Northern Ireland adds to the overall cost of criminal legal aid. Government intervention is needed to reduce unnecessary expenditure and bring greater control over the funding required to meet the fees payable to members of the legal profession.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effect?

A post implantation review will be carried out one year after the commencement of the new rules to establish the percentage of cases in which more than one counsel has been assigned to defendants at the Crown Court.

Ministerial Sign-off for implementation stage impact assessment.

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister

Bridget Prentice Date 28 August 009

Summary: Analysis & Evidence

Policy option: 1	**Description:** No intervention

Annual costs	Description and scale of **key monetised costs** by 'main affected groups'
One-off (Transition) **Yr** **£0** **1** **Average annual cost** (excluding one-off) **£0**	Counsel working on cases at the Crown Court. Northern Ireland Legal Services Commission
	Total Cost (PV) **£0**
Other **key non-monetised costs** by 'main affected groups' None.	

Annual benefits	Description and scale of **key monetised benefits** by 'main affected groups'
One-off (Transition) **Yrs** **£0** **Average annual benefit** (excluding one-off) **£0**	Counsel working on cases at the Crown Court. Northern Ireland Legal Services Commission
	Total Benefit (PV) **£0**
Other **key non-monetised benefits** by 'main affected groups' None	

Key assumptions/sensitivities/risks Inadequate funding available to meet requirements.

Price Base Year N/A	Time Period Years N/A	**Net Benefit Range** (NPV) **£** N/A	**Net Benefit** (NPV Best estimate) **£** N/A

What is the geographic coverage of the policy/option?	Northern Ireland
On what date will the policy be implemented?	N/A
Which organisation will enforce the policy?	NI Court Service
What is the total annual cost of enforcement?	£0

Does enforcement comply with Hampton principles?			Yes	
Will implementation go beyond minimum EU requirements?			N/A	
What is the value of the proposed offsetting measure per year?			N/A	
What is the value of changes in greenhouse gas emissions?			N/A	
Will the proposal have a significant impact on competition?			No	
Annual cost per organisation (excluding one-off)	Micro N/A	Small N/A	Medium N/A	Large N/A
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (Increase – Decrease)		
Increase of £ N/A	Decrease of £ N/A	**Net impact £** N/A

Policy option: 2	**Description:** Introduce new rules prescribing the circumstances in which two counsel may be assigned in cases at the Crown Court in Northern Ireland.

Annual costs	Description and scale of **key monetised costs** by 'main affected groups'
One-off (Transition) **Yr 1** **£ 750,000** **Average annual cost** (excluding one-off) **£1,500,000**	These changes will affect counsel working on cases at the Crown Court. The new rules prescribing the circumstances in which two counsel may be assigned to cases at the Crown Court will lead to a reduction in the number of counsel, particularly Queens Counsel, assigned to defendants at that court tier, which would lead to a reduction in expenditure on criminal legal aid estimated at £1.5m
	Total Cost (PV) **£1,425,000**
Other **key non-monetised costs** by 'main affected groups' None. Defendants at the Crown Court will continue to be represented by two counsel where that is appropriate as is the position with defendants in England and Wales.	

Annual benefits	Description and scale of **key monetised benefits** by 'main affected groups'
One-off (Transition) **Yrs** **£ 1 and 2** **Average annual benefit** (excluding one-off) **£**	The Northern Ireland Legal Services Commission will benefit by a reduction in reports submitted by counsel to be assessed and paid.
	Total Benefit (PV) **£**
Other **key non-monetised benefits** by 'main affected groups' None	

Key assumptions/sensitivities/risks None identified.

Price Base Year N/A	Time Period Years N/A	**Net Benefit Range** (NPV) **£** N/A	**Net Benefit** (NPV Best estimate) **£** N/A

What is the geographic coverage of the policy/option?			Northern Ireland	
On what date will the policy be implemented?			February 2010	
Which organisation will enforce the policy?			NI Court Service	
What is the total annual cost of enforcement?			£0	
Does enforcement comply with Hampton principles?			Yes	
Will implementation go beyond minimum EU requirements?			N/A	
What is the value of the proposed offsetting measure per year?			N/A	
What is the value of changes in greenhouse gas emissions?			N/A	
Will the proposal have a significant impact on competition?			No	
Annual cost per organisation (excluding one-off)	Micro N/A	Small N/A	Medium N/A	Large N/A
Are any of these organisations exempt?	No	No	No	No
Impact on Admin Burdens Baseline (Increase – Decrease) Increase of £ N/A Decrease of £ N/A **Net impact £** N/A				

Evidence Base (for summary sheets)

1. Scope of the Impact Assessment

The grant of criminal legal aid in Northern Ireland is a judicial function, by virtue of Article 29(2) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. This function is usually exercised by a district judge (magistrates' courts), or in certain circumstances the trial judge. Under the Legal Aid in Criminal Cases: Defence Certificate Rules 1966 (the 1966 Rules) the court has the power to certify for more than one counsel and where this happens it is usual for a Queen's Counsel and a junior counsel to be assigned to a defendant. However, in a small number of cases three counsel have been assigned.

Introducing rules prescribing new criteria that must be met by a case before the court can certify for two counsel is part of a programme of measures to prevent unnecessary legal aid expenditure while at the same time ensuring appropriate levels of representation is available to defendants being prosecuted at the Crown Court.

2. Rationale for Government Intervention

The Government is fully committed to ensuring that the proper level of representation is available to defendants at the Crown Court for those who cannot afford to pay for it themselves. Legal aid expenditure is continuing to grow at an unsustainable rate and the current level of representation for defendants at the Crown Court is a contributing factor to that growth. Over a number of years additional funding has been required to meet demand. In doing this, funds have been obtained through reductions in other areas of expenditure within the Northern Ireland Court Service's overall budget and, where that has been insufficient to meet the demand, monetary assistance has been received from the Ministry of Justice/the Treasury. When Policing and Justice is devolved to the Northern Ireland Assembly, funding will be provided through a new Northern Ireland Department of Justice again with a finite budget. Within the Northern Ireland environment, legal aid will have to compete for funds with other areas such as health and education and it is less likely that requests for additional funding will be met by the Assembly.

If the problem is not addressed decisions will have to be taken on how to allocate funding across the various areas of legal aid spending and this would result in some payments not being made on a timely basis. Year-on-year the problem would escalate creating financial difficulties for members of the legal profession and administrative problems for the Commission. No doubt this would also lead to friction between the Commission and members of the legal professions. In short, it is imperative that the problem be addressed urgently.

3. Cost Benefit Analysis

Costs

There are no discernable costs associated with the selected option.

Benefits

To assess the benefits associated with the preferred option the Court Service obtained data on all criminal aid certificates granted for indictable only cases in Northern Ireland in the 2008/09 financial year. Analysing this data indicated that in Northern Ireland two counsel were assigned in 58% of indictable cases. An analysis of data obtained from the Ministry of Justice, indicated that the corresponding figure for England and Wales for 2008/09 was only 5%, meaning that there is a significantly higher instance of two counsel being assigned in Northern Ireland as compared to England and Wales.

Average costs for each class of case (as defined in the Legal Aid for Crown Court (Costs) Rules (Northern Ireland) 2005 (the 2005 Rules) were calculated and these averages were applied to the Northern Ireland data to align with the levels of representation in England and Wales. This indicated potential annual savings of approximately £2.0m per annum.

It should be noted that the figure of £2.0m represents the potential savings if the level of representation in Northern Ireland was brought into line with England and Wales. As the decision on the number and level of counsel being assigned will remain a judicial function, and this will depend on the circumstances surrounding each case, the level of representation cannot therefore be accurately forecast. It is therefore likely that the level of savings achieved will be less than the indicated £2.0m, and it would be appropriate to assume savings of £1.5m per annum.

Option 1: No intervention

Without intervention it is likely that the current practices in respect of the granting of two counsel would continue. While the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 is the statutory basis for the provision of legal aid and it provides for the making of rules to prescribe the manner in which counsel and solicitors are to be assigned, no such rules have yet been made. Therefore the provisions of rule 2(4) of the 1966 Rules still apply to the grant of more than one counsel. While these Rules still apply in this respect some parts of the Rules have subsequently fallen into disuse. While it can be argued that the wording of Rule 2(4) is fairly restrictive in the circumstances in which more than one counsel should be granted for cases other than murder, practices well-established over a number of years would make it difficult, if not impossible to effect the change needed.

It is not possible to predict what might happen if the legislation remains unchanged. It is probable, however, that because of the high level of cases in

which more than one counsel is granted that this level of representation would continue.

Option 2: Introduce new rules in line with England & Wales.

This option involves the making of new rules under Article 36(3) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. This enables the Lord Chancellor to make rules to prescribe the manner in which counsel are to be assigned to defendants at the Crown Court. The Court Service believes that it is appropriate to mirror the provisions made in England and Wales as they relate to the assignment of two counsel. The current provisions in England and Wales are contained in the Criminal Defence Service (General) (No.2) Regulations 2001 (the 2001 Regulations). Regulation 14 of the 2001 Regulations deals with the use of counsel in the higher criminal courts, including the Crown Court. The regulation prescribes criteria that must be met by a case before the court can certify for two counsel. The criteria include the complexity of the case, the level of representation by the prosecution, the number of prosecution witnesses and the number of pages of prosecution evidence.

The introduction of rules would have an impact on counsel in the Crown court. It will reduce the number of cases in which two counsel are instructed but it is not possible to predict the extent to which each level of counsel will be affected. Although the magistrates' court may certify for one junior counsel only this will not preclude a Queen's Counsel being assigned where the Crown Court considers this appropriate.

Summary of Options

The first option would maintain the current level of representation. However, it is not affordable. Options 2 would lead to a reduction in representation by two counsel bringing this jurisdiction more into line with England and Wales with a reduction in unnecessary legal aid expenditure. For this reason, it is the preferred option.

Enforcement and Implementation

A consultation paper and draft rules have been produced. These will be circulated to affected bodies including the Bar and the Law Society for consultation over a 13 week consultation period. The Court Service will offer to meet with both these bodies and any other interested body on request to discuss the proposals. At the end of the consultation period the draft rules will be amended to incorporate any agreed changes and will be laid before parliament before coming into operation.

Impact Test

It is likely that there will be opposition by the Bar Council to the introduction of these new rules as they will reduce the number of cases to which more than one counsel is assigned. However, the rules will provide appropriate

representation for defendants being prosecuted at the Crown Court in Northern Ireland. They will also assist in reducing unnecessary expenditure on criminal legal aid and establish the legislative framework for bringing the Northern Ireland jurisdiction more into line with England and Wales.

Consultation within government

The relevant interested body, that is, the Public Prosecution Service of Northern Ireland, was aware of the development of this proposal.

Public consultation

Copies of the consultation papers, the equality impact screening form and this assessment were made available to the public in hard copy on request or electronically via a web-site maintained by the Court Service. The consultation period ran from the week commencing 21 September 2009 to 18 December 2009.

Summary and recommendation

The recommended option is to introduce new rules prescribing criteria that must be met by a case before the court can assign two counsel to a defendant being prosecuted at the Crown Court. The criteria will be consistent with criteria applied in England and Wales. Implementation of the proposal should lead to savings of approximately £1.5m.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Types of testing undertaken	Results in Evidence Base?	Results annexed?
Competition Assessment	No	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No