

## **Legal Services Agency Northern Ireland**

**2017-18**

### **Report of the Comptroller and Auditor General**

#### **Background**

1. The Legal Services Agency Northern Ireland (LSANI), an executive agency of the Department of Justice (the Department), was established on 1 April 2015 following the dissolution of the Northern Ireland Legal Services Commission (NILSC) under the Legal Aid and Coroner's Act (Northern Ireland) 2014. LSANI has retained the functions of NILSC for administering legal aid in Northern Ireland.
2. I published a report on 21 June 2016, highlighting a range of concerns in relation to the management of legal aid.
  - The LSANI's response to suspected frauds was not effective. The LSANI's counter fraud strategy was not comprehensive or embedded in day-to-day management. Internal controls had been established but were inadequate to prevent and detect fraud and the LSANI was dependent upon third parties to identify suspected fraud.
  - The LSANI did not have an effective method to predict future legal aid expenditure. In partnership, the LSANI and Department sought to develop a new model for forecasting. Despite commendable effort, there remained a number of significant weaknesses, which compromised the model's ability to predict future expenditure reliably.
3. The Public Accounts Committee of the Northern Ireland Assembly has published two reports on the subject of legal aid; one in 2011 and another in January 2017. Both reports were critical of how NILSC and LSANI managed the legal aid budget over a number of years. The January 2017 PAC report contained five recommendations for improving the management of legal aid. (see Appendix 1)
4. The audit opinions on the annual accounts of NILSC and LSANI have been qualified since 2003 due to the lack of effective counter fraud arrangements and weaknesses in the financial estimates of provisions for legal aid liabilities in the annual accounts. The audit of the 2017-18 accounts determined that these issues remain unresolved. Consequently, I am qualifying my audit opinion on the 2017-18 financial statements of LSANI.

#### **Purpose of the Report**

5. I am required to examine, certify and report upon the financial statements prepared by LSANI under the Government Resources and Accounts Act (Northern Ireland) 2001.

6. This report is to explain the background to my qualifications on the LSANI Account for the year ended 31 March 2018 and to highlight concerns I have with the progress of the reforms to improve the governance of the legal aid system.
7. I have qualified the financial statements on the basis of two limitations in scope on my work due to insufficient evidence available to:
  - i. satisfy myself that material fraud and error did not exist within eligibility assessments of legal aid applicants and in expenditure from legal aid funds (£68.8 million); and
  - ii. support the assumptions and judgements used in the determination of the year end provision for legal aid liabilities of £135.7 million at 31 March 2018; and the resulting adjustments required to the annual legal aid expenditure.

**Limitation in scope arising from insufficient evidence that material fraud and error did not exist within legal aid expenditure**

8. The Agency disclosed legal aid expenditure in 2017-18 of £68.8m (Civil £38.3 million and Criminal £30.5 million).
9. There are two aspects to the limitation in scope in respect of fraud and error. Firstly, there was insufficient evidence to support the eligibility of certain legal aid applications: secondly, there was insufficient evidence to support the completeness and accuracy of payments to legal practitioners.

**Eligibility**

10. Means tested legal aid carries a risk that legal aid is granted to individuals who are not eligible if income details are misstated on initial application, or if changes in financial circumstances that arise during the case are not reported by the claimant. LSANI depends significantly upon third parties to verify the eligibility of legal aid applications. In criminal cases, a judge decides upon an applicant's eligibility following confirmation from the Legal Aid Assessment Office (LAAO)<sup>1</sup> that the applicant is in receipt of benefits. However, where there is doubt over the applicant's means or the merits of the case, the court has a legal obligation to resolve those doubts in favour of the applicant. Consequently, it is difficult to estimate how much of criminal legal aid is dependent upon an assessment of benefits being claimed.
11. In civil cases, solicitors and the LAAO assess eligibility. The complexity of civil legal aid schemes gives scope for fraud or error in assessing eligibility. My main concerns relate to eligibility:
  - there is an inherent level of fraud within the benefits system that could impact on legal aid payments. This applies to both civil and criminal legal aid; and

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<sup>1</sup> The Legal Aid Assessment Office is part of the Working Age Group in the Department for Communities

- for applicants who are not in receipt of benefits, for example those employed or self-employed, assessments rely upon the declarations made in application forms with supporting documents such as payslips and accounts, in order to assess eligibility.
12. In 2016-17, LSANI carried out an exercise to estimate the level of claimants who may no longer be eligible for support 12 months after the claim was submitted. The results identified a significant number of claimants who were no longer entitled to legal aid. Consequently, certificates were withdrawn and payments ceased for any legal work completed after the review exercise.
  13. LSANI is investing significant resources to develop a robust strategy to counter fraud and error, working with the Department for Communities (DfC) to develop an estimate of the levels of fraud and error in the system. This includes a more accurate assessment of the proportion of applicants who would have lost benefit entitlement and thereby not been 'passported' for legal aid.
  14. There are a number of strands to the DfC work. This year DfC are considering the LSA staff assessments of legal aid claims and the LAAO assessments of eligibility. This will inform the estimate of fraud and error on this one area of the LSA expenditure. The interview and review of claimant applications is the next significant part of the DfC review. This will require the necessary subordinate legislation to be passed by the NI Assembly.

#### **Payments to legal practitioners**

15. The nature of the legal aid scheme, in making payments to legal practitioners for services, which are provided directly to claimants, creates difficulties for LSANI in determining whether the services were appropriately provided or if overpayments have been made. Currently, LSANI does not produce an estimate of the likely scale of fraud and error in respect of payments to legal practitioners.
16. In my June 2016 report, I noted that a registration scheme is an essential element of ensuring that publicly funded legal services deliver value for money. Its absence undermines the LSANI's ability to implement a robust quality assurance process. A registration scheme has been lacking for a number of years. It is intended that this will be integrated into the Agency's new case management system. The system was planned for completion in 2018 but is unlikely to be fully operational until next year.
17. I asked LSANI what progress it had made to develop and implement the registration scheme. It advised me that the Department has consulted on the registration scheme, including regulations which will be brought before the Assembly in due course. In addition, LSANI has developed an online registration facility as part of its digitalisation programme. This will form the first part of the roll-out of the new system, to be implemented once the legislation is passed.

18. I have limited the scope of my audit opinion on the regularity of expenditure in 2017-18 because I have been unable to obtain sufficient audit evidence to conclude that a material amount of legal aid expenditure has not been claimed fraudulently or in error.

**Limitation in scope arising from insufficient evidence to support the estimate of provisions**

19. The LSANI is not able to determine the specific number of live/active legal aid certificates currently issued. Costs for Civil Legal Aid cases are not standardised, so different firms may bill varying amounts for similar work. The LSANI uses an estimates process to calculate a statistical approximation of the likely number of legal aid certificates. It uses another estimates process to calculate the range of likely average costs of different types of cases. These estimates introduce an unacceptable level of uncertainty and error in the valuation of legal aid liabilities at 31 March.
20. These liabilities are referred to as legal aid provisions and the figures are outlined in the table below.

**Provision for legal aid liabilities at 31 March 2018**

	<b>At 31 March 2018 £ million</b>	<b>At 31 March 2017 £ million</b>	<b>At 31 March 2016 £million</b>
<b>Criminal</b>	<b>39.5</b>	47.2	46.3
<b>Civil</b>	<b>96.2</b>	98.8	80.5
<b>Total</b>	<b>135.7</b>	146.0	126.8

*Source: Legal Services Agency*

21. Provisions for legal aid liabilities are estimated using the Provisions Information Management System (PIMS). PIMS extracts information from the case management database to be used in the calculation of the provision. It is underpinned by a number of key assumptions, including a range of estimated average costs of each case type; the adjustments required for cases which result in no reports or multiple reports; and the estimated time it takes to complete a case.
22. The annual legal aid expenditure is the total predicted cost for all new certificates issued during the year. When the legal aid claims are paid errors and differences are identified between the original estimate and the amounts actually paid. The annual expenditure has been adjusted this year by £19.5 million (£26.3m 2016-17) for these differences. The adjustment is one indication of the level of error in the previous year's provisions estimate.

## Legal Aid Annual Expenditure

	<b>At 31 March 2018 £ million</b>	<b>At 31 March 2017 £ million</b>	<b>At 31 March 2016 £million</b>	<b>At 31 March 2015 £million</b>
Provided in the year - includes predicted cost of new certificates issued in year <sup>2</sup>	<b>88.3</b>	127.9	147.4	153.2
Provisions not required written back - includes errors in previous years provision	<b>(19.5)</b>	(26.3)	(48.8)	(52.2)
<b>Total Annual expenditure</b>	<b>68.8</b>	101.6	98.6	101.0

Source: Legal Services Agency

23. The level of error in the estimated provisions has reduced over the last four years, but remains unacceptably high. It is not possible to assess the level of error in the provisions until the Agency makes the legal aid payments in the following year.
24. Significant work has been undertaken by LSANI to improve the provisions model and a number of the limitations identified in previous years have now been addressed. The Department and LSANI are continuing to develop a model capable of providing a reasonable estimation of future legal aid costs. The model progressed significantly and was used to inform the provision for legal aid liabilities in the 2016-17 and 2017-18 financial statements. However, the model is limited by specific concerns in relation to:
- the accuracy and completeness of the numbers of legal aid certificates; and
  - the quality of management information used in the provisions valuations.
25. I have qualified my audit opinion on the truth and fairness of the amount provided for legal aid liabilities at 31 March 2018 due to insufficient evidence to support the current provisions methodologies and the judgements made when calculating provisions.

## Reforms to improve the governance of the legal aid system

26. The Public Accounts Committee (the Committee) took evidence on my report on the Management of Legal Aid on 29 June 2016 and reported its findings on 11 January 2017. The Committee expressed concerns that previous assurances to improve the management of the legal aid system, following its report in 2011, had not been kept.

<sup>2</sup> These figures are disclosed by LSANI at page 81 of the annual accounts as provisions "Provided in the year" and provisions "not required written back". These amounts include a complex range of financial transactions.

The Committee's report also highlighted specific long-standing issues which have not been addressed, and made further recommendations to urgently reform the governance of legal aid.

27. The Department and the Agency have provided me with a brief summary of the progress made in implementing the Committee's five recommendations (see Appendix 1). I am concerned that nearly 18 months after its published report that the Department and the Agency have not taken action on all of the Committee's recommendations. The Department has yet to:

- Test fully the scope for generating savings from contracting legal aid services in Northern Ireland.
- Instigate a capability review of the Agency's leadership team, including the Department's sponsorship arrangements.
- Review how expenditure currently adjudicated by the Taxing Master can properly be brought under the purview of the Accounting Officer.

28. I asked the Department and the Agency what steps they are taking to ensure that these recommendations will be implemented.

- The Department is planning to conduct a review into contracting legal aid services in Northern Ireland. A scoping paper and terms of reference have been drafted and consideration is now being given to the leadership, governance and resourcing of the review.
- A dedicated Transformation Director and a Programme Manager have joined the Agency's senior team. These appointments will enhance the organisation's capacity to drive forward change.
- The Department remains fully committed to reviewing all legal aid expenditure currently assessed by the Taxing Master and, where appropriate, removing the taxation function from legal aid expenditure.

29. They have further advised that, within the constraints of the current political situation, substantial progress has been made in some specific areas.

- Registration Scheme: The draft legislation, Code of Conduct, the audit approach and regime have each been finalised and the necessary staff to carry out the audits will be recruited once the Registration Scheme is in place. The IT infrastructure has been developed to support the registration scheme. However, the legislation cannot be progressed further in the absence of an Assembly.
- Management Information System: The Agency continues to develop a new digital casework platform to support the delivery of legal aid. The on-line digital

registration scheme has been user-tested with the legal profession and will be available for implementation once the legislation can be made. The Agency anticipates that the new digital platform will be established by April 2019. In addition, the Agency will see a number of additional posts added to the management information capacity.

- Bringing expenditure within the purview of the Accounting Officer:
  - Civil Remuneration: Phase 1 of this project, family fees, is at an advanced stage. The new standard fee approach will remove the need for taxation of these cases. Engagement with the legal profession on the fee proposals continues. The timetable for implementation is likely to be dependent on the appointment of a Minister. .
  - Criminal Court of Appeal: The Department is engaging with key stakeholders on new standard fee arrangements ahead of consultation on revised fee proposals later in the year.

30. At present, the Chief Executive of the LSANI is also the Chair of the LSANI Board. This is a significant limitation in the governance of the Agency and reduces the challenge function of the Board to the executive team. The Department has recently given the Chief Executive the additional responsibility of leading the sponsorship branch in the Department, which oversees the operation of the Agency. I am surprised at the lack of segregation of duties between these key roles.

31. I asked the Department to explain how good governance could be demonstrated in these circumstances. It advised me that across the Department of Justice it is common practice for the Chief Executive of an agency to chair its Executive Board. The Director Access to Justice continues to exercise direct oversight of both the Agency and the relevant policy division with sponsorship responsibilities. An additional challenge function is exerted by the Legal Aid Strategy Group, which is chaired by the Permanent Secretary.

## Conclusions

32. The Agency continues to work with the Department for Communities to estimate the levels of fraud and error in the legal aid budget and to develop an effective counter fraud strategy. Significant progress has been made during the course of the year and a realistic timetable established. There remains insufficient evidence to determine the level of fraud or error regarding the eligibility of legal aid payments or payments to legal practitioners in 2017-18.

33. The Department and the Agency have built a revised methodology for determining legal aid provisions. This provides a more robust estimation of legal aid liabilities but the accuracy is limited by the quality of management information provided. The existing management information systems provide poor information and as a result, there remains insufficient audit evidence to support the completeness and accuracy of the

provision. This situation is likely to continue until the implementation of a new case management system during 2018-19.

34. The Public Accounts Committee took evidence on my report on the Management of Legal Aid on 29 June 2016 and reported its findings on 11 January 2017. I accept that there are significant constraints in some areas on the progress that can be made without a Minister and a legislative Assembly. Nevertheless, I am disappointed by the slow progress that has been made by the Department and the Agency.
35. A lack of progress is most notable in two key areas:
  - the review of contracting legal aid services which is only now being planned; and
  - A capability review of the Agency's leadership team including the Department's sponsorship arrangements.
36. I will continue to keep the implementation of the Committee's recommendations under review and expect to see a substantial improvement in the delivery of the Committee's recommendations.

KJ Donnelly  
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3 July 2018

**PAC RECOMMENDATIONS*****PAC Recommendation 1***

The Committee recommends that the Department fully tests the scope for generating savings from contracting legal aid services in Northern Ireland.

***PAC Recommendation 2***

The Committee recommends that the Department advance the reform of legal aid, focusing on:

- reforming non-criminal legal aid remuneration rates and introducing standard fees as a priority. This should include the introduction of effective controls over the cost of expert witnesses;
- establishing a statutory registration scheme for all providers of publicly funded legal services; and
- establishing an effective management information system in the Legal Services Agency to support the process of reform.

The reform programme must address all the above issues and be supported with a concise action plan including an explicit timetable and milestones for delivery. Further delay must be avoided and the Committee will seek an update on progress in 2017.

***PAC Recommendation 3***

The Committee recommends the Department conducts a review of how expenditure currently adjudicated by the Taxing Master can properly be brought under the purview of the Accounting Officer. In the meantime, the Legal Services Agency must have a complete and detailed analysis of adjustments to claims to establish possible patterns of over claiming.

***PAC Recommendation 4***

The Committee recommends that the Agency establishes a method of measuring the level of fraud within the legal aid system and develops proactive risk-based counter fraud measures. These measures should address specific issues raised continually by the C&AG and build a strong culture of fraud awareness within the Agency. The Department must demonstrate an active role in overseeing this work, and drive the establishment of effective counter-fraud arrangements within the Agency.

***PAC Recommendation 5***

The Committee recommends that the Departmental Accounting Officer instigates a capability review of the Agency's leadership team, including the Department's sponsorship arrangements to ensure that it is adequately resourced and has the necessary skills, experience and culture to deliver a major change programme.