



Northern Ireland Audit Office

Managing Legal Aid



REPORT BY THE COMPTROLLER AND AUDITOR GENERAL
21 June 2016



Northern Ireland Audit Office

Managing Legal Aid

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Northern Ireland Audit Office

Comptroller and Auditor General

21 June 2016

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Executive Summary



Executive Summary

Executive Summary

1. Legal aid plays a vital role in ensuring that there is fair and equal access to justice in Northern Ireland. Legal aid exists to help pay for a solicitor or other legal practitioners:
 - to help people who are under investigation, or are charged with a criminal offence or brought before a court to be dealt with; or
 - to help people who cannot afford to protect their rights in civil and family legal matters such as divorce, matrimonial and maintenance issues, personal injury cases, injunctions, bankruptcy, negligence cases, and bail hearings.

2. In 2011 we published a report on *Managing Criminal Legal Aid*¹ which concluded that expenditure was out of control. Criminal legal aid almost trebled from £22 million in 2000-01 to £60 million in 2009-10. Over the same period, non-criminal legal aid² expenditure increased from £16 million to £37 million. The cost of legal aid has remained high. While there is a small annual variation in schemes between years, since 2011 total expenditure on legal aid has been around £100 million per year. While the cost of criminal legal aid has stabilised, the cost of non-criminal legal aid has increased during this period.

3. Our 2011 report noted that there was a need for significant reform of the legal aid system in Northern Ireland in order to bring expenditure under control. Since then, a number of reforms have been implemented to criminal legal aid but to date, these have not achieved their aims:
 - the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011 (the 2011 Rules) were intended to deliver significant savings by reducing the standard fees payable across the range of cases heard in the Crown Court, and abolishing Very High Cost Cases. It was anticipated that this would reduce Crown Court expenditure to £17 million by 2013-14. However, Crown Court expenditure has actually increased from £26 million in 2011-12 to £30 million in 2014-15. One of the key factors has been a significant increase in the volume of cases in the Crown Court, which reflects the demand-led nature of legal aid spending.
 - the 2011 Rules have been successful in driving down the average cost of cases in the Crown Court but they did not go far enough to achieve the savings intended. While they initially brought remuneration rates in Northern Ireland to a level closer to the fees paid in England and Wales, further changes in that jurisdiction have re-opened the gap between them.
 - Recovery of Defence Cost Orders (RDCOs) were introduced in 2012 and conferred new powers upon the

1 http://www.niauditoffice.gov.uk/8935_legal_aid_final.pdf

2 These cover Legal Advice and Assistance, Assistance By Way Of Representation, Children's Order and Civil Legal Aid.

Legal Services Agency (the Agency) to recover the costs of legal aid to assisted persons who were convicted of crimes in the Crown Court whilst receiving legal aid. At present there is no formal mechanism to identify cases where the RDCOs may be relevant. Without this, it remains unclear how the full potential of these powers can be realised.

- the introduction of the Magistrates' Courts and County Court Rules (Northern Ireland) 2009 (the 2009 Rules) coincided with a significant increase in the average cost per case for the Magistrates' Court. Over the 2010-15 period the average cost per case was £602, 36 per cent higher than the average over the 2000-10 period.
- the Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) (Amendment) Rules (Northern Ireland) (the 2014 Rules) are not intended to have a significant effect upon total expenditure for Magistrates' Court cases. While they are anticipated to deliver savings of £700,000 in particular areas, the bulk of these savings will be offset by predicted increases of £600,000 in other areas.
- the Department of Justice (the Department) is satisfied that the remuneration rates in the 2014 Rules provide comparable rates of payment to the fees payable in England and Wales for similar work.

However, the Department has only provided limited evidence of the research it relied on to support its decision.

4. Non-criminal legal aid has not been reformed. A significant proportion of the arrangements have only recently been put on a statutory footing with the introduction of the Civil Legal Services Remuneration Order (Northern Ireland) 2015. In response to the Access to Justice Review in 2011, the Department committed to introducing a standard fee approach for all types of cases and all court tiers. Work on developing a framework is ongoing and is being pursued on a phased basis. The first stage, the standardisation of fees for Family Proceedings cases, is not expected to be implemented until 2016-17.
5. The Access to Justice Order 2003 provided for the introduction of a Statutory Registration Scheme (the Scheme) for all providers of publicly funded legal services. Our 2011 report noted that there had already been a delay of six years in implementing the Scheme, and the Public Accounts Committee made clear that it expected an effective scheme be established without delay³. The Scheme has still not been implemented and is currently unlikely to be operational until 2017-18. This would be 12 years after the project's original deadline.

3 <http://www.niassembly.gov.uk/assembly-business/committees/public-accounts/reports/report-on-managing-criminal-legal-aid/>

Executive Summary

6. The legal aid budget has consistently been inadequate to meet expenditure. Between 2011-15, a total of £317 million was allocated to fund legal aid to claimants and the associated administration costs of the Agency. Total costs over the same period were £432 million, a shortfall of £115 million.
7. Reliance upon additional in-year funding became pronounced between 2011 and 2015 and began to impact on the Agency's efficiency. In order to live within its means, the Agency introduced weekly limits for expenditure, set at a level to ensure that it could continue to make payments for the entire financial year without exceeding the budget. However, this approach threatened to create inefficiencies, creating backlogs of claims and slowing the rate of processing payments to a level well below operational capacity. The budgets in 2015-16 and 2016-17 have been set at levels closer to the anticipated spend.
8. The Agency does not have an effective method to predict future legal aid expenditure. In partnership, the Agency and Department have sought to develop a new model for forecasting. Despite commendable effort, there remain a number of significant weaknesses which compromise the model's ability to reliably predict future expenditure.
9. The Agency's response to suspected frauds has not been effective. The Agency's counter fraud strategy is not comprehensive or embedded in day to day management. The audit opinion on the annual accounts has been qualified since 2003 due to the lack of effective counter fraud arrangements. Internal controls have been established but are inadequate to prevent and detect fraud and the Agency is dependent upon third parties to identify suspected fraud.

Summary of key recommendations

R1 We recommend that the Department examines the existing arrangements governing the Legal Aid (Recovery of Defence Costs Orders) Rules (Northern Ireland) 2012 to determine how these can be enhanced to achieve greater impact.

R2 These reviews should be comprehensive and evidence justifying any resulting changes to the schemes should be retained. We recommend that the Department subjects all legal aid schemes to regular reviews to determine whether they deliver value for money.

R4 We recommend that the implementation of standard fees should be taken forward as a matter of urgency. Introducing a standard fee regime would help to ensure that non-criminal legal aid fees are consistent and represent value for money.

R6 Budgeting and forecasting are key pillars of good financial management. The opening legal aid budget has been inadequate to meet annual expenditure for a number of years. The Department has made progress in addressing this issue. We recommend that it continues to align resources allocated to fund

legal aid more closely with the expected spend and should now ensure that it continues to align the resources allocated to fund legal aid more closely with the expected spend.

R7 We recommend that the Agency should continue to improve the quality of the data it relies upon to forecast expenditure and ensure that estimates are robust. The information used to support predictions should be consistent, comprehensive, up-to-date and accurate.

R9 We recommend that the Agency should ensure that it responds appropriately to all suspected frauds. This involves sanctioning offenders and recovering the money lost. To facilitate this, a more joined up approach with other public bodies will be necessary. We also recommend that the Agency should seek to develop more effective working relationships with the Department for Communities in particular.

Part One:
Introduction and Background



Part One: Introduction and Background

Legal aid in Northern Ireland

- 1.1 Legal aid plays a vital role in ensuring that there is fair and equal access to justice in Northern Ireland. Legal aid is available through a range of schemes (Appendix 1) and exists to help pay for a solicitor or other legal practitioners:
- to help people who are under investigation, or are charged with a criminal offence or brought before a court to be dealt with; or
 - to help people who cannot afford to protect their rights in civil and family legal matters such as divorce, matrimonial and maintenance issues, personal injury cases, injunctions, bankruptcy, negligence cases, and bail hearings.

Legal aid is a demand-led service

- 1.2 Provided an application for legal aid meets the relevant eligibility and merits tests, there is no basis to refuse it⁴ (a summary of the process for granting legal aid is at Appendix 2). There is no cap or limit on the number of eligible applications which can be granted financial assistance within the financial year. As a result, legal aid expenditure

is demand-led, related directly to the volume of eligible applications received. Expenditure levels are also influenced by a few individual high cost cases. As such, expenditure cannot be controlled through limiting the volume of legal aid assistance granted. The primary mechanism that the Department of Justice (the Department) has used to control expenditure to date has been through amending the remuneration arrangements for legal aid schemes.

Legal aid expenditure rose drastically from 2000 to 2010 but has since stabilised

- 1.3 At the time of our 2011 report *Managing Criminal Legal Aid*⁵ expenditure was out of control. Criminal legal aid almost trebled from £22 million in 2000-01 to £60 million in 2009-10. Over the same period, non-criminal legal aid expenditure increased from £16 million to £37 million⁶. Whilst there is a small level of variation in schemes between years, since our 2011 report total expenditure on legal aid has remained at around £100 million per year.

4 The power to grant or refuse an application for criminal legal aid rests with the judiciary. In cases where assistance is granted, the Legal Services Agency is duty-bound to provide this financial support, and no contribution is required from the assisted person (Appendix 2). For the various non-criminal legal aid schemes applications must pass financial eligibility and legal merits tests. These tests can be applied by either the person's legal representative, the Agency or the Department for Communities dependent upon the type of case (see Appendix 2). It is only by passing both tests that an application will be eligible for financial support, albeit that in some circumstances the applicant may be required to make a financial contribution towards the total cost.

5 http://www.niauditoffice.gov.uk/8935_legal_aid_final.pdf

6 These cover Legal Advice and Assistance, Assistance By Way Of Representation, Children's Order and Civil Legal Aid.

Recent legislative reform in England and Wales is on course to deliver significant financial savings

- 1.4 The legal aid system in Northern Ireland is not directly comparable to ones operating elsewhere in the United Kingdom. The system which operates in England and Wales is most comparable, and is used by the Department to inform its decision making. Over the last four years, there have been controversial reforms implemented in both the criminal and non-criminal legal aid systems in England and Wales. Significant legislative changes to the legal aid schemes have been accompanied by rounds of cuts to the fees payable to legal representatives.
- 1.5 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the LASPO) attempted to reduce costs by significantly reducing the scope of the areas of civil law which were eligible for legal aid support. In doing so, the LASPO effectively reversed the assumption that civil legal aid was available to help on almost all aspects of civil law. Even where an application for legal aid falls within this reduced scope, the LASPO also introduced stricter levels of means and merits testing of applicants⁷.
- 1.6 Following the implementation of the LASPO the Westminster Government moved to reform criminal legal aid and undertook a consultation exercise based on the *Transforming Legal Aid* series
- of documents. The Government's final proposals were outlined in *Transforming Legal Aid – Next Steps: Government Response* in February 2014. The most significant reforms were the introduction of contracts for legal representatives and revised disposable income thresholds to determine financial eligibility for criminal legal aid.
- 1.7 The combined effect of the fee cuts and the LASPO was predicted by the government to generate savings of £320 million per year by 2014-15. The National Audit Office (NAO)⁸ determined that the reforms to non-criminal legal aid were on track to deliver the anticipated level of financial savings. In addition, the reforms to criminal legal aid are predicted to save a further £215 million per year by 2018-19.
- 1.8 The overall package of legal aid reforms has been highly controversial. NAO reported some scepticism over the extent to which the reforms of non-criminal legal aid delivered against the wider service-orientated objectives, and criticised the absence of a sufficient body of research to support the reform programme. NAO also highlighted that the Ministry of Justice did not have a good understanding of the extent to which the reforms would displace certain costs onto other areas of the justice system, diminishing the level of savings achieved. The level of opposition to criminal legal aid reforms has resulted in the Government recently announcing its

⁷ Under the means test the court must assess whether an applicant seeking legal aid has insufficient means to enable them to fund their own defence. Under the merit test the court must decide whether it is desirable in the interests of justice for the applicant to receive free legal aid in the preparation and conduct of their case.

⁸ <https://www.nao.org.uk/report/implementing-reforms-to-civil-legal-aid/>

Part One: Introduction and Background

intention to suspend a planned reduction in remuneration rates for 12 months, and to halt the imposition of the planned dual contracting model. The criticisms and difficulties encountered in England and Wales highlight the key challenge in delivering legal aid reform, which is balancing the opposing objectives of reducing expenditure whilst protecting an individual's access to justice.

Reform in Northern Ireland has been ongoing for over a decade and remains significantly behind schedule

1.9 The need for significant reform of the legal aid system in Northern Ireland has long been recognised by the Department. In 2003, the Access to Justice Order established the Legal Services Commission (the Commission) to implement a number of reforms. Our 2011 report criticised the lack of progress made and emphasised the need for legal aid reform to be implemented. The Assembly's Public Accounts Committee produced its own report⁹ noting the Commission's failure to deliver its objectives of controlling expenditure and implementing a programme of reform by autumn 2007. It also concluded that the reform programme remained significantly behind schedule and that criminal legal aid reforms would not be implemented until 2013 at the earliest, some six years late.

1.10 A key reform objective was to reduce the overall level of expenditure on legal aid, whilst protecting the ability of individuals in Northern Ireland to have access to justice. When considering remuneration arrangements, the Department is required to have regard to four statutory criteria:

- the time and skill which work of the description to which the rules relate requires;
- the number and general level of competence of persons undertaking work of that description;
- the cost to public funds of any provision made by the rules; and
- the need to secure value for money.

1.11 A further theme was the need to improve the governance and management of the legal aid budget in Northern Ireland. In both these areas a huge amount of work is still outstanding, and a number of important reforms have been subject to significant delays.

Our examination focuses on the management of legal aid in Northern Ireland from 2011 up to the establishment of the Legal Services Agency

1.12 On 1 April 2015 the Legal Services Agency (the Agency) was established and assumed the responsibilities of the Commission. The Commission's

⁹ <http://www.niassembly.gov.uk/assembly-business/committees/public-accounts/reports/report-on-managing-criminal-legal-aid/>

management, staff and procedures all transferred into the Agency. While there was a change in the status of the entity (moving from an Arm's Length Body to an Executive Agency within the Department) there was no significant change in the way the organisation operated. Our study considers the management of legal aid up to this point. We refer throughout this report to the Agency. Any reference to 'the Agency' relating to events before 1 April 2015 should be taken to refer to the Commission. Our study also considers the Department's oversight role and its development of policy.

1.13 Our report looks at:

- spending on legal aid (Part 2);
 - reform of legal aid in Northern Ireland (Part 3);
 - budgetary control (Part 4); and
 - counter-fraud arrangements (Part 5).
-

Part Two:
Spending on legal aid



Part Two: Spending on legal aid

Spending on legal aid

2.1 In 2011 we reported that the cost of criminal legal aid had almost trebled over a decade, from around £22 million in 2000-01 to some £60 million in 2009-10. Expenditure on non-criminal legal aid more than doubled from £16 million in 2000-01 to £37 million in 2009-10¹⁰. In 2011-12, the year our report was published, the total value of all legal aid payments in Northern Ireland was £101 million. This was made up of criminal legal aid payments totalling £48 million, and non-criminal legal aid payments¹¹ of £53 million.

2014-15 average annual expenditure on legal aid amounted to £102 million. Criminal legal aid expenditure has remained relatively consistent at between £48 and £51 million per year. Non-criminal legal aid expenditure has fluctuated between £47 million and £57 million per year. This included significant sums spent on individual high cost cases. For example, costs associated with the Omagh case during the period were as high as £5 million in 2011-12 and £3 million in 2013-14.

Criminal legal aid expenditure has stabilised

The cost of legal aid has remained high

2.2 Following the dramatic increase in the total cost of legal aid from 2000 to 2011, overall expenditure has stabilised. Between 2011-12 and

2.3 Criminal legal aid expenditure has two main streams: Crown Court expenditure and Magistrates' Court expenditure. Since 2011 there has been no significant decrease in overall expenditure on cases heard in either the Crown Court or Magistrates' Court. The

Figure 1: Legal aid expenditure patterns 2011-15

| | 2011-12 £m | 2012-13 £m | 2013-14 £m | 2014-15 £m |
|------------------------|---------------|---------------|---------------|---------------|
| Non-Criminal Legal Aid | 53.1 | 47.1 | 54.2 | 57.0 |
| Criminal Legal Aid | 48.4 | 47.7 | 51.4 | 49.4 |
| Total Legal Aid | 101.5 | 94.8 | 105.6 | 106.4 |

Source: Legal Services Agency

¹⁰ NI Assembly Research and Information Service Research Paper, Civil Legal Aid, 22 April 2013.

¹¹ This figure includes payments made under Legal Advice and Assistance (LAA), Assistance by way of Representation (ABWOR), Children's Order and Civil Legal Aid streams. All expenditure information has been sourced from the Agency's Annual Management Information Reports, which provide a cash-based analysis of the Agency's expenditure in that year. The figures exclude the Agency's operating costs, such as staff costs and non-cash charges. More information of the specific purposes of these schemes is contained at Appendix 1.

Figure 2: Crown Court and Magistrates' Court Expenditure¹⁴

| Year | 2011-12 £m | 2012-13 £m | 2013-14 £m | 2014-15 £m |
|--------------------|---------------|---------------|---------------|---------------|
| Crown Court | 25.6 | 28.7 | 30.9 | 29.9 |
| Magistrates' Court | 21.9 | 18.1 | 19.3 | 18.6 |
| Total | 47.5 | 46.8 | 50.2 | 48.5 |

Source: Legal Services Agency

introduction of the 2011 Crown Court Rules (the 2011 Rules)¹² were intended to reduce Crown Court criminal legal aid expenditure from the £26 million incurred in 2011-12 to below £17 million by 2013-14¹³. Instead, the cost of legal aid for cases in the Crown Court has risen from £26 million in 2011-12, to around £30 million by 2014-15 (Figure 2). Crown Court expenditure has accounted for 60 per cent of total expenditure on criminal legal aid each year. Analysis of Crown Court expenditure can be found at Part 3 of this report.

2.4 Magistrates' Court expenditure has fallen by 15 per cent since 2011-12 and the cost has stabilised at around £19 million per year (see Figure 2). This reduction has largely been driven by the number of funded cases falling from 37,000 in 2011-12, to around 31,000 in each of the subsequent years¹⁴. Further details on Magistrates' Court expenditure are provided in Part 3 of this report¹⁵.

Expenditure on non-criminal legal aid has increased

2.5 Non-criminal legal aid refers to the remaining legal aid schemes: Legal Advice and Assistance (LAA), Assistance by Way of Representation (ABWOR), Children's Order and Civil Legal Aid. The majority of expenditure, around 70 per cent, is incurred within the Civil Legal Aid scheme (Figure 3). Whilst expenditure in the first two years of the period was variable, expenditure has subsequently consolidated at around £40 million per year, and is predicted to remain at this level in 2015-16 and 2016-17¹⁶. Part of the reason for the general increase over the period 2011-15 has been the steady increase in the average cost per payment from £5,230 in 2011-12 to £6,142 in 2014-15 – an increase of 17 per cent. This has resulted in a higher level of expenditure in 2014-15 than 2011-12, despite there being 430 fewer payments in that year.

12 Legal Aid for Crown Court Proceedings Costs (Amendments) Rules (Northern Ireland) 2011

13 Department of Justice, Review of the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011

14 Legal Services Agency, Annual Management Information Reports.

15 In addition to Crown Court and Magistrates' Court expenditure, criminal legal aid also includes: County Court Appeals, Extradition, and High Court Bails. The combined value of expenditure in these areas is below £1 million per year, and so they have been excluded from this analysis.

16 Legal Services Agency July 2015 Forecast.

Part Two: Spending on legal aid

2.6 Legal Advice and Assistance, Assistance by Way of Representation and Children's Order account for the remaining 30 per cent of the total non-criminal legal aid expenditure (see Figure 3). These cases tend to be less expensive than Civil Legal Aid cases. For both LAA and ABWOR, the average cost per

claim has remained broadly consistent, and annual fluctuations in expenditure reflect significant changes in the number of payments processed in that year. There has been a steady increase in the average cost per case in Children's Order cases between 2011 and 2015.

Figure 3: Number of claims received and average cost per claim for non criminal legal aid¹⁷

| | Number of Payments | Average Cost £ | Total Expenditure £ |
|--|--------------------|-------------------|------------------------|
| Legal Advice and Assistance | | | |
| 2011-12 | 41,328 | 113 | 4,655,000 |
| 2012-13 | 34,854 | 108 | 3,754,000 |
| 2013-14 | 39,809 | 113 | 4,515,000 |
| 2014-15 | 42,001 | 128 | 5,372,000 |
| Assistance By Way Of Representation | | | |
| 2011-12 | 3,809 | 559 | 2,128,000 |
| 2012-13 | 3,069 | 567 | 1,740,000 |
| 2013-14 | 3,033 | 563 | 1,709,000 |
| 2014-15 | 3,248 | 552 | 1,794,000 |
| Children's Order | | | |
| 2011-12 | 7,640 | 1,241 | 9,478,000 |
| 2012-13 | 5,957 | 1,282 | 7,636,000 |
| 2013-14 | 5,660 | 1,371 | 7,759,000 |
| 2014-15 | 6,601 | 1,387 | 9,157,000 |
| Civil Legal Aid | | | |
| 2011-12 | 7,032 | 5,230 | 36,775,000 |
| 2012-13 | 5,885 | 5,777 | 33,997,000 |
| 2013-14 | 6,618 | 6,067 | 40,154,000 |
| 2014-15 | 6,602 | 6,142 | 40,550,000 |

Source: Legal Services Agency

¹⁷ The figures given for number of payments and average costs will not accurately multiply to total cost, as total cost figures as been rounded to the nearest thousand. All figures agree to the Agency's Annual management Information Reports.

Part Three:
Reform of legal aid in Northern Ireland



Part Three: Reform of legal aid in Northern Ireland

Reform of legal aid in Northern Ireland

3.1 Our 2011 report on Managing Criminal Legal Aid concluded that there was a need for significant reform of the legal aid system in Northern Ireland in order to bring expenditure levels under control. A number of potential reforms have been implemented since then, and further reforms of the legal aid system are being pursued by the Department. This section of the report examines several of these reforms.

Reforms to criminal legal aid remuneration have not achieved their aims

3.2 Criminal legal aid expenditure consists of fees paid in relation to criminal cases heard in the Crown Court and the Magistrates' Court. At the time of our original report, the remuneration rates for the Crown Court were determined by the 2011 Rules, and remuneration for the Magistrates' Court were determined by the 2009 Rules¹⁸.

The Crown Court Rules 2011 have not met their objective

3.3 The 2011 Rules were intended to deliver significant savings by reducing the standard fees payable across the range of cases heard in the Crown Court, and abolishing the Very High Cost Cases¹⁹ (VHCC) classification for cases heard in the Crown Court. It was anticipated that the 2011 Rules would reduce Crown Court expenditure to £17 million per year by 2013-14 – representing a saving of £8 million per year from 2011-12 expenditure levels²⁰. However, Crown Court expenditure has actually increased from £26 million in 2011-12 to £30 million in 2014-15 (see Figure 4).

3.4 One of the key factors behind the increase in expenditure has been an increase in the volume of cases concluded within the Crown Court, which has been significantly higher than anticipated in the Department's business case. The total number of payments increased from 5,377 in 2011-12 to 7,529 in 2013-14, falling to 7,092 in 2014-15 (including both VHCC and non-VHCC payments). This represents an increase of around 32 per cent.

Figure 4: Crown Court Expenditure 2011-15

| Year | Crown Court non-VHCC Expenditure £m | Crown Court VHCC Expenditure £m | Total £m |
|---------|-------------------------------------|---------------------------------|----------|
| 2011-12 | 19.5 | 6.1 | 25.6 |
| 2012-13 | 17.3 | 11.4 | 28.7 |
| 2013-14 | 27.8 | 3.1 | 30.9 |
| 2014-15 | 28.8 | 1.1 | 29.9 |

Source: Legal Services Agency

18 Magistrates' Court and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009

19 A case in which the trial is estimated to last more than 25 days.

20 Department of Justice, Review of the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011

between 2011-12 and 2014-15 and is illustrative of the demand-led nature of the spend. This has undoubtedly contributed to the failure of the 2011 Rules to deliver the anticipated savings. However, the increased volume of payments does not fully account for the increase in Crown Court expenditure.

- 3.5 The 2011 Rules have been successful in driving down the average cost of payments in the Crown Court. Overall, the average cost of a Crown Court legal aid payment fell from £4,761 in 2011-12 to £4,213 in 2014-15 – a decrease of 12 per cent. Nevertheless, even at the lower volume of applications assumed in the business case, these average costs would not have delivered the savings anticipated.
- 3.6 The revised rules did bring remuneration rates in Northern Ireland to a level closer to the fees paid in England and Wales. However, subsequent cuts in remuneration rates in England and Wales mean that the fees in Northern Ireland remain significantly higher.

The Crown Court Rules 2015 are forecast to generate significant savings

- 3.7 The first substantial revision of the 2011 Rules was the 2015 Rules²¹. These Rules applied significant reductions to the remuneration rates for legal representatives for all types of cases, with the exception of the most serious classes of offence – Classes A (homicide and related grave offences) and D (serious sexual offences, offences against children). These reductions were justified by the Department's research which indicated that remuneration under the 2011 Rules was 46 per cent higher for solicitors and 40 per cent higher for counsel than that in England and Wales for the same type of cases (subsequently, the Department revised these to 27 per cent and 22 per cent respectively).
- 3.8 The process for developing and implementing the 2015 Rules was a lengthy and complex one, and the Department has experienced significant opposition from the legal profession. Following their introduction, the Law Society and Bar Council launched a judicial review to challenge the new framework. Whilst the final ruling found in favour of the profession in respect of two of the issues they had raised²²,

21 The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2015

22 The two issues in which the Court found in the applicant's favour were:

- That the fee arrangements made for solicitors in respect of work done by them between arraignment and the first day of trial in a case in which the defendant pleads guilty between these two points does not amount to fair remuneration; and
- The expectation that the Department's proposals would be subject to properly carried out impact assessments, where the conduct of these was reasonably required, in respect of economic impact, rural impact and regulatory impact assessment had been breached.

Part Three: Reform of legal aid in Northern Ireland

the Court determined that it would be disproportionate to strike down the 2015 Rules, and decided the most appropriate course of action would be for the Department to rectify these particular issues.

- 3.9 Following this ruling, the Law Society and the Bar Council launched an appeal against the findings of the High Court. At the suggestion of the Lord Chief Justice, the Department entered into mediation with both the Law Society and Bar Council. The outcome was an agreement based upon changes to the original 2015 Rules. The Department considers that despite these changes, 'the integrity of the 2015 Rules was maintained and expects significant savings to be delivered'.

The introduction of Recovery of Defence Costs Orders has had little impact

- 3.10 Recovery of Defence Cost Orders were introduced in 2012²³ and conferred new powers upon the Agency to recover the costs of legal aid to assisted persons convicted of crimes in the Crown Court whilst receiving legal aid. It was anticipated that only a small number of cases would be captured by these Orders. These recoveries depended on the Agency confirming that the individual had sufficient means to fund their defence independently of legal aid. Since the introduction of these powers only one recovery order has been issued and no recoveries have been executed to date.

- 3.11 The Agency told us its ability to deploy its new powers has been undermined by the absence of a means test carried out when cases are returned to the Crown Court for trial, and a lack of guidance from the Department. At present there is no formal mechanism to identify cases where these powers may be relevant. This is an important point given that the Agency is not involved in awarding criminal legal aid (the award is determined by the judiciary, see Appendix 2) and does not have knowledge of the individual's means at the time legal aid was granted.

- 3.12 The Agency's original solution was to require all defendants returned for trial in the Crown Court to complete a financial means form. 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. The Department concluded that the Rules therefore precluded an all-encompassing process. The Department told us 'the Department and the Agency recognise that it is difficult for the legislation to have a full impact under the existing arrangements and are committed to finding a proportionate resolution. Unfortunately progress in this area has been adversely affected by the judicial review and withdrawal of services in the Crown Court. We will be returning to [the] issue in the new financial year. Our expectation is that a change in the

subordinate legislation will be required'. Until then, it remains unclear how the full potential of the powers conferred in these Rules can be realised.

Recommendation 1

We recommend that the Department examines the existing arrangements governing the Legal Aid (Recovery of Defence Costs Orders) Rules (Northern Ireland) 2012 to determine how these can be enhanced to achieve greater impact.

The award of two counsel in Northern Ireland remains significantly higher than in England and Wales

3.13 In 2011, the Public Accounts Committee²⁴ concluded that the number of Crown Court defendants represented by two counsel in Northern Ireland was high compared to England and Wales. Two counsel represented defendants in 55 per cent of cases in Northern Ireland, compared with 5 per cent of cases in England and Wales. While there are differences between the court systems operating in the two jurisdictions, legal costs clearly increase with the additional representation common in Northern Ireland. PAC recommended that proposed new criteria aimed at tightening qualifying conditions for two counsel should be introduced immediately.

3.14 The Department introduced new Rules in April 2012 to ensure stricter application of the criteria required to appoint more than one counsel, but reiterated that decisions on the award of two counsel in cases in the Crown Court rests with the judiciary. In February 2015 the Department informed PAC that the proportion of Crown Court cases employing more than one counsel funded by legal aid had fallen to less than 20 per cent²⁵. While this reduction is to be welcomed, it still represents a significantly higher proportion than in England and Wales.

The introduction of the Magistrates' Court 2009 Rules has been followed by an increase in average costs

3.15 In 2011, remuneration arrangements for the Magistrates' Court were established by the 2009 Rules which:

- introduced a framework of standard fees for Magistrates' Court proceedings and County Court Appeals;
- made the Agency responsible for the determination of fees payable to legal representatives; and
- introduced a provision for certification of certain Magistrates' Court cases as VHCCs.

24 <http://www.niassembly.gov.uk/assembly-business/committees/public-accounts/reports/report-on-managing-criminal-legal-aid/>

25 Relates to the period April to December 2012.

Part Three: Reform of legal aid in Northern Ireland

3.16 In the decade before the introduction of the 2009 Rules, legal aid expenditure on Magistrates' Court cases rose sharply, largely driven by increases in the annual volume of cases. The average payment from 2000-10 was £444. The highest average annual payment was £480 in 2008-09, with the lowest average being £410 in 2000-01. Volumes increased significantly over the course of the decade, rising from 18,792 in 2000-01 to 32,252 in 2009-10. Since the introduction of the 2009 Rules the volume of payments per year has remained largely stable at 31,000 per year since 2012-13.

3.17 The introduction of the 2009 Rules has coincided with a significant increase in the average payment for cases heard in the Magistrates' Court. Over the 2010-15 period the average payment was £602 – 36 per cent higher than the average over the 2000-10 period. The Agency points to the changes in types of cases brought before Magistrates' Court, including the introduction of diversionary measures, which would have an impact on the average cost per case.

3.18 Despite the apparent increase in costs resulting from the 2009 Rules, the 2014 Rules²⁶ are not intended to have a significant effect upon total expenditure levels for Magistrates' Court cases. Whilst these new rules are anticipated to deliver savings of £700,000 in particular areas, the bulk of these savings will be offset by predicted increases in expenditure of £600,000 in other areas²⁷.

3.19 One of these areas is a 20 per cent uplift of fees in respect of Police and Criminal Evidence Act (PACE) work. This uplift was agreed with the legal profession as part of the consultation process on the overall package of Magistrates' Court legal aid remuneration rules. At the time there was a general acceptance that PACE fees required adjustment on the basis they had not been reviewed for 20 years. The Department considers that the remuneration rates in the 2014 Rules provide comparable rates of payment to the fees payable to legal representatives in England and Wales for similar work. However, the Department has provided limited evidence of the research it relied on to support its decision.

Recommendation 2

We recommend that the Department subjects all legal aid schemes to regular reviews to determine whether they deliver value for money. These reviews should be comprehensive, and evidence justifying any resulting changes to the schemes should be retained.

Recommendation 3

We recommend that the the Department carries out a review of whether the current remuneration arrangements for PACE work, as determined by the 2014 Rules, provide value for money.

26 Magistrates' Court and County Court Appeals (Criminal Legal Aid) (Costs) (Amendment) Rules (Northern Ireland) 2014

27 Department of Justice, Business Case for the Reform of the Magistrates' Court and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009

Non-criminal legal aid remuneration has not been reformed

- 3.20 Non-criminal legal aid²⁸ has not been subject to the same level of legislative reform as criminal legal aid. The current remuneration framework is a complex matrix of statutory and non-statutory standard and composite fees, which sit alongside the submission of time based claims by legal representatives. A significant proportion of these arrangements have only recently been put on a statutory footing with the introduction of the Civil Legal Services Remuneration Order (Northern Ireland) 2015. The complexity of these arrangements has imposed a significant administrative burden upon the Agency which makes non-criminal legal aid payments to legal representatives.
- 3.21 In response to the recommendations made in the Access to Justice Review in 2011, the Department committed to introducing a standard fee approach for all types of legal aid cases and all court tiers. An initial attempt was abandoned on the basis that the model put forward lacked the necessary sophistication to provide a workable and sustainable model. Subsequently the Department engaged in detailed research and consultation with the legal profession to develop a standard fees framework for the entire non-criminal legal aid system. This is being pursued on a phased basis. The first stage, the standardisation of fees for Family Proceedings cases, is expected to be implemented in 2016-17.
- 3.22 The Department is beginning to make progress towards reforming the remuneration of non-criminal legal aid. This is undoubtedly a significant undertaking. It is important that the framework which is imposed is sustainable and robust to challenges. However, the existing complex arrangements, and the administrative demands they impose, have been in place for a significant length of time. A lack of reform over this period has meant that remuneration arrangements for these schemes have not been subject to rigorous financial control.
- 3.23 In 2011, the Access to Justice Report estimated that £5 million per year could be saved from non-criminal legal aid expenditure whilst not unduly affecting an individual's access to justice in Northern Ireland. At that time, non-criminal legal aid expenditure was £41 million²⁹. In the four years since, expenditure has increased to between £47 and £57 million per year. Given the increases in overall expenditure it is likely that the amount which could be saved is now greater than £5 million.

Recommendation 4

We recommend that the implementation of standard fees should be taken forward as a matter of urgency. Introducing a standard fee regime would help to ensure that non-criminal legal aid fees are consistent and represent value for money.

28 These cover Legal Advice and Assistance, Assistance By Way Of Representation, Children's Order and Civil Legal Aid.

29 Figure derived from the Agency's Annual Management Information Report 2010-11.

Part Three: Reform of legal aid in Northern Ireland

The use of expert witnesses is in need of reform

3.23 Payments can be made by solicitors to expert witnesses for the preparation of medical or other specialist reports to be used in court cases. These payments can be made under either a General Authority covering routine work such as reports from general practitioners, engineers etc, or through obtaining prior authority from the Agency to engage specialists such as child psychologists or forensic scientists. There is no set fee structure for this work. Fees payable under this General Authority have not been revised since 1992 and have an upper limit of £120 hour. The Agency must pay any amount claimed up to this limit. Legislation governing General Authority expenditure and the fees payable dates back to 1965 and 1992³⁰. We examined a number of legal aid case files and found that different experts charged different rates for reading and reporting on, for example, the same medical records

3.24 Our 2011 report on Criminal Legal Aid noted that in Crown Court criminal legal aid cases there was no statutory requirement for solicitors to apply for a prior authority to engage experts and this situation remains unchanged. In effect, this means that the Agency is obliged to pay claims if they have the correct supporting documentation and the work appears reasonable at the end of the case. 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. We were unable to investigate these

issues further as the Agency was unable to readily supply information on the costs of expert witnesses.

3.25 In 2011, we recommended that the Agency strengthen its arrangements for appointing expert witnesses and, in particular, consider whether all expenditure should be approved in advance. While some work has been done in this area, legislation introduced in 2015 covering non-criminal legal aid remuneration did not extend to expert fees because, unlike in England and Wales, the Department had not developed a standard fee structure, with appropriate safeguards for exceptional circumstances.

3.26 The Agency has made some progress towards controlling expert witness costs. For example, whenever possible it requires solicitors to obtain three estimates from experts it wishes to appoint and in some Commercial Court cases, the Court will appoint a single expert witness whose report can be used by both parties. The Agency plans to expand the use of a single expert witness to other areas covered by legal aid. Any expert witness costs estimated to be very high and in excess of the normal rates payable will be referred to an Unusually Large Expenditure Panel which will adjudicate on the validity of the request. Nevertheless, until the necessary legislative provision is established, in our view the Agency cannot demonstrate effective control of expert witness costs.

30 The Legal Aid (General) Regulations (Northern Ireland) 1965 and The Legal Aid in Criminal Proceedings (Costs) Rules (Northern Ireland) 1992

3.27 The Department began a consultation exercise in November 2012 asking stakeholders to consider how expert witnesses funded from the legal aid budget should be employed and paid. Due to a change in management and other competing work priorities, this exercise was postponed until November 2014. Themes emerging included:

- the General Authority rates were out of date;
- there was no support for employing single joint experts;
- fixed hourly rates, with provision for exceptionality, were preferable to fixed fees to take account of the time needed to complete the work; and
- a need was identified to provide better training and instructions for witnesses and for better case management.

3.28 The Department reported to the Assembly's Justice Committee in February 2016, providing a post consultation report and outlining the way forward. It has agreed to take forward a programme which will:

- set hourly rates for different types of expert;
- consider a standard fee approach for certain types of cases;
- consider improving interim payments arrangements;

- give further consideration to accreditation; and
- take steps to improve data collection to inform further analysis and reform.

Recommendation 5

We recommend that the Department reviews the legislation governing the use of expert witness with the aim of providing a statutory basis to support the payment of all expert witness fees. This review should also include consideration of fee levels and the scope of categories covered by general authorities.

There are a number of ongoing reforms aimed at improving governance and achieving better value for money

A statutory registration scheme is unlikely to be operational until 2017-18

3.29 The Access to Justice Order 2003, which established the Legal Services Commission, also provided for the introduction of a Statutory Registration Scheme (the Scheme) for all providers of publicly funded legal services. A registration scheme is an essential element of ensuring that publicly funded legal services deliver value for money. Its absence undermines the Agency's ability to implement a robust quality assurance process. Our 2011 report

Part Three: Reform of legal aid in Northern Ireland

Figure 5: Statutory Registration Scheme Timeline



| | |
|-----------------------------------|---|
| 2003 | The Access to Justice Order establishes the Legal Services Commission, and Article 36 provides for the introduction of a Statutory Registration Scheme for all publicly funded legal service providers. |
| 2010 | The Legal Services Commission launches a voluntary Preliminary Scheme. |
| 2011 | The Access to Justice report endorses the introduction a Statutory Registration Scheme. |
| Late 2012 (Early 2013) | The Legal Services Commission conducts a pilot exercise which involves inspection of practitioner files. |
| Late 2013 | The Legal Services Commission commences preparing consultation documents. |
| December 2013 | The Department assumes responsibility for the implementation of the Statutory Registration Scheme. |
| 2014 | The Department completes public consultation exercise. |
| April 2015 | The Department briefs the Justice Committee on the consultation exercise and publishes post-Consultation Report. |
| 2017-18 | Proposed implementation of Case Management System |

noted that there had already been a delay of six years in implementing the Scheme, and the PAC made clear that it expected an effective scheme to be established without delay. The Scheme was included in a Departmental Action Plan created in July 2012, and assigned a completion date of 2014. To date the Scheme has not been implemented and is currently planned to be integrated into the Agency's new case management system which is unlikely to be fully operational until 2017-18. This would be 12 years after the project's original deadline and three years after the Departmental Action Plan deadline (see Figure 5).

The Agency has reduced late claims paid by £1.5 million since 2012

3.30 Since 2011 the Agency rigorously applied its policy on late claims received outside statutory time limits. This resulted in 2,744 criminal legal aid claims totalling £1.5 million being disallowed in full for the two year period 2012-14. This represents 90 per cent of the total number of late claims submitted during this period. However, a judicial review of the application of this policy was upheld in February 2014, resulting in a revised policy being introduced in October 2014. While the revised policy allows for late claims to be disallowed in full, the Agency expects that more claims will be reduced taking account of the circumstances of each case.

3.31 Prior to the formation of the Agency on 1 April 2015, there was no enforceable time limit for the submission of non-criminal legal aid claims. These account for 70 per cent of all claims submitted. Since April 2015 the Agency has reduced or disallowed in full late claims totalling £648,000.

The Department ruled out contracting within the legal aid system but was unable to demonstrate why

3.23 The PAC recommended that contracting³¹ should not be ruled out within the legal aid system and that further work should be carried out on this issue. In February 2015 the Department told PAC that it had considered this as part of the review of the 2011 Rules and as part of developing new arrangements for non-criminal legal aid cases. It concluded in both instances that contracting did not represent better value for money as a method for delivering legal aid services. However, the Department has been unable to provide any documentation to support this conclusion. It told us that it asked for this issue to be included in the Access to Justice Review Part II, which was published in November 2015. The Review recommended that contracting should not be considered for the time being³². The Department told us it will consider any relevant recommendations made in the Review.

31 Contracting would involve the establishment of a system of long-term contractual relationships with providers of legal representation. These representatives would be used to provide legal services in publicly funded cases.

32 <https://www.dojni.gov.uk/sites/default/files/publications/doj/access-to-justice-review-part-2-report.pdf> – Chapter 5

Part Four:
Budgetary control



Part Four: Budgetary control

4.1 The principal objective of budgetary control in the public sector is to determine the resources needed to fund a particular service and to ensure that the amount spent remains within the opening budget. This section of the report explores the failure of the Department and Agency to implement an effective budgetary control system.

total cost of this over the same period was £432 million³³ – a shortfall of £115 million compared to the opening budget (figure 6).

During 2011-15 reliance upon additional in-year funding became more pronounced and began to impact on the Agency's efficiency

The opening legal aid budget has consistently been inadequate to meet expenditure

4.2 As discussed in Part 2 of this report, expenditure on legal aid has remained at around £100 million per year since 2011-12. Attempts at legislative reform of remuneration arrangements have not reduced this expenditure significantly. Expenditure has consistently exceeded the opening resources allocated to fund legal aid. However, additional resources have been allocated within each year.

4.3 Over the years 2011-15, a total of £317 million was allocated to fund legal aid claims and the associated administration costs of the Agency. The

4.4 Generally, government spending over the 2011-15 period has been subject to significant cuts. The opening resources allocated to fund legal aid reduced significantly over the four years 2011-15 as a result of overall cuts to the Department's budget. The lack of successful legislative reform and variable levels of demand have meant that the total cost of legal aid has remained relatively consistent. By 2011, the Access to Justice review had already highlighted that the gap between the resources needed and those allocated 'invariably [resulted in] a debilitating period of negotiation between the Commission and its sponsor during the Autumn of each year as sufficient funds were identified in the centre to meet its anticipated demand'³⁴.

Figure 6: Opening Budget Allocation for Legal Aid compared to Actual Cost 2011-15

| | 2011-12 | 2012-13 | 2013-14 | 2014-15 | Total |
|---|---------|---------|---------|---------|-------|
| Departmental Allocation for Legal Aid (£m) | 84 | 83 | 75 | 75 | 317 |
| Actual Cost (£m) | 107 | 107 | 105 | 111 | 432 |
| Shortfall against Opening Budget as Proportion of Actual Cost | 21% | 22% | 30% | 32% | 27% |

Source: Legal Services Agency, Department of Justice, and NI Executive Budget 2011-15

33 These figures differ from the expenditure reported elsewhere in this report. Those figures are an analysis of the cash expenditure on legal aid claims. Figures in Figure 7 represent the Agency's unringfenced Resource DEL budget and expenditure and in addition to legal aid expenditure include staff costs and other programme costs.

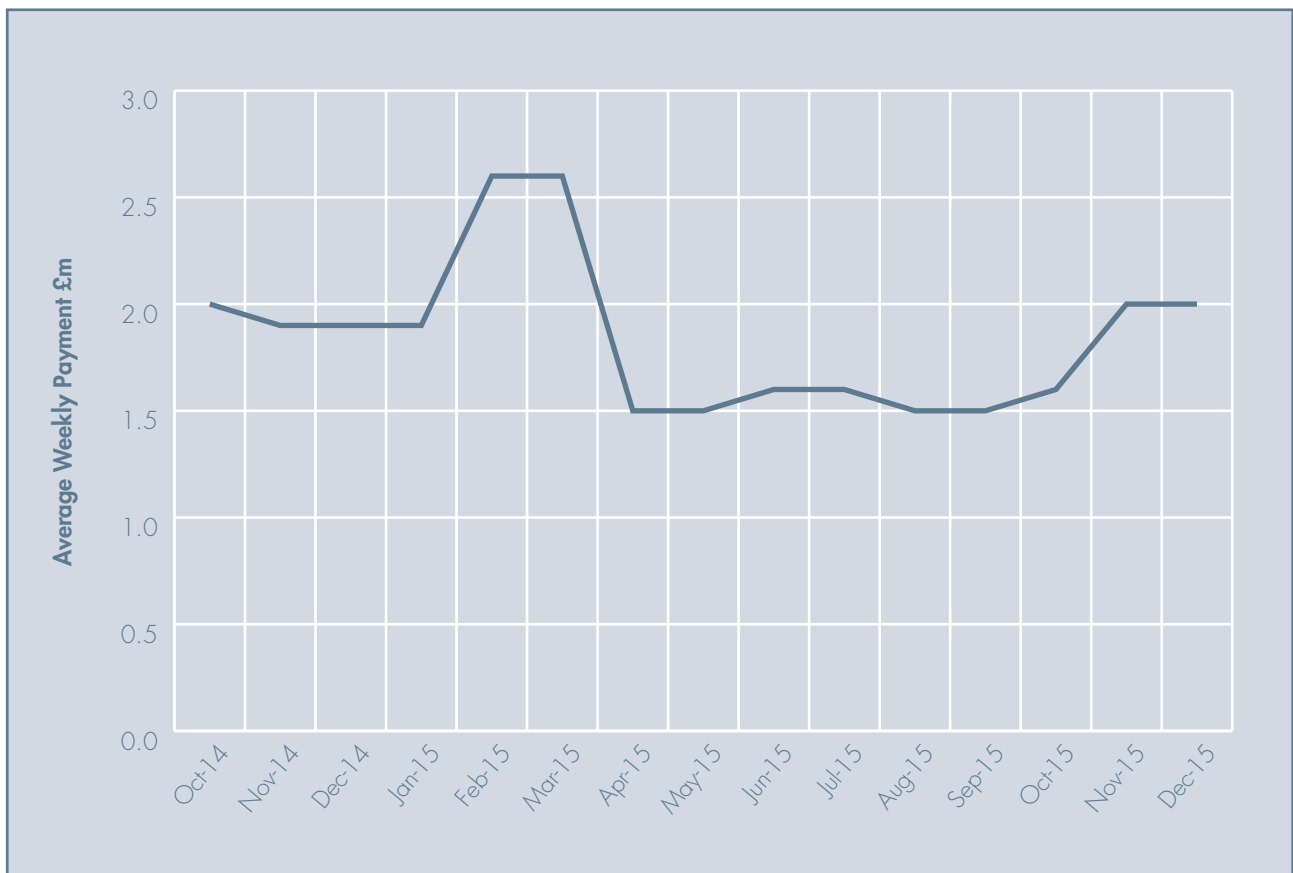
34 Access to Justice, Department of Justice, 2011

4.5 As the gap between the resources allocated and those required grew during the 2011-15 period, the risks for the effective management of the Agency became more significant. In response to this risk the Agency implemented a control in 2014 limiting weekly expenditure levels. These limits are set at a level which will ensure that the Agency can continue to make weekly payments at the same level for the entire financial year, without exceeding the budget.

4.6 This practice has two significant negative consequences. Firstly, applying a cap on weekly expenditure means that not

all claims received are processed for payment. Over a period of time this creates a backlog of claims requiring payment. The Agency predicted that the application of a weekly limit of £1.4 million for the majority of 2015-16 threatened to result in the period of time between the Agency's receipt of a claim and its payment rising to between 22 and 34 weeks, dependent upon the type of case. The allocation of additional funds in November 2015 allowed the Agency to increase the level of weekly payments to around £2 million (Figure 7). These extra resources, combined with the effects of the withdrawal of

Figure 7: Average Weekly Payments



Part Four: Budgetary control

services in the Crown Court following the introduction of the 2015 Rules, enabled the Agency to perform significantly better than predicted.

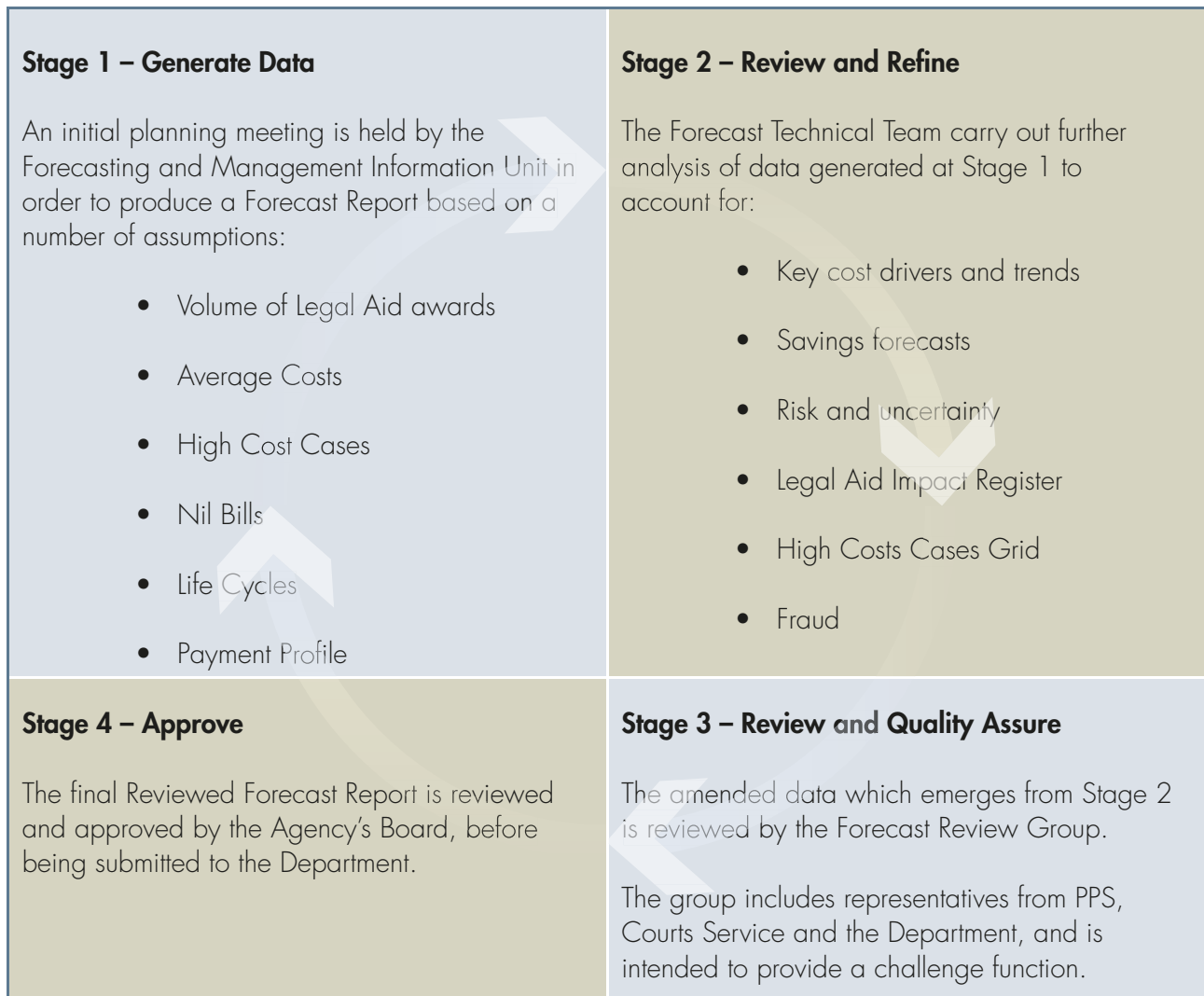
- 4.7 The second consequence is that the application of weekly expenditure limits results in the Agency processing payments at a rate well below its operational capacity. Figures from 2014-15 demonstrate the Agency was comfortably able to process and pay claims worth £2 million each week. The limit of £1.4 million applied in 2015-16 represents only 70 per cent of this capacity. A clear implication is that the current practice of setting expenditure limits results in inefficient use of the Agency's administrative resources. This can be exacerbated where additional resources are allocated late in the year, resulting in a drastic increase in the weekly expenditure limit to try and spend the full amount of resources allocated to the Agency. In late January 2015 the expenditure limit increased from £1.9 million to £2.6 million and could only be met at the cost of around £30,000 in overtime payments to staff. These costs could have been avoided through the earlier allocation of resources to the Agency.
- 4.8 The position has now improved. In 2015-16 and 2016-17 there were significant increases in the Agency's budget allocations which narrowed significantly the gap between the budgets and the anticipated spend. Nevertheless, a gap remains.

Recommendation 6

Budgeting and forecasting are key pillars of good financial management. The opening legal aid budget has been inadequate to meet annual expenditure for a number of years. The Department has made progress in addressing this issue and should now ensure that it continues to align the resources allocated to fund legal aid more closely with the expected spend.

The Agency does not have an effective method to predict future legal aid expenditure

- 4.9 The method the Agency has used to estimate the total value of outstanding legal aid certificates has drawn significant criticism from stakeholders, including the Department, the PAC and the Northern Ireland Audit Office. Since 2003, the audit opinion on the Agency's accounts has been qualified because of this issue.
- 4.10 In response, the Department advised the Assembly's Justice Committee in 2013 that 'the Legal Services Commission had never had accurate forecast(s)... we have been asking the Commission to fix it since devolution, and the Department is now taking ownership of that'³⁵. In partnership the Agency and the Department have developed a new model for forecasting. The model is based upon the calculation of key assumptions and the cost and lifespan of particular types of cases, and applying these to predicted future volumes of cases (figure 8).

Figure 8: Summary of the Forecasting Process

Source: Legal Services Agency

4.11 Despite attempts to implement a new approach, there remain a number of significant weaknesses which compromise the model’s ability to reliably predict future expenditure. The key assumptions used in the forecasting model are undermined by the quality of data available, which is not always comprehensive, consistent or up-to-date.

In our opinion, the patchwork nature of the calculations contributes to an overly complicated model which is difficult to manage and review.

4.12 There are further weaknesses within the review and refinement procedures which are intended to improve the quality of the forecast. A number of key processes

Part Four: Budgetary control

have not been implemented, or are not operating effectively. For example, the Agency currently does not have an effective procedure for identifying cases which will have significantly higher than average costs and so should be monitored separately. This is the case for both criminal and non-criminal legal aid.

- 4.13 Under criminal legal aid, the key factors which will increase the costs of a case are the class of offence and the number of pages of prosecution evidence. Whilst the Agency is aware of the type of offence from the granting of a legal aid award, it does not receive confirmation of the number of pages of evidence related to the case until the final claim for payment is submitted. Earlier notification of this information would allow for improved forecasting.
- 4.14 Within non-criminal legal aid schemes, the key cost driver is the amount of time legal representatives spend on a case. In 2013, the Agency carried out a one-off exercise to identify non-criminal legal aid cases which were likely to cost more than £50,000. This involved writing to legal representatives asking them to identify cases that were likely to breach this threshold. This was successful in identifying a large number of cases which were subsequently carried at a higher value in the Agency's forecasts. However, as this approach was based upon external reporting of cases it provided only limited assurance that all appropriate cases were identified. Furthermore, this exercise

does not provide a sustainable model for identifying unusually expensive cases and the database recording High Cost Civil cases contains no detail on legal aid awards granted after January 2013.

- 4.15 The development of a robust forecasting methodology is something which can support the resource allocation process within the Department, to ensure that legal aid is provided with sufficient resources. Such a system becomes more important in times of significant reform, where historical expenditure data is a less reliable basis for predicting future expenditure levels.

Recommendation 7

The Agency should continue to improve the quality of the data it relies upon to forecast expenditure and ensure that estimates are robust. The information used to support predictions should be consistent, comprehensive, up-to-date and accurate.

Part Five:
Counter fraud arrangements



Part Five: Counter fraud arrangements

- 5.1 Managing the risk of fraud should be a key priority for any public body. An effective counter fraud strategy is essential and its success rests upon the implementation of three key elements:
- preventing the occurrence of fraud;
 - detecting frauds when they cannot be prevented; and
 - responding effectively when fraud is detected³⁶.

In this part of the report we consider the effectiveness of the Agency's counter fraud arrangements.

The Agency's counter fraud strategy is not comprehensive

- 5.2 The audit opinion on the Agency's annual accounts has been qualified since 2003 due to the lack of effective counter fraud arrangements³⁷. For much of this period, the Agency and its predecessors had no documented counter fraud strategy. A working strategy was introduced in 2009 and developed further in 2010. An improved counter fraud strategy was introduced in 2015, based on good practice identified by the Chartered Institute of Public Finance and Accountancy³⁸. Given its recent introduction, it is not yet embedded in the Agency's day to day management.

- 5.3 An essential element of the strategy is the fraud risk assessment, in order that

the Agency understands its specific fraud risks and the potential consequences of fraud to the organisation. While the Agency has undertaken a fraud risk assessment, to date this is largely generic, without an explicit focus on the specific risks that the Agency faces. Crucially, the Agency has not estimated the level of fraud in the system. The Agency is unable to confirm the value of legal aid which has been fraudulently claimed in previous years. Without this, it has no way of knowing whether the controls which it has introduced to prevent frauds are proportionate nor has it a mechanism to measure its success in tackling fraud.

- 5.4 Another key element of the counter fraud strategy is the development of a counter fraud culture within the Agency. At present, the evidence for the existence of this is, at best, limited. While there is mandatory fraud awareness training for all new entrants, with refresher training for all staff every two years, the Agency has not attempted to measure its effectiveness. The results of our audits of the financial statements, conducted over many years, suggest strongly that the counter fraud culture is far from robust.

- 5.5 The Agency is exposed to the risk of fraud committed by the public (as claimants of legal aid) and by the legal profession (as those to whom payments are made). In practice, the preventative controls established by the Agency, such as eligibility tests, focus largely on the risk of fraud committed by members of the public.

36 Managing Fraud Risk in a Changing Environment, NIAO, November 2015

37 A limitation of scope opinion arising from insufficient evidence to confirm that material fraud does not exist within Legal Aid grant expenditure.

38 Code of practice on managing the risk of fraud and corruption, CIPFA, January 2015

Recommendation 8

We recommend that the Agency undertakes further work to develop and embed its counter fraud strategy. In particular, the Agency should establish a reliable estimate of the value of fraud in the legal aid system and take further steps to build an effective counter fraud culture.

Internal controls are inadequate to prevent and detect fraud

- 5.6 Where there are flaws in an organisation's counter fraud strategy, it is to be expected that these will impair its ability to detect the frauds perpetrated against it. 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. While the Agency's staff are a capable source for referrals to the Agency's Counter Fraud Unit (CFU), reliance upon staff vigilance is undermined by the quality of the Agency's case management system. For example, the system does not allow 'risk-flagging' of individual claimants or legal representatives suspected of involvement in fraud. Given the large volume of payments to be processed manually, there remains also the possibility of human error allowing suspicious cases to pass without being referred for investigation.
- 5.7 In the absence of a robust risk assessment, the Agency's sample checks are selected randomly and it is unclear whether they are proportionate or effective. 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.
- 5.8 Under the current legislation the Agency does not have any powers to carry out inspections in the offices of legal representatives involved in legal aid claims. This is a critical gap in the existing counter fraud arrangements. Such powers will become available following the introduction of the Statutory Registration Scheme for providers of legal services. Based upon a very small pilot exercise carried out in early 2013, there is potential for site visits to detect significant compliance issues. The investigations carried out determined that of the 12 firms investigated, five could only be granted limited assurance³⁹. Two of the key issues detected during the inspections were a lack of effective procedures for obtaining verification of client's financial eligibility, and lack of compliance with legal aid legislation. Whilst recognising the very small sample size, the findings of the pilot would appear to indicate the pressing need for a regime of site investigations. This makes the failure to implement the Scheme, discussed in Paragraph 3.30 of this report, all the more disappointing.

39 Of the 12 firms investigated, five were granted substantial assurance, two reasonable assurance, and the remaining five limited assurance.

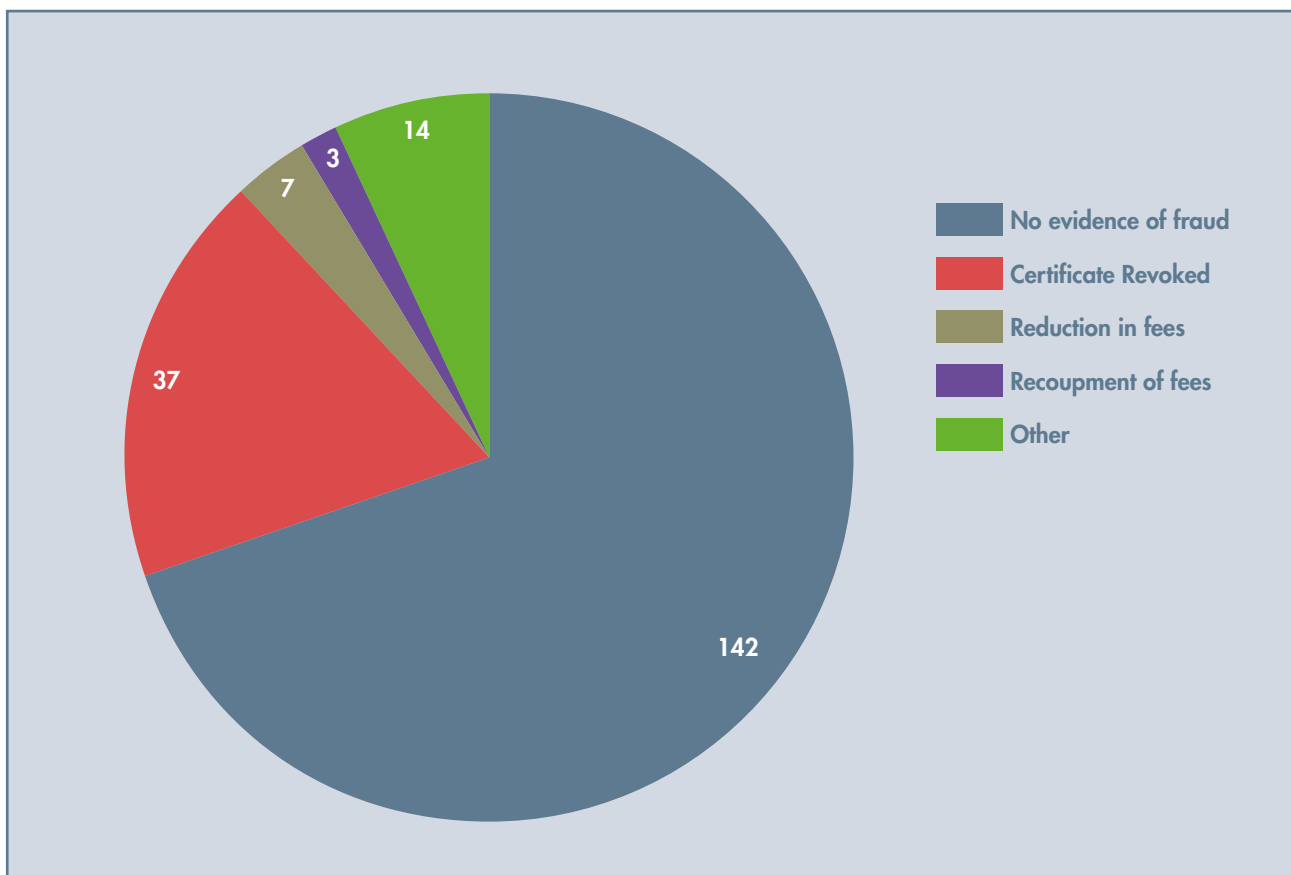
Part Five: Counter fraud arrangements

5.9 The Agency told us that work continues to progress on the introduction of the Scheme. This has included developing a fee charging methodology to meet the costs of the Scheme, which needs to be included in the legislation, alongside the requirements of registration. The aim is to progress the legislation in 2016 with the scheme fully operational in 2017-18.

The Agency is dependent upon third parties to identify suspected fraud

5.10 Reports produced by the Agency's CFU show that of the 932 suspected frauds identified between July 2013 and June 2015, 901 (97 per cent) were notified by external parties (the source of the remaining 3 per cent is classified as 'Other'). Sixty per cent of referrals come from the Single Investigation Service (SIS) in the Department for Communities.

Figure 9: Summary of fraud investigations, July 2013 to June 2015



Source: Legal Services Agency

Each week SIS informs the CFU of all convictions for benefit fraud. This allows the Agency to investigate whether any of those persons used fraudulently obtained benefits to support an application for legal aid. The Agency told us that less than 10 per cent of these referrals are investigated as initial checks show that the majority of individuals were not in receipt of legal aid at the time the benefit fraud was committed. The Agency also pointed out that the notification from SIS comes too late in the process as the individual has already been convicted of benefit fraud and as such the prospect of further prosecution for fraud against the legal aid fund is remote.

The Agency's response to frauds has not been effective

- 5.11 An effective response when fraud is detected is key to a successful counter fraud strategy. Conducting investigations, the successful application of sanctions to offenders, recovery of losses and using the knowledge gained from fraud investigations to enhance the organisation's understanding of risk are all fundamental to this. In a number of these areas, the Agency's response has been ineffective.
- 5.12 In a two year period, the Agency conducted more than two hundred investigations into suspected fraud in civil legal aid (Figure 9).
- 5.13 In 23 per cent of cases, including cases where fraud was not found but where, for some reason, the applicant failed to co-operate with the Agency's investigation, the Agency found evidence to support some form of sanction. However, it has not been able to ensure that those who commit frauds against the legal aid fund are prosecuted. The Agency has no powers to prosecute or to submit cases directly to the Public Prosecution Service (PPS). Persuading the Police Service of Northern Ireland and the PPS that individuals convicted of benefit fraud should subsequently be prosecuted for fraudulently claiming legal aid has proved extremely difficult. This has a significant impact on the Agency's ability to sanction offenders appropriately and recover losses.
- 5.14 The Agency has not used the full range of powers available to it to seek recoveries. Between July 2013 and June 2015 a total of 59 legal aid applications in respect of the Assistance by Way of Representation scheme, where fraud was suspected or where the applicant had not cooperated with requests for information following a fraud referral, were recorded as having been 'Sent to Committee' for withdrawal. However, the Committee which was required to approve these withdrawals has never convened. Consequently, legal aid has been suspended but not withdrawn and at least £25,000 of legal aid obtained incorrectly over this period has not been recovered. The Agency told us that this work is in hand.

Part Five: Counter fraud arrangements

- 5.15 Poor quality management information has limited the Agency's capacity to learn from its experiences in respect of frauds committed. The lack of information prevents the development of enhanced controls to prevent and detect fraud. In particular, the limitations in the functionality of the Agency's case management system prevent individual claimants or legal representatives being 'risk-flagged' for specific consideration in any future applications.
- 5.16 Despite the long-standing qualification of the Agency's accounts in respect of fraud, the resources supporting the counter fraud strategy have diminished since our original report in 2011. The number of full time staff employed in the CFU has fallen from 6 to 4.5 at present. These resources enable the ongoing investigation of referrals, but are not sufficient to allow more proactive counter fraud work. Without this, it appears questionable whether further progress in countering fraud can be achieved.

Recommendation 9

The Agency should ensure that it responds appropriately to all suspected frauds. This involves sanctioning offenders and recovering the money lost. To facilitate this, a more joined up approach with other public bodies will be necessary. We also recommend that the Agency should seek to develop more effective working relationships with the Department for Communities in particular.

Appendix 1: Overview of Legal Aid Schemes

(Paragraph 1.1)

(Information provided in Agency Annual Reports and Accounts)

Legal Advice and Assistance

This scheme is popularly known as the “Green Form” scheme and allows an individual to obtain legal advice from a solicitor on a point of Northern Ireland law. This scheme requires the individual applicant’s financial eligibility to be assessed by a solicitor and can involve the applicant paying a contribution.

Assistance By Way of Representation (ABWOR)

This is an extension of the Advice and Assistance scheme and allows the solicitor to institute proceedings on behalf of the assisted person in court (normally civil matters or matters relating to children). This scheme involves individual applicant’s financial eligibility being assessed and can involve the applicant paying a contribution.

Children Order

This is a form of ABWOR dealing exclusively with cases brought under the Children Order, primarily in the Family Proceedings Court. This scheme involves individual applicant’s financial eligibility being assessed and can involve the applicant paying a contribution.

Civil Legal Aid

Civil Legal Aid provides legal representation in civil court proceedings, primarily in the County Court and High Court. Civil Legal Aid allows someone to obtain legal representation by a solicitor and barrister, either to bring or to defend

a court case. This scheme involves individual applicant’s financial eligibility being assessed and can involve the applicant paying a contribution.

Criminal Legal Aid

Criminal Legal Aid provides free legal representation by a solicitor and barrister to defend someone charged with a criminal offence in the Magistrates’ Court or the Crown Court. An individual’s financial eligibility is assessed by the judiciary who grant criminal legal aid if the applicant’s means are insufficient to fund their own defence and it is in the interests of justice that the applicant receives free legal aid.

Appendix 2: The process for granting legal aid

(Paragraph 1.2)

The process for granting criminal legal aid

The power to grant or refuse criminal legal aid lies with the courts. Under Articles 28 to 30 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, the decision whether or not to grant legal aid is determined by two tests – the means test and the merits test.

Under the means test the court must assess whether an applicant seeking criminal legal aid has insufficient means to enable them to fund their own defence. The court will base its decision upon a Statement of Means form which the applicant is required to complete. There are no set criteria for assessing this declaration, and it is a matter of judicial discretion whether the applicant possesses sufficient means or not.

Under the merit test the court must decide whether it is desirable in the interests of justice for the applicant to receive free legal aid in the preparation and conduct of their defence. Whilst the interests of justice are not defined, the Report of the Departmental Committee on Legal Aid in Criminal Proceedings (the “Widgery Committee”) in 1966 advanced what are generally taken to be the guiding principles behind this test:

- The likelihood of being deprived of liberty;
- The potential loss of livelihood;
- The possibility of serious damage to the individual’s reputation;
- Whether a substantial question of law is involved in the case;
- Whether the applicant has an inadequate knowledge of English;

- Whether the question would require the tracing and interviewing of witnesses;
- The need for expert cross-examination of prosecution witnesses; or
- Whether it would be in the interests of someone other than the accused that the accused be represented.

Article 31 of the 1981 Order indicates that if there is any doubt about whether criminal legal aid should be granted the doubt is to be resolved in the applicant’s favour.

The process for granting non-criminal legal aid

The eligibility criteria for civil legal aid schemes are also set out in the 1981 Order. The precise eligibility criteria, and processes for determining whether the applicant meets these, vary across the particular civil legal aid schemes.

Under Legal Advice and Assistance, a person’s eligibility will be determined by the legal representative they approach. The maximum claim which the legal representative can make for engagement with a client is £88, which is equivalent to two hours work. Prior to performing the work, the legal representative needs to assure themselves that the client is financially eligible.

At present, an applicant will be ineligible if they exceed the disposable earnings or disposable capital (savings) limits set out in the 1981 Order, as amended. An applicant who is in receipt of a “passport benefit” (Income Support, Jobseekers Allowance, Guaranteed State Pension Credit

Appendix 2 (continued)

or Income Related Employment and Support Allowance), or whose disposable income and savings are below the levels set out in the Order will be entitled to full support. Persons whose income or savings fall between these two limits may be liable to make a contribution towards the cost of their legal advice.

The other civil legal aid schemes (ABWOR, Children Order and Civil) require that permission is granted prior to work being performed for which the legal representative intends to be reimbursed through legal aid.

For ABWOR and Children Order applications the applicants financial eligibility is determined by the legal representative whom the applicant approaches. This assessment may determine that the individual is financially ineligible, or if the applicant is liable to pay a contribution towards the cost of their legal representation. The solicitor involved will include details of their assessment upon the application form for legal aid which they submit to the Agency. It is then the Agency which makes the final decision about whether the application should be accepted and legal aid provided to the applicant.

For full civil legal aid the individual's financial eligibility is determined by the Legal Aid Assessment Office, which is a part of the Department for Social Development. This may result in it being determined that the individual is not eligible for legal aid, or that the individual is liable to pay a contribution towards the total cost of their representation. Initially an applicant will approach a solicitor, who will assist them in completing the necessary paperwork. Subsequently, the Legal Aid Assessment Office (LAAO) will determine whether the individual is financially eligible, and if any contribution towards

the total cost is required. The LAAO will report its conclusion to the Agency, which will then decide whether the applicant has reasonable grounds for being a party to the proceedings and that it is not unreasonable for legal aid to be granted. Even if financially eligible, the applicant's petition may be refused by the Agency.

Appendix 3: Remuneration arrangements

(Paragraph 1.2)

Criminal Legal Aid

2005 Rules

In 2005 the Northern Ireland Courts and Tribunals Service introduced the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005. These rules introduced a framework of standard fees for publicly funded legal representation in Crown Court proceedings. Responsibility for determining the level of fees to be paid lay with the Legal Services Commission (the Commission). Appeals against the Commission's decisions could be heard by the Taxing Master. The standard fees were set against statutory value for money tests, prescribed in the 1981 Order as amended by Section 7(6) of the Access to Justice Order 2003, which requires consideration be given to

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

The 2005 Rules meant that, for the vast majority of Crown Court cases, the remuneration did not depend on the number of hours claimed by the legal representatives. Instead a standard fee was paid which was deemed to provide value for money.

The 2005 Rules also introduced a scheme of Very

High Cost Cases which exempted cases from the standard fee regime and required the Taxing master to assess the remuneration payable. A small number of cases received Very High Cost Certificates but this accounted for a significant proportion of Crown Court expenditure.

2009 Rules

In 2009, Court Service brought forward an amendment to the treatment of Very High Cost Cases which required barristers and solicitors to detail the work undertaken and to ensure that all remuneration was against redefined hourly rates. It also tightened up the criteria a case had to meet to be deemed a Very High Cost Case, which reduced the number of cases certified as such.

Also in 2009, Court Service introduced new remuneration arrangements for Magistrates' Court cases, the Magistrates' Courts and County Court Rules (Northern Ireland) 2009, which prescribed a range of standard fees for Magistrates' Court proceedings and appeals to County Court. The Rules vested responsibility for the determination of the fees with the Commission, with appeals against the Commission's decisions being heard by the Taxing Master. The standard fees were again prescribed against a statutory value for money test (outlined above).

The 2009 Rules meant that there was no assessment of time spent on individual cases, rather remuneration, without uplifts, was based on standard fees set in the Rules.

The 2009 Rules also include a provision for certification of certain Magistrates' Court cases as Very High Cost Cases. Fewer cases have been certified as the test is much more restrictive than in the Crown Court Rules.

Appendix 3 (continued)

2011 Rules

In 2011, Court Service introduced further refinements to the remuneration of Crown Court Cases. The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011 reduced the level of remuneration payable to barristers and solicitors and also abolished Very High Cost Cases. New arrangements were introduced to allow the standard fees payable under the Rules to be adjusted by factors which reflected the weight and complexity of the cases.

2014 Rules

The Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) (Amendment) Rules (Northern Ireland) 2014 made a number of amendments to the 2009 Rules for Magistrates' and County Courts. Most significantly, the 2014 Rules removed separate provision for the payment of Guilty Plea 2 Fees, and revoked separate provision for special hourly rates of payment in Very High Cost Cases. Together, these measures were expected to deliver savings of £700,000 per annum. However, these savings would be offset against a number of new additional fees, and the introduction of new fixed fees for Fine Default Hearings, expected to cost £600,000 per annum. It is the Department's intention that these fixed fees for Fine Default Hearings will be replaced by an alternative civil fine enforcement mechanism in four years time.

2015 Rules

The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2015 prescribed significant changes to the remuneration payable to solicitors and counsel representing defendants granted criminal legal aid for cases in the Crown Court. The implementation of these changes are predicted to produce annual savings of £7.7 million by 2017-18.

2016 Rules

At the suggestion of the Lord Chief Justice, in advance of the Appeal Hearing, the Department entered into mediation with the Law Society and the Bar Council in an attempt to resolve the action being taken by the Criminal Bar Association and some solicitors. The outcome of this was that a number of fees were increased as part of a mediated agreement. The uplift in the level of fees offered compared to the 2015 Rules is predicted to reduce the projected savings to £5m per year.

Civil Legal Aid

The remuneration arrangements for civil legal aid are set out in the Schedule 2 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. The framework established by the 1981 Order is a complicated combination of statutory and non-statutory remuneration mechanisms.

Appendix 3 (continued)

For full civil legal aid cases heard in the High Court, the remuneration to be paid to legal representatives is determined by the Taxing Master. Following the completion of a case the legal representatives involved will draw up a Bill of Costs detailing an itemised list of activities, and a total cost for these services. These claims encompass time spent working on the case at an hourly rate, as well as individually expensed activities such as sending letters or making phone calls. These are submitted to the Taxing Master who reviews the claim, and applies reductions if it is deemed that the amount claimed does not represent a fair and reasonable fee. The Taxing Master then provides the Agency with a certificate authorising payment of the legal representative a set amount.

For cases which are heard in the County Court, the remuneration rates are determined by the County Court Rules Committee, and the rates of payment set out in the County Court Rules. The Committee is a consultative body sponsored by the Department, whose membership includes members of the judiciary, the legal profession and the Department. The current framework of fees is set out in Schedule 2 of the County Court (Amendment) Rules (Northern Ireland) 2013. The fees constitute payment rates banded by the financial significance of the case. Provision is made for additional payments where trials last more than one day, and where the judge deems the case to have been complex.

For the remaining areas of law where civil legal aid may be provided to an individual, the Agency is responsible for determining the remuneration rates for legal representatives. Between 2003 and 2013 the Agency established Schedules of Fees for each discrete area of law where legal aid may be granted, and based payments to

legal representatives upon the rates decreed in these Schedules. Once a particular Schedule was developed it has remained in place since, and none of the Schedules have been subject to review or revision. The fees contained in the Schedules were developed as internal guidance documents for the Agency's staff, and were never put on a statutory footing. The Schedules include a number of different bases for payment levels, including time based payment rates, composite fees and itemised rates for particular actions performed by legal representatives.

Since 2012, responsibility for determining remuneration arrangements in these areas has transferred to the Department. As part of the legislative programme required to move the Commission to an Agency, the various Schedule of Fees which had been developed by the Agency were put on a statutory footing in the Civil Legal Services Remuneration Order (Northern Ireland) 2015. This exercise did not involve reviewing or revising the appropriateness of the fees contained within the Schedules.

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