

Legal Services Agency Northern Ireland

2018-19

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.
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. Whilst progress has been made by the Agency on these issues, further work will be needed to resolve them. Consequently, I am qualifying my audit opinion on the 2018-19 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 explains the background to my qualifications on the LSANI Account for the year ended 31 March 2019.
7. I have qualified my opinion on the financial statements due to:
 - i. incorrect legal aid expenditure, which based on the best audit evidence available to me, is estimated at £5.9 million during the year, as a consequence of official error; and
 - ii. limitations in the scope of my work due to insufficient evidence available to:
 - satisfy myself that material fraud and error by legal aid claimants and legal practitioners did not exist within eligibility assessments of legal aid applicants and in expenditure from legal aid funds; and
 - support the assumptions and judgements used in the determination of the year end provision for legal aid liabilities of £135.8 million at 31 March 2019; and the resulting adjustments required to the annual legal aid expenditure.

Qualified audit opinion on irregular legal aid expenditure

8. Legal aid expenditure during 2018-19 totalled £84.3 million. There are a number of reasons why this expenditure may not be applied for the purposes intended by the Assembly or conform to the authorities which govern them:
 - Official error – where an error can be attributed to the actions or inactions of the Agency;
 - Errors made by legal aid claimants and legal practitioners; and
 - Fraud.
9. As I noted in my report on the 2017-18 LSANI financial statements, the Agency has been working with the Department for Communities (DfC) to develop an estimate of the levels of fraud and error within legal aid expenditure. This work has a number of different strands and will take time to develop. However work undertaken to date has enabled the Agency to provide me with an estimate of the level of official error in this expenditure for the first time.
10. DfC's Standards Assurance Unit (SAU) selected a sample of 739 payments made between April 2017 and December 2017 and tested whether they had been

processed in accordance with legislation. The Agency has used this information to estimate the level of official error in 2018-19 legal aid payments. I am satisfied that the approach is reasonable. Whilst the Agency, in line with advice from the Northern Ireland Statistics and Research Agency, views the statistics produced to date to be experimental and advises that they should be interpreted with caution, they nonetheless represent the best audit evidence available to me at this time.

11. The estimated level of overpayments in this expenditure resulting from official error is £5.5 million, whilst the estimated level of underpayments is £0.4 million. All overpayments are considered irregular as the expenditure has not been applied in accordance with the purposes intended by the Assembly. Underpayments resulting from official error are not considered to have conformed to the authorities which govern them as the corresponding transactions have not been processed in accordance with the applicable legislation. Therefore the expenditure is considered to be incorrect in 2018-19.
12. These estimates include deemed errors of £4.9 million, where further information was required to reach a conclusion on the appropriateness of the payment. If this information subsequently becomes available an adjustment is made to the error calculation in the next quarterly report. The Agency aims to produce a final report on official error for the year ended 31 March 2017 by early July 2019, which includes adjustments for deemed errors where the information required had subsequently been produced. Since this report is not available at present I have based my audit findings on the Quarter Three report instead.
13. The types of error identified in this testing included:
 - i. deemed errors of £2.5 million in respect of Court of Criminal Appeal legal aid certificates where testing could not be completed due to outstanding information;
 - ii. inconsistencies between court records and items billed by legal practitioners;
 - iii. travel expenses being paid on standard mileage rather than actual mileage;
 - iv. items not being paid in accordance with the Civil Legal Services; (Remuneration) Order (Northern Ireland) 2015; and
 - v. simple calculation errors.

I asked the LSANI what actions it was taking to address these issues. It told me *“LSA staff have continued to work with the SAU throughout this developmental year to rectify issues raised. This exploratory work will enable the Agency to report a comprehensive estimate of official error and establish a work*

programme to address this. The introduction of LAMS should significantly reduce the level of error in mileage claims. In addition, updated desk instructions have also been issued to all staff which will ensure a consistency of approach across all payment areas.

Amendments to the Civil Legal Services (Remuneration) (Amendment) Order (Northern Ireland) 2019 came into operation on 1 July 2019. Further legislative changes to address other long standing queries are currently beyond the Department's regulation making powers and cannot be advanced in the absence of the Assembly."

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

14. Until the Agency progresses other aspects of its work with DfC it cannot provide me with an estimate of the level of fraud and overpayments arising from errors made by claimants and practitioners in legal aid expenditure.
15. There are two aspects to the limitation in scope in respect of fraud and errors made by claimants and legal practitioners. 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

16. Whilst some assurance was gained by LSANI from the SAU's testing on official errors made in eligibility assessments, consideration of other aspects still need to be addressed. 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 information from the Legal Aid Assessment Office (LAAO)¹ on the level of the applicant's income or that they are 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 income or what benefits are being claimed.

¹ The Legal Aid Assessment Office was part of the Working Age Group in the Department for Communities but transferred to the LSANI on 4 March 2019.

17. 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
 - 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.
18. The LSANI has invested considerable resources to develop a robust strategy to counter fraud and error, working with the DfC to develop an estimate of the levels of fraud and error in the system. The interview and review of claimant applications is the next significant part of the DfC review. Initial work has already commenced to develop the methodology.

Payments to legal practitioners

19. 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 overpayments made to legal practitioners resulting from fraud and error by claimants or practitioners.
20. Under the current legislation the Agency does not have any powers to carry out inspections in the offices of legal practitioners involved in legal aid cases. This is a critical gap in the counter fraud arrangements. Powers to address this will become available on the introduction of the Statutory Registration Scheme for the providers of legal services. This is an essential element of ensuring that publicly funded legal services deliver value for money and its absence undermines the LSANI's ability to implement a robust quality assurance process. The Access to Justice Order 2003 provided for the introduction of such a scheme. It is concerning that over 16 years later the scheme is still not in place.
21. 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 but that the draft legislation cannot be progressed further in the absence of an Assembly. In addition, an online registration facility has been developed as part of the implementation of the Legal Aid Management System (LAMS) on 1 July 2019. This will support the roll-out of the registration scheme once the legislation is passed.

22. I have limited the scope of my audit opinion on the regularity of expenditure in 2018-19 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 by claimants and legal practitioners.

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

23. 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.
24. 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

	At 31 March 2019 £ million	At 31 March 2018 £ million	At 31 March 2017 £million	At 31 March 2016 £million
Criminal	44.6	39.5	47.2	46.3
Civil	91.2	96.2	98.8	80.5
Total	135.8	135.7	146.0	126.8

Source: Legal Services Agency

25. 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.

26. 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 £6.4 million (£19.5 million 2017-18) for these differences. The adjustment is one indication of the level of error in the previous year's provisions estimate.

Legal Aid Annual Expenditure

	At 31 March 2019 £ million	At 31 March 2018 £ million	At 31 March 2017 £million	At 31 March 2016 £million
Provided in the year - includes predicted cost of new certificates issued in year ²	90.7	88.3	127.9	147.4
Provisions not required written back - includes errors in previous years provision	(6.4)	(19.5)	(26.3)	(48.8)
Total Annual expenditure	84.3	68.8	101.6	98.6

Source: Legal Services Agency

27. The level of error in the estimated provisions has reduced considerably over the last four years, but it remains materially inaccurate. 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.
28. 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

² These figures are disclosed by LSANI at page 83 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.

has progressed considerably and was used to inform the provision for legal aid liabilities in the last three years' financial statements. However, it is limited by specific concerns about:

- the accuracy and completeness of the numbers of legal aid certificates; and
- the quality of management information used in the provisions valuations.

29. The introduction of the new case management system on 1 July 2019 should help address these issues in the future. I have qualified my audit opinion on the truth and fairness of the amount provided for legal aid liabilities at 31 March 2019 due to insufficient evidence to support the current provisions methodologies and the judgements made when calculating provisions.

Reforms to the legal aid system

30. In my report on the LSANI's 2017-18 financial statements I noted my concern that not all of the Public Accounts Committee's recommendations to improve the legal aid system had been actioned. By way of update the Agency told me that:

- The review of the scope of considering savings from contracting out legal aid services has now been concluded, and its recommendation was accepted by the Department. However formal endorsement would require Ministerial engagement and this cannot be progressed in the absence of the Assembly.
- The recommendation on a capability review of the leadership team and governance arrangements in place with the Department has been progressed. The Agency will reorganise from three to two Directorates in the coming months. Recruitment processes for directors and senior legal staff are underway.
- Further progress on reviewing how expenditure currently adjudicated by the Taxing Master is brought under the purview of the LSANI Accounting Officer would require legislation. This is beyond the Department's regulation making powers and cannot be advanced in the absence of the Assembly.

Conclusions

31. The Agency continues to work with the DfC to estimate the levels of fraud and error in legal aid expenditure and to develop an effective counter fraud strategy. Significant progress has been made during the course of the year and a realistic

timetable established to progress other elements of this work. There remains insufficient evidence to determine the level of claimant or practitioner fraud or error regarding the eligibility of legal aid payments or payments to legal practitioners in 2018-19. The Agency has estimated £5.9 million of legal aid expenditure was irregular during 2018-19 due to official error. I expect this to decrease in future years as the Agency works to address the issues identified.

32. 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 should improve in future years with the implementation of the new case management system on 1 July 2019.
33. 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. Even so, I am disappointed by the slow progress that has been made by the Department and the Agency.
34. I will continue to keep the implementation of the Committee's recommendations under review.

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