



Northern Ireland Audit Office

Managing Criminal Legal Aid



REPORT BY THE COMPTROLLER AND AUDITOR GENERAL
29 June 2011



Northern Ireland Audit Office

Report by the Comptroller and Auditor General for Northern Ireland

Managing Criminal Legal Aid

This report has been prepared under Article 8 of the Audit (Northern Ireland) Order 1987 for presentation to the Northern Ireland Assembly in accordance with Article 11 of that Order.

K J Donnelly
Comptroller and Auditor General

Northern Ireland Audit Office
29 June 2011

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Glossary

Appropriate Authority	A committee of three comprising one solicitor, one barrister and one lay person selected from a panel appointed by the Lord Chancellor.
Bar Council	The representative and regulatory body for the profession of barristers.
Disbursements	Travelling expenses, witness expenses, and other out of pocket expenses incurred by a solicitor, including the cost of expert witnesses and any reports required e.g. psychiatric evaluations.
Law Centre (NI)	A not for profit agency working to advance social welfare rights in Northern Ireland.
Marking a Brief	Claiming a global figure for preparatory work and the first day of trial. No breakdown of hours worked is provided.
The Law Society	The representative and regulatory body for the profession of solicitors in Northern Ireland.
Taxing Master	A Statutory Officer in the Court of Judicature appointed by the Minister of Justice.

Abbreviations

C&AG	Comptroller and Auditor General
Commission	Northern Ireland Legal Services Commission
Court Service	Northern Ireland Courts and Tribunals Service
Department	Department of Justice
DFP	Department of Finance and Personnel
NAO	National Audit Office
NIAO	Northern Ireland Audit Office
Rules	Statutory Rules
VHCC	Very High Cost Case

Executive Summary



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1. Legal aid is a publicly funded service delivered exclusively by the private sector. Expenditure, which is demanded, is rising every year. In 2000-01, for example, legal aid payments were £38 million, but by 2010-11 this total had risen to £93 million¹. Criminal legal aid is available to anyone accused of a crime where a judge determines that it is in the interests of justice for legal aid to be granted and where the judge concludes that the accused person does not have sufficient means to pay for their own defence. In 2010-11, criminal legal aid accounted for 54% of total legal aid spend.
2. The current responsibilities for granting and authorising the payment of criminal legal aid are complex and have created a tension between accountability and responsibility. The Northern Ireland Legal Services Commission (the Commission) is accountable for legal aid expenditure, whereas the Northern Ireland Courts and Tribunals Service (Court Service) retains policy responsibility for criminal legal aid and the judiciary decides who receives it. In addition, for significant periods of time, the Commission did not have responsibility for determining the remuneration payable in individual cases. Against this background we examined the arrangements for the management of criminal legal aid in Northern Ireland.

There has been a dramatic rise in costs over the last decade (Part 2)

3. The cost of criminal legal aid has more than doubled during the last 10 years, rising from £22 million in 2000-01 to £60 million in 2009-10, before falling back to £51 million in 2010-11. Such increases within the public service are unsustainable, particularly in the current environment of limited resources and competing priorities.
4. Defendants in more serious or complex criminal cases are often represented by two counsel. However, there is a huge disparity between the assignment of two counsel in Northern Ireland (55% of indictable cases) and the practice in England and Wales (5% of indictable cases). Clearly legal costs increase with additional representation.
5. Up until 2009, where a solicitor or barrister considered that the prescribed hourly rate or fee payable would not provide fair remuneration for work undertaken in respect of an individual case they could seek an increase. From 2000-01 to 2008-09, more than half the criminal legal aid payments in respect of cases heard in the Magistrates' Courts² were subject to such an uplift. These consistently accounted for more than three quarters of the criminal legal aid expenditure, with uplifted payments averaging around three times that of those paid at the prescribed rate. New rules introduced in 2009 have improved the situation. While we welcome the recent change to the rules, we are concerned

¹ Excluding administration costs.

² Magistrates' Courts deal with those (usually lesser) criminal offences where the defendant is not entitled to trial by jury. These are known as summary offences, and involve a maximum penalty of six months imprisonment and/or a fine of up to £2,000.

that the delay in reviewing Magistrates' Courts remuneration led to a situation where uplifts to the prescribed hourly rates became the norm.

6. If fee-earners are still dissatisfied with the additional funding approved, they have a right to make representation to the Commission to present their case for increased fees. The process is free and we found it uncommon for fees to be reduced. Indeed, since the Commission was established two-thirds of appeals, in respect of non-standard cases heard in the Crown Court, have been won, resulting in an additional £10 million being paid to the legal profession. We find it unacceptable that corresponding figures are not available in respect of the Magistrates' Courts.
7. Although the Commission is allowed to reduce payments to legal representatives for the late submission of claims, complete information on this aspect of performance has been difficult to access. Consequently, we cannot say if this penalty regime is being used consistently or effectively to either encourage compliance or reduce the Commission's costs.

Very High Cost Cases were set up to control costs but appear to be doing the opposite (Part 3)

8. Very High Cost Cases (VHCCs) are those where the trial is likely to last in excess of 25 days. These are the most complex and lengthy criminal trials and VHCC status provides access to higher rates of remuneration for preparatory work and higher fees. While it was expected that around five cases a year would qualify as a VHCC, in practice there has been around 27 a year.
9. Since their introduction in 2005, only 11% of VHCCs have actually proceeded to trial lasting more than 25 days. Of the remaining cases, 52% went to trial but lasted less than 25 days while 37% never went to trial at all. This may happen where the defendant decides to plead guilty or where the prosecution withdraws the charges. In these circumstances, the Commission has no statutory power to revoke the VHCC certificate, or reduce the level of fees payable. Based on a random sample of cases, we calculate that up to £23 million may have been paid since 2005 in respect of cases which failed to go to trial lasting in excess of 25 days.
10. In October 2009, a new qualifying condition was introduced which stated that a VHCC must be "*likely to proceed to trial*" as well as the trial being likely to last more than 25 days. Since then, 40% of applications for VHCC status have been turned down by the Commission. Prior to this, less than 1% of applications were refused.
11. Legislation requires solicitors and barristers to submit a detailed, itemised breakdown of the work undertaken, at least every three months, together with an estimate of costs until a VHCC is completed. Where a solicitor or barrister fails to provide sufficient supporting information,

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the Commission can revoke the VHCC certificate. We are concerned that the Commission has never used these powers. In our view, this practice does not provide a sound and defensible basis for assessing claims and managing costs.

12. A high percentage of appeals against the level of fees paid in VHCC cases were successful, resulting in total payments increasing from £4.5 million to £7 million. We found little documentation to support this increase. Since the introduction of new rules in October 2009, Court Service has been able to intervene in such appeals “*in the public interest*” and has done so, resulting in 28 out of 41 claims being withdrawn by the legal profession. We see this as a progressive step which should help reduce costs in future.
13. During the course of our study, Court Service introduced new Rules, with effect from 13 April 2011, which removed VHCCs in Northern Ireland and reduced the fees payable to defence lawyers in Crown Court cases. However, the new fees remain, overall, more generous than those which apply in England and Wales and in Scotland. Cases certified prior to this date will continue to be assessed under the old rules.

There is enormous potential for improvement to the Commission’s budgetary control system (Part 4)

14. The budget provided for legal aid has consistently been below the resources

required, with £150 million additional funding needed since 2003. The demand led nature of legal aid means that resolving the budgeting arrangements should be a matter of priority.

15. The Commission is expected to generate efficiency savings of almost £30 million by 2013-14. Over 60% of these savings are expected to be generated by the new Rules which came into operation on 13 April 2011, but further savings are dependent on legislation receiving approval by the Assembly. However, even if the Commission achieves its projected savings, forecast expenditure is still £1.4 million in excess of the budget.

The Commission has not been successful in carrying out the reforms it was set up to do (Part 5)

16. The Commission, in conjunction with Court Service, was expected to implement a programme of reform by autumn 2007. The Commission told us that it has faced a number of significant difficulties that have hindered its ability to deliver the reform programme as planned. The target date for full implementation is now March 2014.
17. The Access to Justice Order (2003) refers specifically to the Commission’s duty to secure value for money. The Commission told us that, as the Order has not yet been fully enacted, there is no statutory requirement or basis for it to assess the quality of criminal legal services provided by the legal profession. However,

notwithstanding the requirements of the Order, there is an onus on the Commission, as with all public sector bodies, to use its resources efficiently, economically and effectively.

18. The Commission reports its performance against a number of targets each year but this is largely activity-based reporting, rather than reporting outcomes.
19. Members of the legal profession have been involved in the process for agreeing the fees payable for the delivery of criminal legal aid services, creating an inherent conflict of interest.
20. There are serious deficiencies in the quality and consistency of the Commission's management information. However, there is considerable scope for the Commission to make better use of the information at its disposal.

Changes since completion of fieldwork

21. Following the completion of fieldwork for this report, Court Service made new Rules for the remuneration of Crown Court work³ which came into effect on 13 April 2011. Court Service has estimated that this change will reduce criminal legal aid expenditure by some £18 million a year. The new Rules removed VHCCs, together with the 'exceptionality' provisions for Crown Court cases. There will therefore no longer be any 'non-standard' Crown Court cases, as all cases are now covered by standard fees.

Conclusion on value for money

22. The Northern Ireland Legal Services Commission was established in 2003 and given responsibility for introducing measures to control legal aid expenditure. Over seven years later, the Commission is still some way from fully implementing the reform programme, and costs appear to be escalating out of control. We found insufficient management information in some areas which would help the Commission predict and control expenditure. In other areas the Commission needs to make better use of the information already at its disposal. Significant potential exists for efficiency improvements, including direct cost savings. This, however, will not be achieved unless the Department of Justice, Court Service, the Commission and professional bodies work together. The current framework for managing criminal legal aid does not ensure value for money for the taxpayer or proper accountability for public money.

3 The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (NI) 2011.

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Key recommendations

23. We have made a number of recommendations to address these issues. The most important are summarised here:

- Given that GB has had systems in place to limit the number of counsel for over 10 years, Court Service needs to introduce the new procedures and tighter criteria that have already been identified for assigning two counsel in Crown Court cases, as a matter of priority.
- While we welcome the recent change to the regulations which removes the separate category for VHCCs, Court Service must regularly review the new remuneration scheme to ensure that it remains 'fit for purpose' and offers value for money.
- While the Commission has no legislative basis to require the Taxing Master* to provide full documentation, it should seek his agreement to provide a full record of decisions made on all VHCCs still to be processed, including a breakdown of fees and disbursements allowed in his assessments and re-assessments.
- The Commission must take immediate steps to review the information it relies upon to forecast and monitor expenditure, ensuring that it is comprehensive, accurate and up-to-date.
- The Commission must assess the quality and value for money of the criminal legal aid services funded from the public purse.
- In common with all public sector bodies, the Commission and Court Service must review their governance arrangements on a regular basis to ensure that conflicts of interest are minimised and managed effectively.
- The Commission needs to identify the information it needs to manage its business and develop a strategy to rationalise its disparate manual and computer systems in order to make better use of the information at its disposal.

* See Appendix 4.

Part One: Introduction and Background



Part One: Introduction and Background

1.1 The legal aid system in Northern Ireland helps ensure that those people in greatest need are not denied access to justice because they cannot afford to pay for it. Legal aid exists to help pay for a solicitor or other legal practitioners:

- to help people protect their rights in civil matters such as divorce, matrimonial and maintenance issues; personal injury cases; injunctions; bankruptcy; negligence cases, and bail; or
- to help people who are under investigation, or facing criminal charges.

Ninety-eight per cent of applications for criminal legal aid are accepted

1.2 Criminal legal aid is only available to people who have been charged with a criminal offence. It pays for legal advice and 'representation', which means a solicitor and, if necessary, a barrister to put their case in court.

1.3 The decision whether or not to grant criminal legal aid lies solely with the courts. In making a decision, the judge must take into account the financial means of the accused; and whether it is desirable, in the 'interests of justice', that the person brought before the court should have legal assistance⁴. In deciding whether a case meets the 'interests of justice' test, the judge must consider:

- whether the offence, if proved, would lead to a custodial sentence;
- whether there is a possibility of loss of livelihood or damage to the defendant's reputation;
- whether there is a substantial question of law to be argued; or
- whether the defendant may be unable to understand the proceedings, for example due to inadequate English or mental illness.

In 2009-10, some 98% of applications for criminal legal aid in Northern Ireland were successful. **Appendix 1** outlines the process for granting criminal legal aid in more detail.

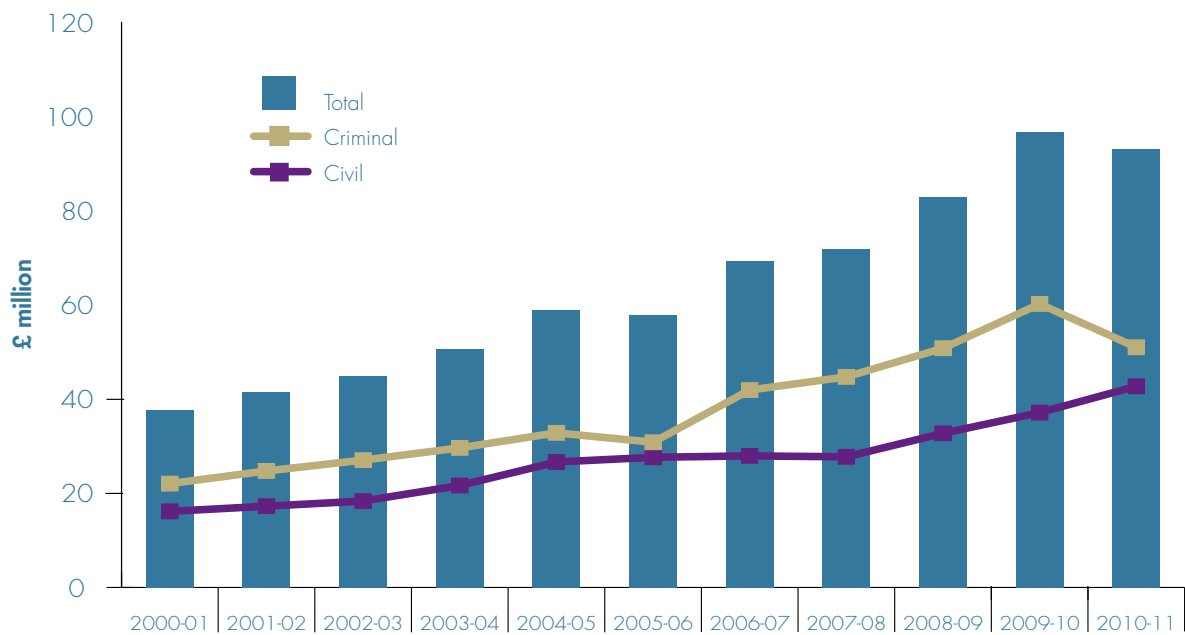
Legal aid spending is continuing to rise

1.4 Legal aid plays a vital role in ensuring that there is 'fair and equal access to justice in Northern Ireland'⁵. However, it is becoming increasingly expensive. In 2000-01, total legal aid spending, excluding administration costs, stood at some £38 million. It had increased to nearly £97 million by 2009-10, falling back to just over £93 million in 2010-11, with criminal legal aid currently accounting for around 54% of the total spend (see **Figure 1**).

1.5 At a time when all public services are facing unprecedented budgetary pressures, the current system of legal aid payments is under intense scrutiny.

4 Legal Aid, Advice and Assistance (Northern Ireland) Order 1981

5 Taken from the Department of Justice's Mission Statement.

Figure 1: The cost⁶ of legal aid has more than doubled since 2000-01

Source: NAO analysis of the Commission's data

The Justice Minister has raised concerns about the increasing spend on legal aid and has said that the current system is unsustainable, particularly in very high cost criminal cases "in which less than 1% of the cases consume almost 30% of the total legal aid budget"⁷.

Northern Ireland spends more per head on legal aid than other comparable nations

1.6 In 2009, the National Audit Office (NAO) published a report⁸ which showed that Northern Ireland spent around £26 per head on criminal legal aid in 2006, more than any other comparable jurisdiction; the average spend of £725

per prosecution was also the highest of any jurisdiction except for Scotland (see **Figure 2**). (A comparison of the system in Northern Ireland with those in England, Scotland and Wales is at **Appendix 2**).

1.7

NAO said that the differences were partly due to the greater defence costs inherent in an adversarial legal system, in contrast to jurisdictions where judges play a greater investigative role. However, even countries with comparable legal systems spend significantly less than Northern Ireland, for example, New Zealand and Canada spend less than £5 per head (these figures relate to 2006: since then, expenditure in Northern Ireland on criminal legal aid has risen by 50%).

⁶ These figures exclude administration costs.

⁷ Extract from a speech made by the Justice Minister to an invited audience in Castle Buildings, June 2010. The quote refers to the 2009-10 financial year

⁸ *The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission*; National Audit Office; HC 29; November 2009.

Part One: Introduction and Background

Figure 2: Expenditure on criminal legal aid in selected jurisdictions* (2006)

	Expenditure £m	Population in millions 2006	Expenditure per capita £	Number of prosecutions 2006	Expenditure per prosecution £
United Kingdom					
England and Wales	1,179	53.7	22.0	1,779,300	663.00
Northern Ireland	44	1.7	25.9	61,233	725.10
Scotland	111	5.1	21.8	149,500	739.10
Similar legal jurisdictions					
New Zealand	20	4.2	4.8	111,100	180.00
Canada	139	32.9	4.2	428,500	324.40
European countries with some similarities in legal aid systems					
Ireland	32	4.3	7.4	-	-
Finland	25	5.3	4.7	223,600	111.80
Netherlands	104	16.4	6.3	554,500	187.47
Other					
France	56	63.5	0.9	707,800	79.10

Note: * comparisons between countries have to be treated with care because of differences in legal systems and in the reporting of data
Source: National Audit Office analysis of published data

Legal aid reform has been ongoing for over a decade and is significantly behind schedule

1.8 Following a review of the legal aid scheme in England and Wales in the late 1990s, the Government expressed concern that there had been no substantial reform of legal aid in Northern Ireland since the early 1980s. Consequently, an extensive period of consultation began in 1999, culminating in the Access to Justice (Northern Ireland) Order 2003, which contained three key themes of reform:

- creation of a new body to administer publicly-funded legal services;
- introduction of measures to take control of expenditure on publicly-funded legal services; and
- establishment of a registration scheme and codes of practice to demonstrate that legal services purchased at public expense are of an appropriate standard and quality.

- 1.9 On 1 November 2003, the Northern Ireland Legal Services Commission (the Commission) assumed responsibility for the administration of publicly-funded legal services from the Law Society of Northern Ireland.⁹ Following the devolution of policing and justice functions on 12 April 2010, the Commission became a non-departmental public body sponsored by the Northern Ireland Courts and Tribunals Service (Court Service), which itself is an agency of the Department of Justice (the Department). The powers of the Commission are set out in Article 7 of the Access to Justice (Northern Ireland) Order 2003.
- 1.10 Once established, the Commission was to introduce a programme of reform, covering both civil and criminal legal aid, by autumn 2007 which, among other things, would introduce a new registration and code of practice for all firms, bodies and individuals wishing to provide publicly-funded legal services. However, due to a number of factors including difficulties in recruiting and retaining senior staff, full implementation remains behind schedule, and the latest target date is March 2014. A number of reforms specifically related to criminal legal aid are being introduced by Court Service simultaneously, with full implementation expected by June 2013.

Our examination focuses on the arrangements for the management of criminal legal aid in Northern Ireland

Scope of the audit

- 1.11 Criminal legal aid is a publicly funded service delivered exclusively by the private sector. It is important that expenditure is effectively monitored and controlled to demonstrate that value for money is being achieved. Only some elements of the Access to Justice Order have been introduced and the Commission has been operating under transitional arrangements since it was established.
- 1.12 The responsibilities for granting and authorising the payment of criminal legal aid are complex, spanning four sets of Statutory Rules (see **Appendix 3**). These arrangements have given rise to difficult issues in terms of proper accountability for public funds. An overview of the key responsibilities is set out in **Appendix 4**. The arrangements have produced a situation in which the Accounting Officer of the Commission is accountable for large sums of public money, but has no policy responsibility for criminal legal aid or role in deciding who receives criminal legal aid. For significant periods of time the Commission did not have responsibility for determining the remuneration payable in individual cases.

⁹ Prior to this, the Legal Aid Department of the Law Society of Northern Ireland was responsible. The creation of the Commission helped to resolve the anomalous position of the Law Society as both the paymaster and representative of the profession receiving funds.

Part One: Introduction and Background

- 1.13 Against this background, our report addresses four broad issues:
- why spending on criminal legal aid has more than doubled during the past decade (**Part 2**);
 - the disproportionate growth in the spend on Very High Cost Cases (**Part 3**);
 - whether the Commission has an effective system of budgetary control (**Part 4**); and
 - whether appropriate measures are in place for achieving value for money (**Part 5**).

Methodology

- 1.14 Our report draws on a wide range of evidence including interviews with key staff in the Commission and Court Service; examination of key policy documents held by both bodies; detailed analysis of legal aid data; and examination of a sample of case files, including Very High Cost Cases.
- 1.15 During the course of our study, the Justice Minister announced a review¹⁰ to examine how best to help people secure access to justice (the Terms of Reference are provided at **Appendix 5**). This is being carried out by the former Chairman of the Commission and the findings are due to be published in summer 2011. We would hope that our report will inform this process and ultimately strengthen the ability of the Commission to fully implement its reform programme and deliver a sustainable legal aid scheme.

10 'Review of Access to Justice in Northern Ireland', announced by the Justice Minister on 13 September 2010

Part Two: Spending on Criminal Legal Aid



Part Two: Spending on Criminal Legal Aid

2.1 In this part of the report we consider the reasons for the dramatic rise in costs of criminal legal aid.

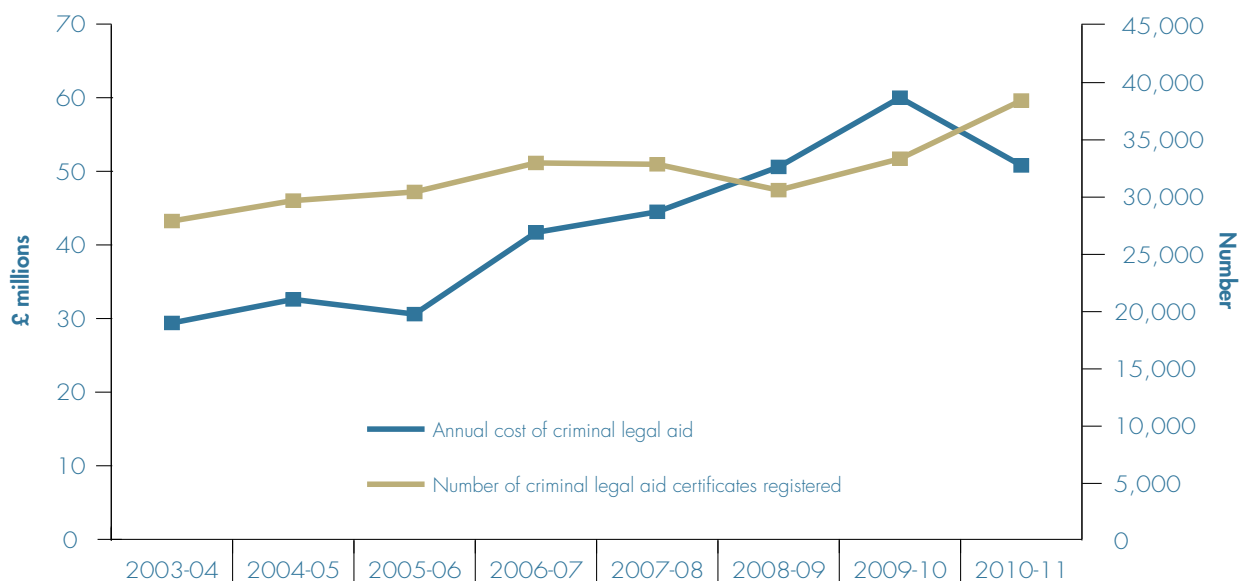
Criminal legal aid expenditure has more than doubled over the last decade

2.2 Criminal defence work is demand-led and all cases which pass the means test and meet the 'interests of justice' criteria (see paragraph 1.3) are funded, with no financial contribution expected from claimants. The legislation does not prescribe a fixed financial limit beyond which an accused person would be ineligible for legal aid - it is up to the courts to decide whether the accused person's means are insufficient.

2.3 The past decade has seen the overall cost of criminal legal aid almost trebling, from around £22 million in 2000-01 to some £60 million in 2009-10, before falling back to £51 million in 2010-11. This rapid growth in expenditure has not been matched by a proportionate increase in the number of criminal legal aid certificates registered (see **Figure 3**). It appears that the significant increase in criminal legal aid spending is not a result of a greater number of cases, but has other causes.

2.4 This increase in costs may in part reflect the increasing complexity of criminal legislation and increases in penalties which have led to more cases being heard in the Crown Court. Of particular concern is the dramatic increase in

Figure 3: Annual costs and numbers of certificates registered



Source: NIAO, based on statistics provided by the Commission

Figure 4: Expenditure¹¹ on criminal legal aid

	Very High Cost Cases £m	Excluding Very High Cost Cases			Total £m
		Magistrates' Court £m	Crown Court £m	Appeals/ Bails £m	
2000-01	-	7.6	13.7	0.5	21.8
2001-02	-	8.1	15.9	0.5	24.5
2002-03	-	7.4	18.8	0.6	26.8
2003-04	-	6.9	21.7	0.8	29.4
2004-05	0.3	8.8	22.7	0.8	32.6
2005-06	0.1	10.7	18.9	0.9	30.6
2006-07	1.3	7.2	32.5	0.7	41.7
2007-08	6.5	13.1	24.1	0.8	44.5
2008-09	17.5	14.3	18.3	0.5	50.6
2009-10	28.4*	14.8	16.3	0.5	60.0
2010-11	12.8	20.6	16.7	0.7	50.8

Source: Court Service

Note: * The figure for 2009-10 is inflated due to a backlog of payments being made in that year.

expenditure on Very High Cost Cases (VHCCs). While small in number, these have a significant impact on the criminal legal aid budget (see **Figure 4**). The VHCC scheme was revoked with effect from 13 April 2011 - Part 3 deals with the administration of VHCC's in more detail.

2.5 The Commission is not responsible for determining all payments under the criminal legal aid system

While the Commission is responsible for administering criminal legal aid, Court Service develops policy and sets the levels of remuneration for the different types of work undertaken. Responsibility for determining the appropriate volume of work and fees to be paid in any particular case lies with a number of bodies, some of which are outside the

11 Excludes administration costs

Part Two: Spending on Criminal Legal Aid

control of the Commission (see **Figure 5**). The complexities of these arrangements make it difficult to predict costs and are detrimental to effective budgetary control. Part 4 deals with this aspect in more detail.

Appendix 6 provides an overview of the Court structure and associates the various

types of case to the relevant legislation. **Appendix 7** outlines the legal framework governing the responsibilities for determining the fees to be paid in criminal legal aid cases.

2.6 The Commission told us that it has long been concerned that it is held accountable for significant sums of public

Figure 5: Overview of the decision-making process for criminal legal aid



Northern Ireland Legal Services Commission – against statutory standard fees for Crown Court and Magistrates’ Court cases

Appropriate Authority¹² - Old Magistrates’ Court cases and Crown Court cases usually against hourly rates (or a combination of hourly rates and composite fees in Magistrates’ Court cases)

Taxing Master¹³ – for Very High Cost Criminal cases against hourly rates (and appeals in other cases)

Source: *The Commission*

12 See Glossary

13 See Glossary

money, and has increasingly been given responsibility for assessing fees, but is not responsible for granting criminal legal aid.

The Commission cannot say how many claims have been reduced for late submission

- 2.7 Claims for legal aid fees not submitted within three months of the end of court proceedings may be reduced if no good reason is given for late submission. Financial penalties can be imposed in accordance with a 'late submission' policy (this is over 20 years old and good practice suggests that it should be reviewed). The Commission provided us with information which showed that deductions have generally ranged from 2.5% to 20% and told us that 50% has been applied in cases where claims were submitted over twelve months late.
- 2.8 To test how robustly this penalty regime has been implemented, we asked the Commission for the number of late claims where penalties had not been imposed and the reasons for this. The Commission could not provide this information as *"the reasons for any waive of the penalties... are recorded on each individual claim and the decision to waive are taken by appointed staff, to ensure consistency of approach in the treatment of such claims and any representations made to the Commission"*. It did, however, conduct a sample of one month's business which showed that 74 deductions, amounting to £2,544, had been applied in respect of

202 late submissions.

- 2.9 The imposition of penalties for cases submitted late is one area where the Commission can potentially reduce its costs. However, the Commission's information in this area is incomplete and robust performance information is not available. The Commission told us that its computer system only allows access to information on a case-by-case basis, and does not provide global information on concluded cases. Better management information would help the Commission to evaluate the effectiveness of its current processes and sanctions.

Recommendation 1: The Commission should record centrally all instances of late claims, and provide clear explanations for the action taken, particularly when deductions have not been made.

Recommendation 2: The Commission should investigate ways to access data on concluded cases, in order to produce performance information on the level of penalties imposed, both overall and on a case-by-case basis.

Between 2000 and 2009, more than half the criminal legal aid payments in respect of cases heard in Magistrates' Courts were uplifted

- 2.10 Up until 2009, where a solicitor or barrister considered that the prescribed

Part Two: Spending on Criminal Legal Aid

hourly rate or fee payable would not provide fair remuneration for work reasonably undertaken in respect of an individual case they could seek an increase. From 2000-01 to 2008-09, more than half the criminal legal aid payments in respect of cases heard in the Magistrates' Courts¹⁴ were subject to such an uplift. These consistently accounted for more than three quarters of the criminal legal aid expenditure, with uplifted payments averaging around three times that of those paid at the prescribed rate (see **Figure 6**).

2.11 The Commission told us that "*the 1992 Rules sought to ensure fair remuneration in each case. This approach allowed individual claimants to present arguments that their cases would not be fairly remunerated without additional funding.*" We were also told that, with the introduction of new Rules in 2009, the position improved as "*there are no exceptionality provisions to allow cases to secure an uplift on the prescribed standard fee.*" The full effect of this however, may take some time to become apparent as many cases which may

Figure 6: Cost of cases heard in Magistrates' Courts

	Payments made at the prescribed rate			Payments uplifted		
	Number of payments	Total cost £m	Average cost per payment £	Number of payments	Total cost £m	Average cost per payment £
2000-01	8,833	1.8	204	9,957	5.9	593
2001-02	8,035	1.6	199	9,407	6.5	691
2002-03	8,526	1.7	199	9,242	5.7	617
2003-04	6,950	1.4	201	8,638	5.5	637
2004-05	7,774	1.6	206	12,845	7.2	561
2005-06	9,723	2.0	206	14,886	8.7	584
2006-07	5,542	1.1	198	10,027	6.1	608
2007-08	11,273	2.2	195	19,068	10.9	572
2008-09	8,626	1.6	185	20,551	12.7	618
2009-10	12,629	3.6	285	19,623	11.2	571
Total	87,911	18.6	212	134,244	80.4	599

Source: NIAO based on data supplied by the Commission

Figure 7: Cost of cases heard in Crown Courts

	Payments made at the prescribed rate			Payments uplifted		
	Number of payments	Total cost £m	Average cost per payment £	Number of payments	Total cost £m	Average cost per payment £
2000-01	335	0.1	298	3,274	13.6	4,154
2001-02	255	0.1	392	3,330	15.8	4,745
2002-03	229	0.1	437	5,054	18.7	3,700
2003-04	208	0.1	481	3,532	21.6	6,115
2004-05	315	0.2	635	7,052	22.5	3,190
2005-06	2,760	6.4	2,319	6,446	12.5	1,939
2006-07	3,557	9.7	2,727	2,914	22.8	7,824
2007-08	5,102	13.8	2,705	531	10.4	19,586
2008-09	5,504	14.3	2,598	768	4.0	5,208
2009-10	4,632	12.2	2,634	633	4.1	6,477
Total	22,897	57.0	2,489	33,534	146.0	4,354

Source: NIAO based on data supplied by the Commission

attract an uplift remain to be processed. While we welcome the recent change to the Rules, we are concerned that it took so long for this to happen, leading to a situation where uplifts to the prescribed hourly rates became the norm.

90% (pre-2005-06 when new Rules introduced an extensive range of standard fees) to just over 10% in recent years (see **Figure 7**). In 2009-10, uplifted payments accounted for some 25% of the criminal legal aid expenditure in Crown Courts compared with 75% in Magistrates Courts.

In contrast to Magistrates' Courts, just 25% of criminal legal aid payments in respect of cases heard in the Crown Court were uplifted

2.12 In the Crown Court, the proportion of payments that have been uplifted has reduced dramatically, falling from over

Recommendation 3: The Commission and Court Service must ensure that the rates of payment are formally reviewed on a regular basis to ensure that they remain appropriate and that payments at the higher rates remain the exception rather than the norm.

Part Two: Spending on Criminal Legal Aid

Appeals have increased costs significantly

2.13 If fee-earners are dissatisfied with the additional funding approved, they have a right to make representation to the Commission to present their case for increased fees. The process is free and it is uncommon for fees to be reduced. Since 2003-04, an additional £10 million has been paid to the legal profession in respect of non-standard cases heard in the Crown Court (see **Figure 8**). Corresponding figures in respect of the Magistrates' Courts are not maintained by the Commission. Court Service told us that while the introduction of the standard fee regime in 2005 has reduced the number of requests, there are still a number of cases in the system which may be subject to this process.

There is a significantly higher proportion of defendants represented by two counsel in Northern Ireland than in England and Wales

2.14 Defendants in more serious or complex cases are often represented by two counsel, usually a Queen's Counsel and a Junior Counsel, although in a small number of cases three counsel have been assigned. While the legislation governing the provision of criminal defence services in Northern Ireland has been in existence since the mid-1960s, equivalent legislation in England and Wales was repealed in 2001. The GB regulations¹⁵ set out the conditions for the assignment of more than one counsel, with stricter criteria applying for the assignment of a Queen's Counsel.

2.15 In 2009, Court Service carried out a comparison on the assignment of two

Figure 8: Outcome of appeals since 2003-04 (Crown Court cases)

	Number of non-standard payments	Number of payments appealed	% of payments appealed	Number of payments increased on appeal	% of appeals won	Increase on appeal (£)
2003-04	3,532	381	11	225	59	1,043,973*
2004-05	7,052	336	5	190	57	784,379
2005-06	6,446	325	5	221	68	2,193,653
2006-07	2,914	397	14	267	67	2,585,892
2007-08	531	100	19	58	58	681,976
2008-09	768	219	29	172	79	1,231,296
2009-10	633	219	35	199	91	1,972,374
Total	21,876	1,977	9	1,332	67	10,493,543

Note: *one payment reduced on appeal

Source: NIAO based on data supplied by the Commission

counsel¹⁶ in Northern Ireland with England and Wales. This showed that 55% of indictable offences in Northern Ireland had two counsel assigned, compared with just 5% 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. In August 2009, Court Service proposed the introduction of new regulations to tighten the criteria and procedures for assigning two counsel in Crown Court cases. The consultation period ended in February 2010 and a formal Departmental response is still awaited.

Recommendation 4: Given that GB has had systems in place to limit the number of counsel for over ten years, Court

Service needs to introduce the new procedures and tighter criteria that have already been identified for assigning two counsel in Crown Court cases, as a matter of priority.

Since 2003-04, almost £13 million has been spent on disbursements

2.16 In addition to payments made for work carried out by the legal profession, criminal legal aid also covers “disbursements” – these are payments made by a solicitor to third parties, such as expert witnesses, or for the preparation of medical or other specialist reports. Almost £13 million has been spent on disbursements since 2003-04, of which one-third was incurred in Very High Cost Cases (see **Figure 9**).

Figure 9: Expenditure on disbursements

	Total disbursements £	Very High Cost Case disbursements £	% of total in respect of Very High Cost Cases
2003-04	1,163,851	-	-
2004-05	1,319,268	-	-
2005-06	1,164,321	13,804	1.2%
2006-07	2,511,732	373,721	14.9%
2007-08	2,907,500	1,500,163	51.6%
2008-09	1,480,056	1,349,418*	91.2%*
2009-10	2,304,072	1,014,826	44.0%
Total	12,850,800	4,251,932	33.1%

Note: * £566,000 was in respect of one VHCC, hence the high percentage rate.

Source: *The Commission*

16 Court Service Consultation Document – Reform of legal representation provided by way of criminal legal aid at the Crown Court, August 2009

Part Two: Spending on Criminal Legal Aid

- 2.17 Solicitors wishing to use expert witnesses may apply to the Commission for a “*prior authority*”, which specifies the person to whom the payment will be made and the maximum rate and number of hours that can be claimed. This provides certainty of funding, something that many experts will demand before undertaking work. The use of a ‘prior authority’ is also desirable in respect of novel, contentious or unusually high expenditure cases. However, there is no statutory requirement to apply for an authority, and claims for payment will still be settled if they are supported by adequate documentation and the work appears reasonable at the end of the case.
- 2.18 The Commission currently analyses its expenditure on disbursements over some 60 categories, which should allow it to monitor trends and patterns. This should also provide useful management information if standard rates on a UK-wide basis are to be set for expert witnesses. The Commission told us that no details of disbursements relating to Very High Cost Cases are provided by the Taxing Master and the Commission has no power to challenge his assessment. As a result, no analysis of this significant portion (33%) of disbursement expenditure can be made.

Recommendation 5: The Commission must strengthen the arrangements for appointing expert witnesses and, in particular, consider whether all expenditure should be approved in advance.

Part Three: Very High Cost Cases



Part Three: Very High Cost Cases

3.1 In 2005, following the approach taken in England and Wales, a new category of case was introduced for the most complex Crown Court criminal cases. Known as Very High Cost Cases (VHCCs), expenditure on these has risen from less than £1 million a year to over £28 million in 2009-10, before falling back to £13 million in 2010-11.

3.2 Although new rules came into effect on 13 April 2011 which removed VHCCs in Northern Ireland, these only apply to work done under a criminal legal aid certificate granted on or after this date. Cases certified as VHCCs prior to this will continue to retain VHCC status and will be processed and paid on this basis. In this part of the report we consider the reasons for the increase in costs in respect of Very High Costs Cases and identify improvements which can be applied to the significant number of claims that are outstanding.

The criteria for defining Very High Cost Cases in Northern Ireland are wider than in England and Wales

3.3 In England and Wales, a VHCC is defined as a case where the trial is likely to last more than 40 days, or between 25 and 40 days where certain specific criteria are met. The threshold for counsel is 60 days. The focus is on controlling costs, and these cases are managed through individual contracts. A Complex Crime Unit within the Legal Services Commission¹⁷ agrees with solicitors and advocates in advance the hours required

for each area of work. This process occurs every three months, and solicitors and advocates must submit evidence to support the work undertaken. In a recent report¹⁸ the National Audit Office found that this is the stage where savings can be made by disallowing proposed work.

3.4 In Northern Ireland, the definition of a VHCC's is any case in which the trial is estimated to last more than 25 days. Solicitors and counsel submit claims for payment once the case is concluded. Court Service told us that VHCCs are paid at hourly rates (as is the case in England and Wales) to cater for cases where a standard fee would not provide adequate payment for the legal representatives. It also said that a proposal to introduce contracting arrangements was dropped following opposition from the legal profession; and instead claims are assessed by the Taxing Master. Although this was to be a temporary arrangement while alternative measures were developed to provide better cost control, it is still in place. A further proposal to introduce contracting was included in a public consultation¹⁹ in June 2008, but Court Service told us that this was also abandoned "*following opposition by the legal profession (barristers in particular)*".

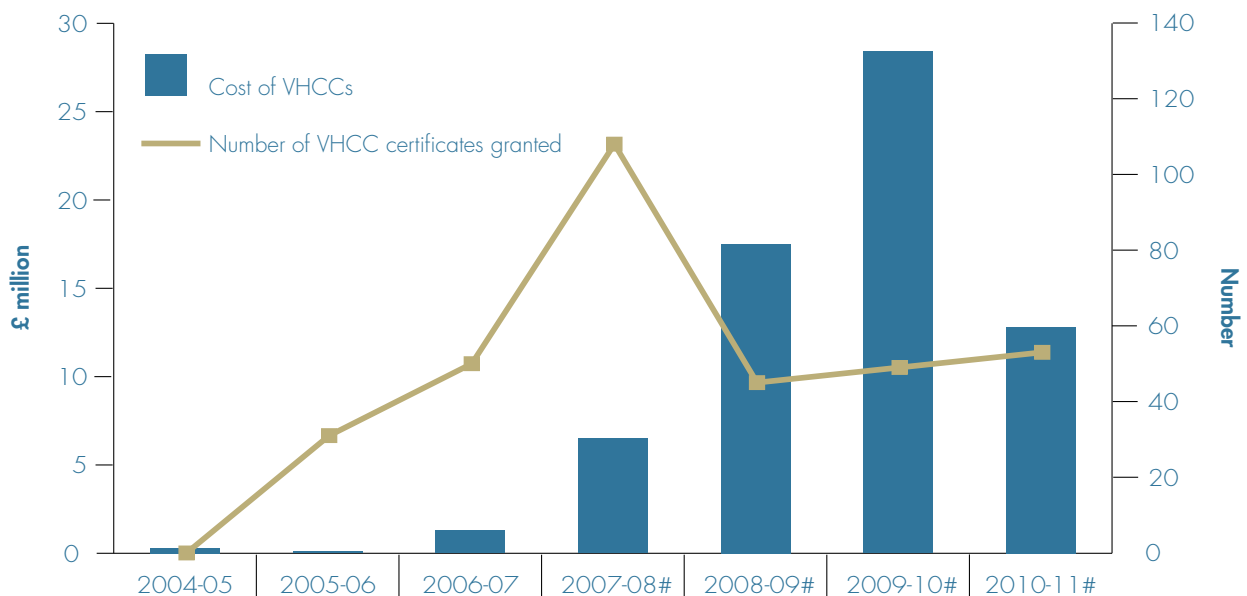
Expenditure on VHCCs has been greater than expected

3.5 The Commission expected that around five cases each year would qualify as a VHCC in Northern Ireland. In practice, it told us that the number has averaged

17 A separate Legal Services Commission is responsible for the administration of legal aid in England and Wales.

18 *The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission* – National Audit Office, 27 November 2009, HC 29, Session 2009-2010

19 Very High Cost Criminal Cases Consultation 30 June 2008

Figure 10: Expenditure on VHCCs

Source: Court Service

Note: # Figures taken from the draft accounts for these years

27 per year. As a result, expenditure has been far greater than expected. In 2010-11, total spend on VHCCs was £13 million (see Figure 10), representing some 25% of the criminal legal aid budget. This compares with 8% in England and Wales.

Once VHCC status is granted, the certificate remains in place even though the case may not go to trial lasting more than 25 days

3.6 Under the 2005 Rules, an application may be made to the Commission for a VHCC certificate if a solicitor can confirm that all members of the legal team support the application. Under the 2009 Rules, each legal representative applies

separately. Details to be provided include:

- a description of the case;
- the number of defendants;
- the volume of documentation;
- the potential number of witnesses; and
- estimates for the duration of each of the separate elements of the trial.

Once VHCC status is confirmed, the certificate remains in place even if the case does not subsequently go to trial or last more than 25 days. This may happen where the defendant chooses to plead guilty at the start of a trial or where the

Part Three: Very High Cost Cases

prosecution chooses to withdraw the charges at a later stage. The Commission has no statutory power to review the issue of a VHCC certificate or reduce the fees payable in these circumstances.

Between April 2005 and September 2009, less than 10% of VHCC applications were refused

3.7 Between April 2005 and September 2009²⁰, a VHCC certificate covered all members of the legal team. During this period, the Commission granted 263 VHCC certificates and refused 24 applications (8%). The Commission told us that it would have considered the information submitted by the legal representative, as well as the information on court listings, to determine the potential length of a trial. A number of applications were refused as insufficient detail was provided to support the claim. Other certificates were refused where information from the court indicated that the trial would not last longer than two to three weeks. Court Service told us that a review of the Commission's certification of VHCCs had concluded that the decisions were appropriate.

Since the introduction of new rules in October 2009, 40% of applications have been refused

3.8 Court Service told us that the failure to introduce contracting arrangements (see paragraph 3.4) allowed the legal profession to "exploit the slightly loose drafting of the 2005 Rules, and to

continue to make claims based on brief fees²¹", even though this was not the intention. As greater numbers of claims were certified as VHCCs, and counsel continued the practise of "marking a brief" rather than submitting itemised claims, new rules²² were introduced from 1 October 2009 which, among other things:

- refined the certification arrangements;
- closed the loophole on claiming brief fees by requiring legal representatives to maintain contemporaneous records of work done;
- reduced the rates of remuneration in line with England and Wales; and
- gave Court Service the power to intervene where claims are appealed.

3.9 From this date, one of the conditions of VHCC certification is that "*the case is likely to proceed to trial*" in addition to the trial being likely to last more than 25 days. Also, separate certificates are granted to individual members of the legal team rather than the defence team as a whole. The Commission told us that since the introduction of the 2009 Rules, 52 applications have been made for VHCC status of which 31 certificates have been granted and 24 applications (46%) refused. At the time of our report, it estimated that around half of criminal cases were being processed under these rules.

20 When the 2005 Rules applied

21 See Glossary

22 The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2009

The Commission has never exercised its power to revoke a VHCC certificate due to the lack of supporting documentation

- 3.10 Under the 2005 Rules, each member of the legal team must submit quarterly reports to the Commission with a breakdown of the work undertaken (on an hourly basis) and an estimate of costs until the case is completed²³. We were told that *"until September 2009, some barristers continued to submit brief fees to the Taxing Master. In some cases, this was the only supporting documentation for their claims while in other cases brief fees were submitted in addition to claims for hours worked in preparing a case. Due to the lower level of fees paid under the 2009 Rules, solicitors and counsel were advised by the Law Society and Bar Council not to take on new cases. While the threat of industrial action has now been lifted, counsel have sought to submit a "brief fee" in a number of claims submitted since normal progress of cases resumed."*
- 3.11 The rules were amended in 2009 to prohibit the consideration of brief fees as part of a claim. Court Service told us that *"in a very small number of claims, payments were made on the basis of brief fees submitted and Court Service has intervened to require the assessment to be redetermined"*.
- 3.12 Where a solicitor or barrister fails to provide sufficient supporting information, the Commission can revoke the certificate. We are concerned that the Commission has never used these powers. In our

view, this practice does not provide a sound and defensible basis for assessing claims and managing costs. Court Service explained that before 2009, one certificate covered all legal representatives and if the VHCC certificate was revoked it applied to all representatives and not just the non-compliant one. Since the introduction of the new Rules in 2009, this is no longer the case and, in our view, the Commission must make effective use of all sanctions available to it in order to encourage compliance with the regulations, and potentially reduce its costs.

Only one in ten cases given VHCC status go to trial lasting more than 25 days

- 3.13 Since their introduction in 2005, only 11% of VHCCs have gone to trial and lasted in excess of 25 days. Of the remaining cases, 52% went to trial but lasted less than 25 days while 37% did not go to trial at all (see **Figure 11**). Court Service told us that it is perfectly acceptable for a case to receive VHCC certification but not proceed to trial, where a defendant pleads guilty or the case is withdrawn by the Public Prosecution Service, provided that the case was judged to be likely to last 25 days or more if it had run.

23 VHCC arrangements (unlike other Crown Court Cases) provide specific remuneration for preparatory work undertaken by solicitors and barristers on the basis of number of hours worked.

Part Three: Very High Cost Cases

Figure 11: Duration and cost of VHCC trials 2005-2010

	Number of VHCCs*	% of total	Cost (to date) £m	% of VHCC total spend
VHCC trials lasting more than 25 days	27	10.6	15.10	35.3
VHCC trials lasting less than 25 days	134	52.5	19.44	45.4
VHCC that did not go to trial	94	36.9	8.24	19.3
TOTAL	255#	100	42.78	100

Note: * The Court Service and Commission do not record information on a criminal case basis, but on a defendant/claim basis, as cases can have many defendants and be split or joined as proceedings progress through the courts.

Court Service has processed claims in respect of 267 defendants in VHCCs but information is only included in respect of 255. The remaining 12 defendants relate to old claims that are not on the Court Service's current spreadsheet and details could only have been provided following a lengthy manual search.

Source: Court Service

- 3.14 Given that 90% of VHCCs did not go to trial and last more than 25 days, it is difficult to see how this is an efficient use of resources. Without a proper objective assessment of the work required before the case commences (as in the England and Wales contracting arrangements), the Commission cannot be fully satisfied that a case fully warranted VHCC certification or that the level of expenditure is justified.
- 3.15 We asked if either the Commission or Court Service had reviewed the effectiveness of the VHCC scheme by determining the amount that would have been due had the cases been paid under the standard fee scheme. The Commission told us that it had not done so as Court Service is responsible for criminal policy and remuneration arrangements for all work done in the criminal courts.
- 3.16 Court Service had also not previously recalculated the cost of VHCCs but did agree, at our request, to complete a short exercise in respect of ten cases (see **Figure 12**). Figure 12 shows that expenditure incurred in this sample of VHCCs which did not go to trial lasting more than 25 days was nearly six times more than would have been paid under 'standard' rates (see also Case Study 1). If this was reflected across all such VHCCs, then up to an additional £23 million (i.e. £27.7million x ⁵/₆) may have been paid, since 2005. While this cannot be regarded as an overpayment, without a proper objective assessment of costs before the case starts (see paragraph 3.3), this level of "additional" expenditure cannot be justified.

Figure 12: Comparison of amounts payable between VHCC costs and standard fees

	Amount paid as a Very High Cost Case £	Amount payable under Standard Fees £	Difference £
Case 1	272,950.20	21,220.31	251,729.89
Case 2	155,000.00	31,866.00	123,134.00
Case 3	35,000.00	8,022.20	26,977.80
Case 4	246,231.59	52,304.38	193,927.21
Case 5	106,809.71	12,858.81	93,950.90
Case 6	274,308.60	74,884.75	199,423.85
Case 7	118,119.66	18,162.92	99,956.74
Case 8	33,600.00	6,922.00	26,678.00
Case 9	140,000.00	9,389.00	130,611.00
Case 10	20,781.52	2,630.45	18,151.07
TOTAL	1,402,801.28	238,260.82	1,164,540.46

Source: Court Service

Case Study 1

Based on a murder case with the defendant changing plea to guilty before the trial commenced.

	Very High Cost Case		Standard fee payable* for a Guilty Plea £
	Amount Claimed* £	Amount Determined* £	
Solicitor	53,529	53,529	8,900
Junior Counsel	40,000	30,000	3,088
Senior Counsel	46,740	45,000	6,175
TOTAL	140,269	128,529	18,163

*excluding disbursements and VAT

Source: Court Service

Part Three: Very High Cost Cases

Recommendation 6: While we welcome the recent change to the regulations which removes the separate category for VHCCs, Court Service must regularly review the new remuneration scheme to ensure that it remains 'fit for purpose' and offers value for money.

The Commission does not ask the Taxing Master to provide a breakdown of the fees allowed, or explanations for his decisions

3.17 Claims in respect of VHCCs are submitted directly to the Taxing Master (see paragraph 3.4), who assesses the fees due and passes his "determination" to the Commission for payment. The Commission told us that it does not have the authority to require the Taxing Master to provide a breakdown of the fees approved or give explanations for his decisions. As solicitors and barristers decide the amount of time and work necessary in each case, and counsel submit an overall figure covering preparatory work and the first day of trial ("marking a brief"), there is no clear audit trail to support how the final amounts payable are assessed.

Appeals

3.18 If any member of the legal team submitting a claim does not agree with the Taxing Master's assessment, they can request that the fee is re-assessed within 21 days. At April 2011, 147 requests for re-assessment had been processed with the following results:

- 85 granted an increase;
- 7 refused (assessed as correct);
- 36 withdrawn;
- 2 heard but decision deferred; and
- 17 currently proceeding to hearing.

3.19 Court Service told us that of the 85 cases granted an increase, the total amount originally assessed was £4,529,021, while the total following re-assessment was £6,955,705, an increase of almost 54%. The Taxing Master does not provide any explanations for increasing a claim - a "re-determination" certificate is simply prepared and sent to the Commission for payment.

3.20 We examined a small number of recent claims to review the information submitted by solicitors and counsel in support of their claims against the amounts assessed and re-assessed by the Taxing Master (see **Figure 13**). All the cases had been assessed since January 2009, when a small VHCC Unit was set up by Court Service to provide administrative support to the Taxing Master to address the backlog caused by the unexpectedly high number of VHCCs²⁴. The Unit prepares a schedule for the Taxing Master with a breakdown of the information contained in the claims made by the solicitor and counsel in each case. We found no evidence on file that the Taxing Master had provided any documentation to support his assessments or re-assessments.

²⁴ In order to address hardship concerns resulting from the backlog it was decided that interim payments equal to 60% of the amount claimed would be paid before the claims were assessed. Once a determination was made, any balance due would be payable, and any amount overpaid would be recoverable. Interim payments were discontinued from April 2010.

Figure 13: Re-assessments by the Taxing Master

	Amount* Submitted to the Taxing Master £	Amount Assessed by the Taxing Master £	Amount Re-assessed by the Taxing Master £
Case 1			
Solicitor	49,593.68	49,308.60	n/a
Junior Counsel	101,975.00	60,000.00	90,000.00
Senior Counsel	162,628.00	90,000.00	135,000.00
Case 2			
Solicitor	14,805.85	13,000.00	13,000.00
Junior Counsel	10,932.00	10,000.00	n/a
Senior Counsel	15,726.88	12,000.00	n/a
Case 3			
Junior Counsel	76,700.00	40,000.00	Appeal withdrawn
Senior Counsel	89,430.00	50,000.00	n/a
Case 4			
Solicitor	67,426.63	66,231.59	n/a
Junior Counsel	105,008.00	70,000.00	n/a
Senior Counsel	149,746.82	110,000.00	n/a
Case 5			
Solicitor	29,309.71	29,309.71	n/a
Junior Counsel	48,540.84	32,500.00	n/a
Senior Counsel	68,204.85	45,000.00	n/a
Case 6			
Junior Counsel	65,913.34	60,000.00	n/a
Senior Counsel	95,802.50	95,000.00	n/a
Case 7			
Solicitor	29,267.78	15,000.00	n/a
Junior Counsel	21,702.28	18,600.00	additional 222.85
Case 8			
Solicitor	53,528.66	53,528.66	n/a
Junior Counsel	40,000.00	30,000.00	n/a
Senior Counsel	46,740.00	45,000.00	n/a

Note: *excluding disbursements and VAT

n/a = not applicable

Source: NIAO based on Court Service information

Part Three: Very High Cost Cases

Recommendation 7: While the Commission has no legislative basis to require the Taxing Master to provide full documentation, it should seek his agreement to provide a full record of decisions made on all VHCCs still to be processed, including a breakdown of fees and disbursements allowed in his assessments and re-assessments. This information can not only be used to profile expenditure and monitor patterns of spend, but also improve transparency and accountability.

- 3.21 The 2009 rules no longer provide for the re-assessment of costs by the Taxing Master, but permit him to review his decision. The difference is that, after review, the Department of Justice now has a right to intervene and put written and / or oral representation to the Taxing Master. At the time of our report, seven claims have been assessed under the 2009 rules at a value of £162,000.

Since October 2009, Court Service has been able to challenge appeals for increased fees, resulting in a substantial proportion being withdrawn

- 3.22 Under the 2009 rules, where an appeal or review of fees paid (including those cases determined under the 2005

Rules) goes to the Taxing Master, Court Service may arrange for written or oral representations to be made on its behalf, *“with a view to ensuring that the public interest is taken into account”*. Court Service told us that it has intervened in 41 cases, of which 28 appeals have been withdrawn. As a result, some £1.5 million has been recouped by the Commission. Although no reasons have to be given for withdrawing an appeal, Court Service told us that it believed that without this intervention it is likely that all of the appeals would have proceeded.

- 3.23 Court Service told us that a second batch of cases, relating to 28 separate claims for fees (5 by solicitors and 23 by counsel) are listed for hearing before the Taxing Master in June 2011 for a decision on a procedural point, after which the substantive claims can be dealt with. We welcome the introduction of the Court Service’s challenge function and see it as a positive step which will contribute to reducing costs.
- 3.24 Case Study 2 provides an example of a barrister’s appeal to the Taxing Master and the outcome following Court Service’s intervention.

Case Study 2

The barrister claimed a total of **£832,255**.

The Taxing Master first assessment as to what represented a reasonable fee was **£411,250**.

An Interim payment of **£499,346** had already been made to the barrister in advance of the Taxing Master's assessment.

Following Court Service's intervention, the barrister agreed to settle at the Taxing Master's original assessment and a refund of **£88,096** was paid to the Commission.

Note: All amounts are inclusive of VAT

Source: *Court Service*

- 3.25 During the course of our study, Court Service introduced new Rules which cut the fees payable to defence lawyers in Crown Court cases that are certified on or after 13 April 2011. The new rules remain, overall, more generous than those which apply in England and Wales and in Scotland. Very High Cost Cases certified prior to this will continue to be assessed under the old rules.
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Part Four: The Budgetary Control System



Part Four: The Budgetary Control System

- 4.1 The principal objective of budgetary control within the public sector is to remain within allocated budgets at year end. This requires a comprehensive financial planning and approval framework; a rigorous process for setting budgets; compatibility with organisational management and performance data; and a system that sets clear responsibilities, reporting frameworks and produces prompt and accurate monitoring information on performance against budgets.
- 4.2 The high numbers of people awarded criminal legal aid, combined with the introduction of many new criminal offences and accompanying high costs, most of which are outside the Commission's control, have proved challenging to the budgeting process. The Commission also told us that as criminal legal aid is a demand-led service *"this creates challenges in forecasting*

expenditure". However, this does not absolve it from normal public sector accounting requirements. In this part of the report we consider the effectiveness of the Commission's budgeting and budgetary control regime.

The Commission has exceeded its budget every year, requiring £150 million of additional funding

- 4.3 Every year, since its establishment in 2003, the Commission has been unable to estimate with any accuracy the budget that it needed and has sought almost £150 million in additional funding. In 2009-10, the total spend on legal aid was more than double the original estimate (see **Figure 14**). Given the extent of additional resources required in this period, we are surprised that the Commission's annual bids for funding have consistently been significantly lower

Figure 14: Legal aid budget and expenditure for 2003-04 to 2009-10

Year	Main budget allocation £m	Additional resources £m	Total allocation £m	Total spend £
2003-04	42.9	16.8	59.7	54.6
2004-05	41.2	22.5	63.7	64.6
2005-06	41.8	19.9	61.7	63.1
2006-07	67.1	7.8	75.0	74.9
2007-08	65.7	18.5	84.2	77.7
2008-09	65.0	22.0	87.0	89.8
2009-10	65.0	59.3	124.3	104.3

* Bid relates to criminal and civil legal aid and running costs

Source: *The Commission*

than the total spend in previous years. In order to obtain a realistic budget allocation, the initial bid needs to be based on a comprehensive assessment of the amount of funding actually required taking account of previous expenditure patterns. During the current economic climate, such increases will be hard to sustain within public sector budgetary constraints.

- 4.4 The Commission told us that *“as part of the Devolution settlement for legal aid, the UK Government recognised that the budget for legal aid had been inadequate and had not reflected the committed expenditure in the system. The settlement sought to provide additional funding to recognise the historic funding issues. However, the demand-led nature of legal aid means that resolving the budgeting arrangements should be a matter of priority”*.

A retrospective approach to budgeting has been adopted by the Commission

- 4.5 Prior to 2009, the Commission used a system of averaging historic costs of legal aid certificates multiplied by estimated future numbers of cases, adjusted to reflect previous case lifecycles, to determine its budgetary requirements. Further adjustments to the system were required to take account of the legislative and procedural changes introduced, mostly in an attempt to implement the requirements of the Access to Justice Order (see paragraph 1.8). Although the Commission began to use actual historic costs and reduced reliance on staff judgement from 2009, problems remain.

- 4.6 We consider this form of retrospective budgeting, where future trends are based on past experience, is more effective for organisations operating in a stable environment. For it to be successful, it must be based on up-to-date and accurate data. However, there is limited management information available to the Commission and, as a result, it has been unable to forecast expenditure with any degree of accuracy. No information is held electronically on case progress or the type of case, while limited information on VHCCs and disbursements are held in manual files. This does not provide the Commission with a sound basis on which to forecast or monitor expenditure.

Recommendation 8: The Commission must take immediate steps to review the information it relies upon to forecast and monitor expenditure, ensuring that it is comprehensive, accurate and up-to-date.

Recommendation 9: Given that criminal legal aid is demand-led, the Commission, in conjunction with the Department of Justice, also needs to take account of any legislative or policy changes which could potentially have a financial impact on criminal legal aid.

Recommendation 10: For the VHCCs remaining in the system the rules regarding the submission of comprehensive and regular expenditure reports should be enforced rigorously by the Commission, the Taxing Master and Court Service.

Part Four: The Budgetary Control System

Even if the Commission achieves its projected efficiency savings, forecast expenditure still exceeds the budget

- 4.7 It is expected that efficiency savings, generated under the reform programme, will allow the legal aid budget to be reduced to £75 million from 2014-15 onwards. However, the Commission's forecast expenditure for each year until 2013-14 still exceeds its agreed budget (see **Figure 15**).
- 4.8 Court Service told us that the majority of the efficiency savings (£18 million) will be generated by the 2011 Remuneration Rules which have already come into operation. We also note that correspondence between Court Service and the Department of Finance and Personnel (DFP) in July 2010²⁵ drew attention to the fact that achieving the remaining efficiency savings is dependent on subordinate legislation receiving Assembly approval.

Recommendation 11: The Commission and Court Service must work together to ensure that projected savings are practical and achievable, thereby allowing the Commission to set, and work to, a realistic budget.

The Commission's accounts have been qualified every year

- 4.9 The Commission produces two sets of financial statements for each reporting period, i.e. for its administration and running costs (the Grant in aid account) and for its expenditure on legal aid costs (the Grant account). Since the Commission was established in 2003-04, audit opinions²⁶ on the Grant Account have been qualified by the Comptroller and Auditor General (C&AG) for two main reasons:
- inaccurate estimates of liabilities for legal aid at each year end (provisions); and

Figure 15: Legal aid budget and forecast expenditure for 2010-11 to 2013-14

	Budget £m	Forecast Expenditure (including efficiency savings) £m
2010-11	85	113.3
2011-12	85	100.0
2012-13	85	90.3
2013-14	79	80.4

Source: The Commission

25 Following devolution, DFP assumed responsibility for providing funding.

26 Responsibility for the audit of the Commission's financial statements up to and including 2009-10 lies with the National Audit Office.

- insufficient evidence to prove that legal aid expenditure had not been claimed fraudulently.

While the Commission has improved its financial estimates, further work is needed

- 4.10 The Commission has sought to improve its estimation technique by developing a new model to estimate more accurately legal aid provisions at the financial year end. This was first used in preparing the 2008-09 financial statements and while it has reduced the level of error and misstatement, further work is needed to refine the model and the assumptions used. The C&AG concluded that legal aid provisions at 31 March 2009, disclosed at £116 million within the 2008-09 financial statements, had been overstated by between £9 million and £22 million.
- 4.11 There should be a close correlation between the estimation technique / assumptions used to calculate legal aid provisions at each year end and the method the Commission uses to forecast what its legal aid expenditure will be in future years. Given the issues identified with the estimation of legal aid provisions, it is not surprising that the Commission has had problems in arriving at robust financial projections for legal aid expenditure.
- 4.12 These issues, and the time the Commission has spent in addressing them, have led to delays in producing audited Annual Reports and Accounts. As a result, the 2008-09 audited financial statements
- were only published in April 2011 and work is currently ongoing in respect of the 2009-10 Annual Report and Accounts.
- 4.13 The qualification due to insufficient evidence that legal aid expenditure had not been fraudulently claimed, by either applicants or practitioners, relates to both civil and criminal legal aid. As the Commission has only a small counter fraud unit, it is unable to provide adequate assurance that material fraud does not exist in legal aid claims and payments made. The Commission told us that it has identified this as a priority area and is considering what additional measures need to be established in order to prevent and detect fraud.
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Part Five:
Value for Money



Part Five: Value for Money

5.1 As criminal legal aid is a publicly funded service delivered exclusively by the private sector, it is important that expenditure is controlled and monitored to clearly demonstrate that value for money is being achieved. In this part of the report we consider whether the Commission can clearly demonstrate that it is obtaining value for money in terms of criminal legal aid.

The reforms intended to curb the cost of criminal legal aid have not yet been implemented

5.2 The Commission (in conjunction with Court Service) was to implement a programme of reform, comprising a number of separate projects, by autumn 2007 including the introduction of:

- greater powers to regulate costs paid for legal services; and
- introducing a new registration and code of practice for all firms, bodies and individuals wishing to provide publicly-funded legal services.

In addition, the Access to Justice Order (2003) included new provisions for the administration of criminal legal aid, which have not yet been commenced. Court Service told us that the latest target date for full implementation of the reforms in respect of criminal legal aid is June 2013 (see **Appendix 8**).

5.3 We are concerned that, despite the implementation timetable being revised

and extended on a number of occasions, the planned reforms in respect of criminal legal aid are still not complete and the Access to Justice Order is not fully enacted. We consider that an implementation date some six years after the original completion date is unacceptable. We believe that adopting an approach whereby all projects were progressed concurrently rather than prioritised has contributed to the delay in delivering the planned reforms.

Recommendation 12: In order to improve the chances of delivering the reform programme in respect of criminal legal aid, individual projects should be prioritised and progressively introduced.

The Commission does not assess the quality or value for money of criminal legal aid services

5.4 The Commission told us that, with the most recent changes taking effect from April 2011, criminal legal aid fees are now paid almost completely by reference to standard fees set out in Rules approved by the Assembly. It also said that DFP approval is required to the level of fees set and there is a statutory requirement to review these Rules within two years. The Commission told us that the Rules governing criminal legal aid “*all set fees against a statutory value for money test. The Commission considers that it is entitled to rely on these fees in the first instance and to provide information and*

suggestions as part of the statutory review of the fees to ensure that it is securing value for money for the public purse."

The Commission also said that it does not procure services in criminal legal aid as *"the defendant has a statutory right of choice of a provider of defence services"*.

- 5.5 The Access to Justice Order refers specifically to the Commission's duty to secure value for money:
- Article 7(6) (b) states that it shall have regard to *"the need to secure value for money"*; and
 - Article 21(4) states that *"in funding criminal defence services the Commission shall aim to obtain the best possible value for money"*.
- 5.6 While neither of these Articles has been enacted, there is still an onus on the Commission to secure value for money in all expenditure decisions. The Chief Executive's²⁷ letter of appointment as Accounting Officer requires him to ensure *'that the organisation's procurement, projects and processes are systematically evaluated and assessed to provide confidence about suitability, effectiveness, prudence, quality, good value and avoidance of error and other waste, judged for the public sector as a whole, not just the Accounting Officer's organisation'*.
- 5.7 We asked the Commission to provide details of the systems that it has in place to assess the quality of the criminal legal services it funds. It told us *"since Article*

21 (4) of the Access to Justice Order has not been implemented, there is no statutory requirement for the Commission to assess the quality of criminal legal services, and the Commission does not currently have the power to exclude a solicitor or barrister from undertaking criminal legal aid". It also said that it is developing a registration scheme to review the quality of work funded at public expense.

Recommendation 13: The Commission must assess the quality and value for money of criminal legal aid services funded from the public purse.

The Commission's performance reporting for criminal legal aid is activity-based

- 5.8 Each year, the Commission submits a Corporate Plan to Court Service for approval covering the subsequent three years. This sets out the Commission's key objectives, key performance targets and its strategy for achieving those objectives. Of the Commission's 46 performance targets, six (all process based rather than outcome focused) relate directly to criminal legal aid. Details of its performance for the first six months of the 2009-10 financial year (the latest available), are shown at **Figure 16**. The Commission told us that *"it is the Department which sets the level of fees for criminal legal aid, eligibility, etc which will determine the overall cost. The Commission's role is only to make the payments in accordance with the rules."*

²⁷ The Commission's first Chief Executive was appointed in October 2003 and remained in post until July 2009. An interim Chief Executive was in post from August 2009 to January 2010 when he was appointed as Chief Executive through an external competition.

Part Five: Value for Money

Figure 16: The Commission's performance against targets

Performance Target	Performance against target (as at 30 September 2010)	Red/Amber/Green
Determine applications for VHCC status in criminal cases from date of receipt – 80% within 2 weeks	Not Yet Achieved 68% in 2 weeks	Due to external factors
Consult on the introduction of a registration scheme for solicitors and advocates which will regulate who can provide publicly funded legal services and pilot a voluntary registration scheme by March 2011	Progress has continued in the development of a registration scheme with over 80% of forms now completed by practitioners wishing to join the preliminary scheme. A standards paper has been agreed with the Registration Working Group and will now progress	
Implement new remuneration arrangements for the payment of graduated fees to solicitors and counsel instructed in Crown Court cases by September 2010	Court Service is responsible for criminal legal aid policy and remuneration arrangements. They have engaged with the Northern Ireland Bar Council and the Law Society on proposals to introduce new legislation governing remuneration of Crown Court fees. This covers all types of claims for Crown Court fees and removes the need for exceptionality and VHCC certification. New proposals have been drafted along the structure of the 2005 rules and consultation has begun, responses were due by 19 November 2010. DPP and Justice Committee approval will then be required.	
Implement new arrangements for certification of VHCCs in the Crown Court by September 2010	A draft Project Initiation Document has been prepared and an exercise has commenced to examine historical PACE claims paid by the Commission	
Implement review of procedures for the provision of advice at police stations under Police And Criminal Evidence (PACE) legislation by Dec 2010	Both years, 2008-09 and 2009-10, published on 15 June 2010. The information published in respect of counsel was anonymised. It is the Commission's current plan to publish the information for counsel in full as soon as possible.	Due to external factors

Source: Legal Services Commission

A financial target set by the Commission would be meaningless as there is nothing the Commission can do to vary the level of fees to be paid”.

- 5.9 Performance is reported on a quarterly basis to the Governance and Accountability group chaired by the Director of Courts, the Commission’s Audit Committee, and Management Board. However, Court Service told us that, due to the limitations of the Commission’s IT systems, it could not conduct independent checks on the accuracy of the reported performance.
- 5.10 Timely, accurate, consistent, complete and relevant information is a pre-requisite for effective management of resources, improved decision-making and accurate performance measurement. This report has shown that there is clearly an urgent and critical need for the Commission to review its management information systems and improve the way it manages information within the organisation.

Recommendation 14: The Commission needs to identify the information it needs to manage its business and develop a strategy to rationalise its disparate manual and computer systems in order to make better use of the information at its disposal.

As members of the legal profession are involved in the process for determining fees, a conflict of interest exists

- 5.11 A conflict of interest arises when a person, in a position of trust, has a competing professional or personal interest. These competing interests can make it difficult for the person involved to remain impartial, and create the appearance of impropriety. This has the potential to undermine confidence and / or impair an individual’s ability to perform their duties objectively. Importantly, a conflict of interest can exist if the circumstances can be perceived to create one: consequently, a conflict of interest can exist without any unethical or improper act or intention. It is vital, therefore, that any such situations are managed effectively to avoid any real or perceived threats to independence.
- 5.12 A number of the Commission’s Committees and Review Panels incorporate members of the legal profession for their expertise. For example:
- the Commission’s Board²⁸ includes four members of the legal profession, including the current Director of the Law Centre (NI)²⁹;
 - three quarters of the panel members of the Appropriate Authority are either solicitors or barristers; and
 - the criminal fees advisory committee is made up entirely of solicitors and counsel.

28 Commissioners are appointed by the Minister for Justice

29 See Glossary

Part Five: Value for Money

5.13 Members of the legal profession were also involved in the process for determining fees in respect of approximately two-thirds of criminal legal aid expenditure in 2009-10. For example, under the 1992 rules, the Appropriate Authority determines costs associated with work carried out in non-standard cases under a criminal legal aid certificate. (Figure 6 shows that this amounted to 75% (£11.2 million) of Magistrates Court case expenditure in 2009-10). We were told that *"since April 2011 there is no panel of Appropriate Authority members and responsibility for this function will transfer directly to the Commission in the summer"*.

5.14 In order to minimise the potential for conflicts of interest, Court Service told us that judicial members of its Board have *"made it clear that they will not discuss legal aid at Board meetings"* and that, as a result, issues relating to legal aid are dealt with by its Finance Committee leading to a *"deficiency in the scrutiny of legal aid"*. It also told us that *"the judicial members of the Court Service do not have a conflict of interest in respect of payments to the profession. They do not comment on any substantive policy issue as such matters are for Ministers not the judiciary. Their abstention from such discussions has nothing therefore to do with a conflict of interest as it does not exist."*

5.15 We recognise the important role that specialist legal advisors play in administering the system for criminal legal aid. Nevertheless, it is clear that

a conflict of interest is inherent in these arrangements. We understand that the Review of Access to Justice in Northern Ireland is likely to address some of these issues (see paragraph 1.15).

Recommendation 15: In common with all public sector bodies, the Commission and Court Service must review their governance arrangements on a regular basis to ensure that conflicts of interest are minimised and managed effectively.

Appendix 1 (paragraph 1.3)

The process for granting criminal legal aid

The power to grant or refuse criminal legal aid is vested in the court. The decision as to whether or not to grant or refuse is determined by two tests - the means and merits tests.

Under Articles 28 to 30 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 the court must assess whether an applicant seeking criminal legal aid has insufficient means to enable him to fund his own defence. The court will require the applicant to complete a Statement of Means Form setting out his means. It is a matter of judicial discretion to decide in the individual circumstances of the applicant and the case whether the applicant either has or has not sufficient means to fund his own defence.

Having assessed the means of the applicant and merits of the case, the court will either grant criminal legal aid or will refuse the application. Unlike England & Wales, in Northern Ireland contributions towards the costs of the defence cannot be required in respect of criminal legal aid. Where an applicant is claiming to be on state benefit there is a well established verification check with the Social Security Agency.

The court is also responsible for determining the merits test which is whether it is desirable in the interests of justice that an applicant should have free legal aid in the preparation and conduct of his defence (Articles 28 to 30 of the 1981 Order).

The interests of justice test is not defined in the 1981 Order but the recommendations put forward in the Report of the Departmental Committee on Legal Aid in Criminal Proceedings (the "Widgery

Committee") in 1966 (Command 2934, paragraph 180) are generally taken to be the guiding principles. These are:

- (a) the likelihood of being deprived of liberty;
- (b) the potential loss of livelihood;
- (c) the possibility of serious damage to the individual's reputation;
- (d) whether a substantial question of law is involved in the case;
- (e) whether the applicant has an inadequate knowledge of English;
- (f) whether the question would require the tracing and interviewing of witnesses;
- (g) the need for expert cross-examination of prosecution witnesses; or
- (h) 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 whether criminal legal aid should or should not be granted, the doubt is to be resolved in the applicant's favour.

(Source: Northern Ireland Legal Services Commission)

Appendix 2 (paragraph 1.6)

Jurisdictional Comparison Table: THE ADMINISTRATION OF CRIMINAL LEGAL AID			
Jurisdiction	England & Wales	Scotland	Republic of Ireland
Administrative body	Legal Services Commission	Scottish Legal Aid Board	Department of Justice (Criminal Legal Aid) Irish Legal Aid Board (Civil Legal Aid)
Public Defender Service	<ul style="list-style-type: none"> Four Public Defender Service Offices in Swansea, Pontypridd, Darlington and Cheltenham. 	<ul style="list-style-type: none"> Seven Public Defender Service Offices in Ayr, Dundee, Edinburgh, Falkirk, Glasgow, Inverness and Kirkwall 	<ul style="list-style-type: none"> No current provision. Consideration may be given in the longer term to introduce a Public Defender Service.
Legal Aid Provider Contracts	<ul style="list-style-type: none"> Standard Crime Contract – All legal aid providers must sign a contract with the Legal Services Commission before they are able to undertake legal aid work. 	<ul style="list-style-type: none"> Every solicitor and firm of solicitors wishing to provide criminal legal assistance must register with the Legal Aid Board 	<ul style="list-style-type: none"> Every solicitor wishing to provide criminal legal aid work must register with the County Registrar for each County in which they wish to practice. Barristers must register with the Department of Justice. No contracting arrangements in place.
Quality Review	<ul style="list-style-type: none"> Peer Review - an assessment of the competency of advice by solicitors Quality Profiles: Provide assurance that contract work is in line with the reasons why legal aid was granted and is being carried out according to the contract Rules. Quality assurance scheme for advocates 	<ul style="list-style-type: none"> Peer Review Criminal Quality Assurance Committee 	<ul style="list-style-type: none"> No provision

Appendix 2 (paragraph 1.6)

Jurisdiction	England & Wales	Scotland	Northern Ireland	Republic of Ireland
Plea Discussions	<ul style="list-style-type: none"> Legal aid made available for the funding of plea discussions to provide the possibility of early resolution in certain cases with the potential to be at the most complex and expensive end of the spectrum. 	<ul style="list-style-type: none"> Section 76 Plea – available for the remuneration of counsel only. Basically a front loaded Guilty Plea. Consideration being given to extending this fee to solicitors' remuneration. 	<ul style="list-style-type: none"> No provision. Fees are paid according to case category and disposal. Guilty Pleas are the lowest fees payable in both the Magistrates' and Crown Courts. 	<ul style="list-style-type: none"> No provision
Duty Solicitor Scheme	<ul style="list-style-type: none"> Police Duty Solicitor Scheme Magistrates' Court Duty Solicitor Scheme 	<ul style="list-style-type: none"> Police Duty Solicitor Scheme Court Solicitor Scheme 	<ul style="list-style-type: none"> Police Duty Solicitor Scheme has recently transferred to the Law Society for administering. Magistrates' Court Duty Solicitor Scheme for the greater Belfast area only. Scheme is administered by the Law Society. 	<ul style="list-style-type: none"> No provision

Source: Court Service

Appendix 3 (paragraph 1.12)

Statutory Rules Governing Remuneration Arrangements

1992 Rules

1 Historically, remuneration for criminal legal aid in Northern Ireland was regulated by the Legal Aid in Criminal Proceedings (Costs) Rules (Northern Ireland) 1992 (SR1992 No 314) ("the 1992 Rules"), which prescribe standard fees for cases meeting certain criteria and rates of remuneration to be applied to various elements of work undertaken by lawyers in non-standard fee cases. These Rules were modelled on the equivalent Regulations in England and Wales (that is, the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989), but modified to take account of certain differences in Northern Ireland.

2 There were a number of differences in respect of the method of assessing costs in Northern Ireland as compared to England and Wales, including:

- in Northern Ireland, the Appropriate Authority determined fees in non-standard cases in accordance with the 1992 Rules; this is a committee of three persons: a solicitor, a barrister and a lay person appointed by the Lord Chancellor. Where the Appropriate Authority proposes to allow fees above a fixed level, the amount so allowed must firstly be certified as appropriate by the Taxing Master;
- in England and Wales the Appropriate Authority was an officer

appointed by the Lord Chancellor (Crown Court proceedings) or the then Legal Aid Board (Magistrates' Court proceedings);

- the Northern Ireland scheme operated an extra statutory system of composite fees for Magistrates' Courts proceedings as opposed to the prescribed standard fee system operating in England and Wales; and
- there was no provision in Northern Ireland for graduated fees in respect of advocacy in the Crown Court.

3 The most significant distinction was the duty placed on the Minister of Justice, (previously the Lord Chancellor, prior to the devolution of justice in Northern Ireland), when determining rates of remuneration for criminal legal aid work. In Northern Ireland, the Minister of Justice must ensure that rates are fair for work reasonably undertaken and properly done (Article 37 of the 1981 Order), but in England and Wales he must have regard to six statutory factors (Section 34(9) of the 1988 Act) before determining the rates. The six factors are the:

- time and skill which the work requires;
- general level of fee income arising from the work;
- general level of expenses of legal representatives which is attributable to the work;

Appendix 3 (paragraph 1.12)

- number and general level of competence of legal representatives undertaking the work;
- effect of the regulations on the handling of the work; and
- cost to the public funds of any provision made by the regulations.

4 In Northern Ireland the fees paid in respect of each case were assessed by the Appropriate Authority. The Taxing Master and the courts have supervisory control over the level of fees to ensure they represent fair and reasonable remuneration.

2005 Rules

5 In 2005 the NICTS introduced new rules, The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005, which introduced a range of standard fees for Crown Court proceedings. These Rules vested responsibility for the determination of the fees with the Commission (there was no role for the Appropriate Authority) with appeals against the Commission's decisions being 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 to 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.

6 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; rather a standard fee was paid which was deemed to reflect value for money.

7 In addition, 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

8 In 2009, Court Service brought forward 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.

9 Also in 2009, Court Service introduced new remuneration arrangements for Magistrates Court cases, The Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009, which prescribed a range of standard fees for Magistrates Court proceedings and appeals to the County Court. The Rules vested responsibility for the determination of the fees with the Commission (there was no role for the Appropriate Authority) 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 at paragraph 5 above.

10 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.

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

also abolished Very High Cost Cases. New arrangements were introduced to allow the standard fees payable under the Rules to be adjusted by the factors which reflected the weight and complexity of the cases. This means that there is no role for the Taxing Master in determining the value of Very High Cost Cases.

(Source: Northern Ireland Legal Services Commission)

2011 Rules

12 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

Appendix 4 (paragraph 1.12)

Key Responsibilities

Lord Chancellor / Northern Ireland Minister for Justice

The Lord Chancellor had overall responsibility to Parliament for criminal legal aid in Northern Ireland. He set the overall policy framework for legal aid within which criminal legal aid was administered and the remuneration payable. Upon the devolution of policing and justice this function became the responsibility of the Minister for Justice.

Legal Aid Department / Legal Services Commission

The Legal Aid Department was a Department of the Law Society for Northern Ireland established for the purpose of delivering an effective and efficient legal aid service. The Legal Aid Department administered criminal legal aid in support of the Appropriate Authority. The objectives of the Legal Aid Department in respect of criminal legal aid were to:

- comply with decisions of the Appropriate Authority;
- provide effective and efficient administrative support to the Appropriate Authority; and
- ensure that those claiming costs for criminal legal aid were provided with an administrative service which met defined levels of quality at a value for money price.

In 2003 the Northern Ireland Legal Services Commission was established and assumed responsibility for the administration of civil and criminal legal aid. In respect of criminal remuneration the Northern Ireland Legal Services

Commission inherited the Legal Aid Department's role to support the Appropriate Authority until the 2005 Crown Court and 2009 Magistrates Court Rules vested responsibility for determining fees in the Commission, not the Appropriate Authority.

Appropriate Authority

The Appropriate Authority comprised solicitors, barristers and lay representatives and functioned in accordance with the 1992 Rules, having regard to such directions as had been issued by the Lord Chancellor. It was responsible for the efficient and effective performance of the duties placed upon it by the Rules. Its main purpose was to determine costs in respect of work done under a criminal legal aid certificate.

The main duties under the Rules and Directions were:

- the determination of costs in respect of work done under a criminal legal aid certificate in accordance with the Rules - rule 4(1);
- in determining costs to take into account all relevant circumstances - rule 4(3);
- to notify a solicitor or counsel of the costs so determined and authorise payment accordingly - rule 10(1);
- to redetermine costs if the solicitor or counsel is dissatisfied with amount of costs allowed - rule 12.

The Appropriate Authority has had no role in determining Crown Court fees for any criminal legal aid certificate granted since April 2005 or Magistrates Court certificate granted since September 2009. The panel of the Appropriate

Authority expired at the end of March 2011 and Transfer of Function Rules will be made to enable the Commission to determine the fees payable in the small residue of cases which remain to be assessed under the 1992 Rules.

accordance with the requirements of the means test (insufficiency of means to pay for his own defence) and merits test (interests of justice).

(Source: Northern Ireland Legal Services Commission)

The Taxing Master

The Taxing Master is a Statutory Officer in the Court of Judicature appointed by the Minister. The Taxing Master had responsibility to oversee remuneration rates in criminal cases under the 1992 Rules to ensure they were fair and reasonable remuneration for work properly undertaken. There is a right of review of costs taxed by the Master to the Court of Judicature.

Among other duties, the Taxing Master hears appeals against decisions of the Northern Ireland Legal Services Commission in respect of Crown Court cases assessed under the 2005 Rules and Magistrates' Court cases assessed under the 2009 Rules. For Crown Court cases in which Very High Cost Case certificates were granted between 2005 and 2011 the Taxing Master is also responsible for assessing the remuneration payable. This role terminated with the making of the 2011 Crown Court Rules.

Northern Ireland Courts and Tribunal Service

The Northern Ireland Courts and Tribunal Service advises the Minister for Justice (and previously advised the Lord Chancellor) on criminal legal aid matters including remuneration of criminal legal aid cases.

The Judiciary

The judiciary are responsible for awarding and refusing legal aid in criminal matters in

Appendix 5 (paragraph 1.15)

Terms of Reference of Review of Access to Justice in Northern Ireland

To review legal aid provision in Northern Ireland and to develop proposals to improve access to justice which will:

1. Ensure that defendants have adequate representation to secure the right to a fair trial in criminal cases;
 2. In civil cases provide adequate, appropriate, efficient and cost-effective mechanisms for resolving legal disputes, whether by action in the courts or otherwise;
 3. Examine previous review work to determine what recommendations and proposals remain relevant;
 4. Examine what the scope is for alternative approaches and structures, as set out in the Minister's speech on 7th June 2010;
 5. Make proposals for an efficient and cost-effective system of administration to develop policy and support access to justice; and
 6. Make proposals to achieve value for money in the use of public funds within the available budget, including identification of possible future savings to reduce the legal aid budget.
-

Appendix 6 (paragraph 2.5)

Court Structure		
Court	Legislation	Type of Case
UK Supreme Court Hears appeals on points of law in cases of major public importance	Criminal Appeal (Northern Ireland) Act 1980, section 37	Costs assessed by Supreme Court officials: <ul style="list-style-type: none"> • re. solicitors, based on an hourly rate • re. counsel, based on a brief fee
The Court of Appeal Hears appeals on points of law in criminal cases all courts	Criminal Appeal (Northern Ireland) Act 1980, sections 19 and 28	Costs assessed by Taxing Master: <ul style="list-style-type: none"> • re. solicitors, based on an hourly rate • re. counsel, based on a brief fee
The Crown Court Hears all serious criminal cases	Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2009	Standard Fee Cases, with uplift if case is exceptional / wholly exceptional Very High Cost Cases, based on an hourly rate Very High Cost Cases, with new maximum hourly rates of payment
Magistrates' Courts (including Youth Courts) Deals with lesser criminal offences where the defendant is not entitled to trial by jury, known as summary offences, with a maximum penalty of six months imprisonment and / or a fine of up to £2,000	Where certificate granted before September 2009 Legal Aid in Criminal Proceedings (Costs) Rules (NI) 1992 Where certificate granted after September 2009 Magistrates' Court and County Court Appeals (Criminal Legal Aid) (Costs) Rules (NI) 2009	Standard Fee Cases Non-Standard Fee Cases Standard Fee Cases Very High Cost Cases, based on maximum hourly rates of payment

Appendix 7 (paragraph 2.5)

Roles and Responsibilities for Criminal Legal Aid Fees				
Court	Type of case	Role of the Commission	Role of the Appropriate Authority ³⁰	Role of the Taxing Master
Crown Court (2005 Rules)	Standard	<ul style="list-style-type: none"> Assesses claims under standard fee rules³¹ Processes payment If legal representative considers the fee too low then they can apply for a certificate of exceptionality 	None	Considers appeals under Rule 14
	Exceptional	<ul style="list-style-type: none"> Where appropriate, grants certificate of exceptionality specifying maximum number of additional hours approved. (May seek advice from Criminal Defence Services Advisory Panel, however, final decision remains with Commission) Legal representatives may appeal the decision on exceptionality to an internal Review Panel Assessment is based on standard fees plus exceptionality element – normally will not exceed 175% of standard fee Processes payment 	None	Considers appeals in respect of Internal Review Panel's decisions
	Wholly exceptional	<ul style="list-style-type: none"> Where appropriate awards 'wholly exceptional designation' Passes claim to Taxing Master Processes payment based on Taxing Master's determination 	None	Assesses claim and authorises any additional funding as he deems necessary
	Very High Cost Case	<ul style="list-style-type: none"> Issues certificate if satisfied conditions are met Monitors 3-weeks expenditure reports submitted by each member of the legal team Can revoke a certificate if supporting documentation is not submitted Processes payment based on Taxing Master's assessment 	None	<ul style="list-style-type: none"> Receives claims directly Assesses claims Passes his assessment to Commission for payment Considers requests for reassessment of fees

30 See Glossary

31 Payments are based on the 'class' of offence, linked to the method of disposal.

Court	Type of case	Role of the Commission	Role of the Appropriate Authority ³⁰	Role of the Taxing Master
Crown Court (2009 Rules)	Standard	<ul style="list-style-type: none"> As above 	None	<ul style="list-style-type: none"> As above
	Exceptional	<ul style="list-style-type: none"> As above 	None	<ul style="list-style-type: none"> As above
	Wholly Exceptional	<ul style="list-style-type: none"> As above 	None	<ul style="list-style-type: none"> As above
	Very High Cost Case	<ul style="list-style-type: none"> Issues certificate if satisfied that new definition is met Greater power to revoke certificates 	None	<ul style="list-style-type: none"> Can only review his initial assessment Court Service can ask for review
Crown Court (2011 Rules)	Standard	<ul style="list-style-type: none"> As above 	None	<ul style="list-style-type: none"> Considers appeals under Rule 14
	Exceptional	<ul style="list-style-type: none"> None – provisions on exceptionality removed 	None	<ul style="list-style-type: none"> None
	Wholly Exceptional	<ul style="list-style-type: none"> None – provisions on exceptionality removed 	None	<ul style="list-style-type: none"> None
	Very High Cost Case	<ul style="list-style-type: none"> None – VHCC provisions removed 	None	<ul style="list-style-type: none"> None
Magistrates' Court	Standard	<p>For certificates issued up to 29 September 2009 (1992 Rules)</p> <ul style="list-style-type: none"> Determines fees payable for all standard cases – under delegated authority from the Appropriate Authority. (Upper limit payable is based on list of fees together with hourly thresholds for different types of work) Processes all payments <p>For certificates issued on or after 30 September 2009 (2009 Rules)</p> <ul style="list-style-type: none"> Determines fees payable for all cases Processes payments Where requested by legal representatives, provides details of financial assessment 	<p>For certificates issued up to 29 September 2009</p> <ul style="list-style-type: none"> Delegates authority to the Commission to determine fees payable Responsibility for appeals on fees <p>For certificates issued on or after 30 September 2009</p> <p>None</p>	<p>For certificates issued up to 30 September 2009</p> <p>None</p> <p>For certificates issued on or after 30 September 2009</p> <p>Considers appeals of financial assessment by the Commission</p>

Appendix 7 (paragraph 2.5)

Court	Type of case	Role of the Commission	Role of the Appropriate Authority ³⁰	Role of the Taxing Master
Magistrates' Court	Non-standard	<p>For certificates issued up to 29 September 2009 (1992 Rules)</p> <ul style="list-style-type: none"> • Where "special circumstances" are claimed, makes decision on nature of the case³² • Prepares assessment schedule for non standard cases before passing to Appropriate Authority • Processes payments 	<p>For certificates issued up to 29 September 2009</p> <ul style="list-style-type: none"> • Assesses appeals on the nature of the case • Assesses fees payable • Hears appeals from claimants for increased fees 	<p>For certificates issued up to 29 September 2009</p> <p>Considers referrals where:</p> <ul style="list-style-type: none"> • A solicitor requests an enhancement to hourly rates • Counsel payments exceed the maximum allowed • A case is deemed standard but solicitor/counsel claim non-standard fees
	Very High Cost Cases	<p>Introduced on 30 September 2009 (2009 Rules)</p> <ul style="list-style-type: none"> • Issues VHCC certificate where it determines that the case meets the qualifying criteria • Where requested by legal representatives, provides written reasons for refusal of a VHCC • Determines fees • Authorises payments 	<p>Introduced on 30 September 2009</p> <p>None</p>	<p>Introduced on 30 September 2009</p> <ul style="list-style-type: none"> • Considers appeals against the Commission's decision not to grant a VHCC certificate. • Considers appeals of financial settlements assessed by the Commission.

Source: Court Service

Appendix 8 (paragraph 5.2)

Criminal Legal Aid Reform Programme (as at April 2011)		
Project	Target Date	Projected annual savings £ million
Crown Court Remuneration	April 2011	18.3
Assignment of Counsel	June 2011	1.5
Recovery of Defence Costs Orders	June 2012	0.2
Criminal Legal Aid Means Testing	June 2013	0.5

Note: A review of Magistrates' Court remuneration will begin in September 2011. This will produce some savings, for example, provision for VHCCs in the Magistrates' Courts will be removed, but these cannot yet be quantified.

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ISBN 978-0-337-09733-1



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