

N	I	A	O
----------	----------	----------	----------

**promoting better use of
public money”**

**NORTHERN IRELAND
LEGAL SERVICES
COMMISSION
ACCOUNT
for year ended
31 March 2012**

**Northern Ireland Legal Services Commission
Report of the Comptroller and Auditor General
Year ended 31 March 2012**

Summary

1. The Northern Ireland Legal Services Commission (NILSC or “the Commission”) was established on 1 November 2003 under the Access to Justice (Northern Ireland) Order 2003 to provide Legal Aid in Northern Ireland. It is responsible for administering civil and criminal Legal Aid and it is currently a Non Departmental Public Body under the Department of Justice.
2. NILSC prepares accounts for both its use of Legal Aid funds (the Grant Account) and for its administrative operations (the Grant-in-Aid Account). My report relates solely to the audit of the 2011-12 Grant Account. I completed my audit of the 2010-11 Grant Account¹ on 30 March 2012 and I am pleased that NILSC now produces more timely financial statements than has been the case since its formation in 2003. The Grant Account has been qualified each year since the establishment of NILSC. I am again qualifying the 2011-12 account on the same basis as I did in 2010-11. The qualification has two aspects:
 - i) insufficient audit evidence on the level of fraud (see paragraphs 8 to 18 below); and
 - ii) insufficient audit evidence to support the rationale used and judgements made when estimating outstanding liabilities for services provided by legal practitioners at the year end (see paragraphs 19 to 25 below).
3. In my report published in June 2011, I highlighted a range of concerns in relation to the administration of criminal Legal Aid². These concerns were considered by the Public Accounts Committee (PAC)³ and, in its subsequent report, the Committee concluded that the absence of a cohesive counter-fraud strategy, based on established best practice meant that NILSC was not well placed to manage the risk of fraud. It recommended that NILSC take urgent action to identify the risks of fraud and establish proactive counter-fraud measures to manage them.
4. In 2011-12 there was evidence of progress being made by NILSC in relation to reducing the risk of fraud and error in criminal Legal Aid payments. Of the £45 million criminal Legal Aid bill, £21 million related to the new standard fees⁴ arrangement. As a result this has reduced the risk of overpayments in almost half of the criminal Legal Aid costs. The standard

¹ Prior to 2010-11 and the devolution of justice functions, the Comptroller and General of the National Audit Office issued his opinion on the NILSC accounts.

² NIAO Report “Managing Criminal Legal Aid” published 29 June 2011.

³ Report NIA 20/11-15 Public Accounts Committee – Managing Criminal Legal Aid, Session 2011/2012, dated 26 October 2011.

⁴ Standard fees adopted in the 2009 Magistrates’ Courts rules.

fee arrangement has also led to a reduction in the uncertainty around the amount of outstanding liabilities at the year end for criminal cases where standard fees now apply.

5. There has been less progress on addressing the other factors leading to my qualification of the Grant Account in the financial period, however this is not unexpected as it has only been seven months since my last report. In my view, the significant changes that are necessary to address weaknesses in the Legal Aid system are likely to take some years to fully resolve. I welcome the steps NILSC and the Department of Justice have taken towards improving controls over criminal legal aid expenditure but I would strongly recommend that improvements are made to controls over civil Legal Aid.

Purpose of the Report

6. I was appointed as auditor of NILSC under the Access to Justice (Northern Ireland) Order 2003 as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010. I am required to examine, certify and report upon each statement of accounts prepared by NILSC.
7. The purpose of this report is to explain the background to my qualifications on the Legal Aid Grant Account for the year ended 31 March 2012. As I have noted above, I have continued to qualify the Legal Aid Grant Account on the basis of two limitations in scope on my work due to insufficient evidence available to me:
 - i. to satisfy myself that material fraud did not exist within Legal Aid grant expenditure (£98 million); and,
 - ii. to support the assumptions and judgements used to calculate Legal Aid provisions (£106 million).

Limitation in scope arising from insufficient evidence to satisfy myself that material fraud did not exist within Legal Aid grant expenditure

8. The nature of the Legal Aid scheme, in making payments to legal advisors for services which are directly provided to Legal Aid claimants, creates difficulties for NILSC in determining whether the services were appropriately provided, or if overpayments have been made. In addition, means tested Legal Aid carries a risk that Legal Aid is granted to individuals who are not eligible if income details are misstated on initial application, or if changes in financial circumstances that arise during the case are not reported by the claimant. Statute requires NILSC to depend significantly upon third parties to verify the eligibility of Legal Aid applications, for instance, in civil cases solicitors and the Legal Aid Assessment Office (LAAO)⁵ assess eligibility and in criminal cases judges decide on an applicant's eligibility.

⁵ The Legal Aid Assessment Office is part of the Social Security Agency.

9. For criminal Legal Aid, I am pleased to note the progress that has been made in reducing the risk of fraud and error from the introduction of standard fees. Over time this risk will reduce further as cases under the old rules (with varying fees claimed per case type) pass out of the system leaving a better controlled caseload under the new costing arrangements.
10. Civil Legal Aid systems are more complex with greater scope for fraud or error in terms of eligibility for Legal Aid and payments to legal practitioners. The Statute requires LAAO to conduct the eligibility assessment for those cases that are not assessed by solicitors. LAAO can access the benefits system to confirm those applicants who are in receipt of benefits. For those not receiving benefits, it assesses the maximum contribution payable and in doing so places particular reliance on the declarations made in the application form. In 2011-12 approximately 50% of civil cases processed by LAAO related to applicants in receipt of benefits. LAAO assessed cases resulted in payments of approximately £37 million from a total of approximately £53 million paid in relation to civil Legal Aid.
11. NILSC does not seek or obtain an assessment of the level of actual or suspected fraud or error from the Department of Social Development (DSD). DSD's Standard Assurance Unit regularly monitors and measures the level of fraud and error within the benefits system using sampling techniques. As NILSC did not request this information from DSD it had no estimate of the level of fraud or error present within the benefits checked by LAAO in determining Legal Aid eligibility.
12. Solicitors also approve eligibility for Legal Aid advice relating to 'Green Form,' 43,000 cases at a cost of approximately £5 million in 2011-12, and 'Assistance By Way of Representation' (ABWOR), some 4,200 cases totalling approximately £2 million in 2011-12. In these cases, the only routine verification performed is a twenty percent check of applicants who declare that they are in receipt of a 'passport' benefit. NILSC pass these cases to LAAO for verification.
13. During the audit, my staff found that by Statute the LAAO checks on civil Legal Aid applications are only required to cover an applicant's eligibility for an assessment period of 12 months, yet civil Legal Aid cases can run for as long as nine years and an applicant's circumstances may have changed in the period from assessment to the payment being made.
14. In addition to eligibility issues for those claiming Legal Aid, I also have concerns over the level of fraud in payments to legal practitioners. PAC recommended that to address my concerns NILSC should establish a robust inspection regime, including visits to the offices of legal professionals. During these visits, practitioners' records should be audited, including ensuring that there is adequate supporting evidence for bills issued and to confirm the eligibility of applicants at the time of payment. The small Counter Fraud Unit operating at NILSC in the 2011-12 financial period did not have an inspection regime in place and therefore could not provide me with the level of assurance that other established inspection regimes provide to Legal Aid bodies in other parts of the UK. In the absence of this

key control, or other compensating controls, I cannot obtain sufficient audit evidence to gain assurance that material fraud or overpayment does not exist. NILSC does not currently produce an estimate of the likely scale of fraud and error.

15. In the absence of verification controls, NILSC has an element of dependence upon whistleblowers to identify cases where fraud is present in Legal Aid claims. The Commission informed me that whistleblowers are an important source of information however staff within the Commission continue to identify claims that they believe should be, and are, further investigated by the Counter Fraud unit. Under the provisions of Managing Public Money Northern Ireland, Annex 4.7.8, the Commission has notified its sponsor of a number of potential frauds against the Legal Aid Fund. These cases are currently being investigated via the appropriate channels.
16. NILSC told me that an updated Counter Fraud Strategy has been adopted and the Counter Fraud Policy and procedures have been updated. The Commission has established an internal Counter Fraud Group which has been setup to review, identify and implement a range of improvements to the current controls in place. It is developing a counter fraud action plan which will be used to continually improve counter fraud measures. This review includes an examination of relationships with other relevant government bodies and agencies to communicate and share information to counter fraud. The Commission is also utilising its management information systems to examine any trends and seeking to learn lessons from any issues raised to focus the work of the Counter Fraud team. The Commission is also seeking access to the Department for Social Development's database to directly confirm that applicants are in receipt of welfare benefits declared in their legal aid application form. Other initiatives include the introduction in July 2012 of a 1% sample check which requires the external legal file from the Practitioners to be verified prior to payment.
17. The Commission is also introducing a Registration Scheme (a register of all providers of publicly funded legal services) and a Code of Practice. The Commission has developed a draft Code for individual solicitors and firms, which is currently being discussed with the Law Society of Northern Ireland; a pilot compliance audit of the Code requirements is due to commence within the next few weeks in preparation for the introduction of the Statutory Scheme in Autumn 2013. Discussions on this area on this are ongoing with the Bar Council.
18. I will continue to monitor NILSC's progress in implementing these improvements during future audits. Given the weaknesses I have identified in the eligibility of applicants in receipt of Legal Aid and the counter fraud arrangements in place during 2011-12, I have limited the scope of my audit opinion on regularity because I have been unable to obtain sufficient audit evidence to enable me to conclude that payments to legal professionals are regular.

Limitation in scope arising from insufficient evidence to support the rationale used and judgements made when calculating provisions

19. There continue to be significant issues with the application of the accounting policy, estimation technique and disclosures used by NILSC in estimating outstanding liabilities for services provided by legal practitioners to Legal Aid claimants at each financial year end. These liabilities are referred to as Legal Aid provisions.
20. Legal Aid provisions, valued at £106 million at 31 March 2012 (31 March 2011: £109 million), are estimated by NILSC in two ways. For Very High Cost Cases (VHCCs)⁶ (£16 million) the provision is estimated on a case by case basis and the 2009 rules mean that NILSC receives regular reports on costs from legal representatives. Provisions for all other Legal Aid certificates granted (£90 million) were valued using a number of assumptions including assumptions on the lifecycles⁷ for cases, the number of cases where NILSC will not incur costs and the average cost for each type of case.
21. The key weakness identified in previous audit qualifications on Legal Aid provisions related to the lifecycle assumptions being used and whether they were based upon worst-case scenarios which were not reflective of the normal trends. In response to my previous report, NILSC conducted an exercise to drill down from the high level classifications to further refine its lifecycle assumptions. The impact of this exercise was an increase of £1.2m in the liability calculation. However, as NILSC considered that the liability may already be potentially overstated, it did not process this change. In the period, NILSC reviewed the length of the lifecycles being used and found that changes to lifecycles assumptions at a more detailed level resulted in significant variances to the liability calculated. The Commission's view is that while the life cycle assumptions should properly reflect its liabilities, it would not adjust the lifecycle assumptions in 2011/12 until further work was carried out on categorisation.
22. I also identified weaknesses in information available to support the calculations for the other assumptions noted in paragraph 20 above. In particular, the average costs of cases used in the model has proved to be more volatile in 2011-12 with a significant impact on the provisions calculation. NILSC recognises that average cost assumptions need to be refined further.
23. Legal Aid provisions are challenging to estimate but ensuring that the basis and assumptions used to estimate provisions are reasonable is important for not only the preparation of the financial statements which I audit, but also for ensuring robust budgeting systems going forward. Given my on-going concerns with the accuracy of the estimation basis, I would recommend that

⁶ As defined by The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 and The Magistrates' Courts and County Court Appeal (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009, also referred to as the 2005 and 2009 Rules.

⁷ Lifecycle refers to the estimated time it takes to complete each type of case, from when the Legal Aid certificates are granted to when the legal professionals' bills are paid. Lifecycle assumptions are particularly important because they affect the number of Legal Aid certificates which will be included within the calculation of Legal Aid provisions.

NILSC re-assesses whether the current basis is fit-for-purpose or whether an alternative approach should be sought. However, the estimation of these liabilities is, by nature, extremely difficult due to the current out-working of the Legal Aid scheme. NILSC should, in my view, consider re-engineering operational practices to reduce the level of outstanding liabilities that need to be estimated and, in so doing, improve its control over such significant expenditure. For instance, legal practitioners do not currently present bills for work done on a regular and timely manner. A change to this practice could substantially reduce the uncertainty of outstanding liabilities at the year end. In addition, the application of standard fee arrangements for criminal Legal Aid (see paragraph 9), could be expanded further across civil Legal Aid categories, reducing the estimation assumptions required for outstanding liabilities at the year end. I understand that NILSC is reviewing this methodology and I welcome this initiative, otherwise I am concerned that continuing with the current approach will not resolve my qualification of provisions.

24. NILSC told me that this is a priority stream of work for both the Commission and its Sponsor which due to its complexity will require an action plan over the next 3 to 5 years. It will include legislation changes for some of the initiatives; further introduction of standard fees within Civil Legal Aid; changes to the IT infrastructure and requirements for invoices to be submitted on a more timely basis. NILSC advises me that it will continue to review the assumptions applied within the provision methodology in 2012-13, focussing on the methodology used for average costs and nil bills, and validation of those assumptions. The Commission, along with its Sponsor is carrying out a strategic review of Provisions which will include a review of the Accounting Policy and will continue, along with its Sponsor body, to refine the methodology adopted with any significant conclusions being communicated with the NIAO.
25. I have limited the scope of my audit opinion on the 2011-12 Legal Aid Grant Account because I have been unable to obtain sufficient audit evidence to enable me to conclude that Legal Aid provisions in the Grant Account have not been materially misstated.

KJ Donnelly
Comptroller and Auditor General

Northern Ireland Audit Office
106 University Street
Belfast
BT7 1EU

November 2012