

# **COMMUNITY LEGAL SERVICE FUND AND CRIMINAL DEFENCE SERVICE ACCOUNTS FOR THE YEAR ENDED 31 MARCH 2009**

## **Report of the Comptroller and Auditor General to the Houses of Parliament on the Community Legal Service Fund and Criminal Defence Service Accounts for the year ended 31 March 2009**

### **Introduction**

1. The Legal Services Commission (the Commission) is an executive non-departmental public body of the Ministry of Justice. The Commission is responsible for the provision of legal aid in England and Wales through the Community Legal Service Fund (for civil cases) and the Criminal Defence Service (for criminal cases).

### **The purpose of my report**

2. The purpose of this Report is to explain the background to the qualification of my audit opinion on the Community Legal Service Fund and Criminal Defence Service accounts for the year ended 31 March 2009 in respect of material error in payments to solicitors. I also outline the steps the Commission is taking to address the weaknesses in the system of control over the payments made to solicitors, in order to prevent a reoccurrence of these errors in the future.

### **My obligations as Auditor**

3. Under the Access to Justice Act 1999, I am required to examine, certify and report on the Commission's accounts. I am required, under International Standards of Auditing (UK and Ireland) to obtain evidence to give reasonable assurance that these accounts are free from material misstatement. In forming my opinion I examine, on a test basis, evidence supporting the disclosures in the financial statements and assess the significant estimates and judgements made in preparing them. I also consider whether the accounting policies are appropriate, consistently applied and adequately disclosed.

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**Audit Opinion**

**Qualified audit opinion due to material error in payments to solicitors**

4. As part of my audit of the accounts, I am required to satisfy myself that the expenditure and income shown in the accounts have been applied to the purposes intended by Parliament and conform to the authorities that govern them; that is, they are "regular". In determining whether expenditure and income conform to the authorities that govern them, I have regard to the legislation authorising the financial transactions and relevant regulations issued under the governing legislation.
  
5. I have qualified my opinion on the Legal Services Commission's accounts for the year ended 31 March 2009 as I identified material errors in respect of payments made to solicitors. In order to support my regularity opinion, I needed to assure myself that the amounts paid to solicitors were in line with the legislation governing the fee regimes and that the Commission approved legal aid only to eligible applicants. My testing identified an estimated total overpayment error of £24.7 million in the Commission's accounts for 2008/09. The overpayments relate either to solicitors' claims being paid at amounts higher than that supported by evidence or where legal aid had been provided to applicants whose eligibility could not be demonstrated. This error represents 1.2 per cent of the Commission's expenditure during the year.

**Legal Aid payments to solicitors**

6. During 2008/09, the Commission incurred operating expenditure of £2,091 million. Legal aid for criminal cases through the Criminal Defence Service, covering work at the police station and Magistrates' Court (Crime Lower) and at the Crown Court (Crime Higher), totalled £1,176 million. Legal aid for civil cases through the Community Legal Service- which covers Legal Help (advice on civil matters) and Civil Representation (representation of clients at the County Court and Family Court) - totalled £915 million.

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7. The Commission contracts solicitors to provide advice and representation to eligible applicants through a number of legal aid schemes. The way in which the Commission pays the solicitors varies depending on the scheme but is based on the claims the solicitors submit for work done on each case. The provision of legal aid through some schemes is subject to an eligibility assessment of a client's financial means. The means assessments are completed by different parties, dependent on the scheme, as set out below.

COMMUNITY LEGAL SERVICE	CRIMINAL DEFENCE SERVICE
1. Legal Help <i>Means tested by the solicitor</i>	1. Crime Lower: Police Station <i>Not means tested</i>
2. Civil Representation <i>Means tested by the Commission</i>	2. Crime Lower: Magistrates' Court <i>Means tested by the Court</i>
	3. Crime Higher: Crown Court <i>Not means tested</i>

8. In order to confirm that amounts paid to solicitors were in line with the relevant legislation, I tested the accuracy of a sample of claims for each scheme. In order to ensure that legal aid was only provided to eligible applicants I placed reliance on the work of the Commission's own assurance teams. I identified an error rate for each exercise and extrapolated this across each population to calculate an estimated total error for the Commission's accounts.
9. The estimated total error in the Commission's accounts for 2008/09 is an overstatement of expenditure of £24.7 million. The majority of this error (£18.3 million, 74 per cent) relates to overpayments made to solicitors across both the civil and criminal schemes. The remaining error of £6.4 million (26 per cent) relates to payments made to solicitors where legal aid had been provided to claimants whose eligibility could not be demonstrated. The majority of errors relate to expenditure through the Community Legal Service (£16.8 million), with the expenditure through the Criminal Defence Service accounting for approximately a third of the estimated total error (£7.9 million).

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10. I set out in the following paragraphs further details of the overpayment and eligibility errors identified during the audit of the 2008/09 accounts.

**Overpayment errors**

11. During my audit I have estimated £18.3 million of overpayments to solicitors as set out in the following table:

<b>ESTIMATED ERROR ON ACCURACY OF PAYMENTS</b>				
<b>Legal Aid Scheme</b>	<b>Population £'m</b>	<b>Financial errors £</b>	<b>Error rate %</b>	<b>Estimated Error £'m</b>
Legal Help: Immigration & Family	130.2	6,514	8.06%	10.5
Crime Lower: Police station & Magistrates' Court claims	478.5	356	0.74%	3.6
Legal Help: Other	106.4	449	2.12%	2.3
Crime Higher: Crown Court payments to advocates	277.7	1,310	0.61%	1.7
Crime Higher: Very High Cost Cases (VHCC) payments	108.0	2,933	0.30%	0.3
Civil Representation	804.7	(11)	(0.01%)	(0.1)
<b>Total of Accuracy Errors</b>		<b>11,551</b>		<b>18.3</b>

12. I have outlined below further details of the most significant errors - on Legal Help, Crime Lower and the Crown Court. I also report on the Commission's own assurance mechanisms over the payment of solicitors through these schemes; the extent of my own testing, and the type and incidence of errors identified.

*Legal Help and Crime Lower*

13. For Legal Help and Crime Lower, the Commission pays solicitors through various fixed and standard fee schemes, with rates largely determined by the category of work, Solicitors input their claims in respect of work undertaken into the Commission's LSC Online system<sup>1</sup>, which currently has limited data validation controls in operation. The claims determine the standard monthly payments

<sup>1</sup> LSC Online was introduced in 2007/08 in phases and has been fully operational since March 2009. The system allows solicitors to submit electronic claims to the Commission.

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- that suppliers will receive from the Commission. These claims are not validated by the Commission before monthly payments are processed. Instead, throughout the year, the Commission's Contract Compliance Audit (CCA) team reviews a sample of claims, confirming that the suppliers have discharged their contractual requirements, including whether the file supports the fee claimed. This is the Commission's only direct mechanism to confirm the accuracy of individual claims submitted by solicitors.
14. During 2008/09, the Commission deployed a large team of 80 staff on this assurance work, each of whom spent a limited proportion of their time on the work (estimated as equivalent of 12 full time members of staff). The team selected a random sample of solicitors and chose 20 case files from each solicitor to review. Following this review, the Commission concluded that, for a number of cases, the claims were in respect of applicants ineligible for legal aid or outside of contractual requirements.
15. The Commission's policy is to tolerate up to two unsupported files in a sample of 20, although it ignores any partial errors in claims. Where there are more than two unsupported files in the sample, the Commission seeks to recoup the value of the claim from the solicitor and may undertake further testing of the solicitor's files. The Commission may also consider the application of a contract sanction if it considers the solicitor's level of non-compliance to be particularly serious, rather than due to an administrative error. The Commission issued 14 notices of contract breaches to providers during 2008-09 and a further 11 to date during 2009-10.
16. I planned my audit to take assurance from the Commission's own review of 7,845 solicitor case files selected across 455 solicitors. However, my reperformance of a sample of the case file reviews identified that not all claim errors had been identified by the Commission's auditors. As a result, I was not able to rely on the Commission's work and so undertook additional testing of a sample of 450 claims in order to test their accuracy.

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17. My additional work indicates that within the Legal Help and Crime Lower expenditure streams there are net over claim errors of £16.3 million. This calculation is a prudent one; it includes cases where I found insufficient evidence to support fees or disbursements claimed by solicitors as well as demonstrable errors.
18. I found the highest level of financial error (eight percent) was in relation to Family and Immigration claims within Legal Help; my testing here indicated that 25 percent of all claims were incorrect or unsupported. For many of these errors, the solicitor had claimed an incorrect category or level of work and the majority of such errors resulted in over claims. For example, I identified a number of instances where the solicitor had incorrectly claimed an asylum fee instead of the correct (and lower) immigration fee. Another major source of error related to inaccuracies around the claiming of VAT.
19. The Commission recognises there are a number of factors contributing to this significant level of over claims. This includes the complexity of the fee regimes, the lack of system-enforced controls in LSC Online to validate the accuracy of the claims when submitted, and the quality of the Commission's post-payment internal assurance processes. This, together with the limited sanctions in place for incorrect claims, creates a risk of suppliers exploiting the payment system.

*Crown Court Payments*

20. The Commission pays advocates for work in the Crown Courts through the Advocates Graduated Fee Scheme. The fees are determined by the facts of the case, such as advocate category, type of case, number of witnesses and number of pages of prosecution evidence. These claims are validated by Her Majesty's Court Service (HMCS) prior to payment. The work undertaken by HMCS is governed by a Service Level Agreement with the Commission. While the claims are not subject to review by the Commission, the Service Level

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Agreement provides for the Ministry of Justice’s Internal Audit service to undertake an audit at the request of the Commission.

21. I undertook testing at a number of Crown Courts to confirm the accuracy of payments made to advocates. This testing identified a total net overpayment error of £1,310, which related to actual errors and claims which were not supported by sufficient appropriate audit evidence. When extrapolated, this indicates an estimated net overpayment of £1.7 million. Recoveries of over payments made to advocates are dealt with by HMCS under the Service Level Agreement using powers set out in Article 26 of the Criminal Defence services Funding Order.

*Eligibility*

22. I have identified an estimated £6.4 million of payments to solicitors for legal aid provided to ineligible clients. I have set out below the details of the most significant errors - on Legal Help, Crime Lower and Civil Representation. I also report on the Commission’s own assurance mechanisms over the payment of solicitors through these schemes; the extent of my own testing; and the type and prevalence of errors identified.

<b>ESTIMATED ERROR ON ELIGIBILITY</b>			
<b>Legal Aid Scheme</b>	<b>Population £'m</b>	<b>Financial errors £</b>	<b>Estimated Error £'m</b>
Legal Help	236.6	178	2.3
Crime Lower: Magistrates' Court	184.2	23,036	2.3
Civil Representation	286	10,064	1.6
CLS Direct	3.2	999	0.2
<b>Total of Eligibility Errors</b>		<b>34,277</b>	<b>6.4</b>

*Legal Help*

23. Before solicitors provide initial advice to clients on a civil matter, the solicitor must complete a means assessment of the client’s financial eligibility for legal aid.

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24. The Contract Compliance Audit (CCA) testing conducted by the Commission includes testing claims to confirm client eligibility for the receipt of legal aid. However, the CCA results identified a high number of potentially ineligible clients due to solicitors not always retaining sufficient evidence to support their assessment of a client's eligibility. The Commission agreed to conduct an additional file review exercise to specifically test client eligibility using alternative sources of evidence. Having satisfied myself of the scope and quality of this work, I placed reliance on the Commission's work in this area for the external audit of the accounts.
25. The results from this separate exercise identified an estimated error of £2.3m, which indicates the Commission may have paid this amount to solicitors for advice provided to individuals who were not eligible for legal aid.

*Crime Lower: Magistrates' Court*

26. The Criminal Defence Act 2006 introduced means-testing for the representation of clients in the Magistrates' Court from October 2006 onwards. The means assessment of the applicant's financial eligibility for legal aid is completed by the Magistrates' Court where the client's case is being heard.
27. Due to the limited evidence of client eligibility provided by the solicitors and maintained by the Courts, in 2008/09 the Commission undertook a separate exercise to confirm the eligibility of clients to alternative sources of evidence. This is the Commission's assurance mechanism for confirming the eligibility of recipients for criminal legal aid, which is led by its National Courts Team. Having satisfied myself of the scope and quality of this work, I placed reliance on the results of the Commission's work in this area.
28. The work of the National Courts Team identified an estimated net over claim in 2008/09 of £2.3 million (1.2% of the population of £184 million). This indicates that the Commission may have paid out this amount to solicitors for



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representation in Court of individuals who may not have been eligible for legal aid. This is a prudent error calculation; it includes cases where there was insufficient evidence of eligibility as well as proven cases of ineligibility.

*Civil Representation*

29. When the Commission provides legal aid to clients under the Civil Representation scheme, the clients may be required to make a contribution towards the costs of the case. The means assessment and calculation of any contributions to be paid by the client were completed by individual assessors within the Commission's regional offices. The Commission introduced a cross-office quality review to validate the assessments made on a sample of approved applications. Having satisfied myself of the scope and quality of the work undertaken by the regional offices, I placed reliance on the results of the Commission's work in this area.

30. The Commission's review identified errors where either an individual was ineligible for legal aid, or where the amount of contribution had been incorrectly calculated. The results indicate an estimated overpayment error of £1.6 million. The Commission's policy is to adjust the amount of contribution where this was incorrectly calculated or to revoke certificates if legal aid has been granted to ineligible applicants.

**Actions taken or proposed to be taken by the Commission to address the weaknesses in the system of control**

*Accuracy of payments for Legal Help and Crime Lower*

31. The most significant issue for the Commission is the high level of error in the accuracy of solicitor claims for work provided through the Legal Help and Crime Lower legal aid schemes. The Commission considers that the errors stem primarily from the complexity of the fee regime; the lack of controls within LSC Online to validate the claims and the quality of the CCA work to identify

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- incorrect claims. In my view, the absence of a strict sanctions regime to deter the submission of incorrect claims by suppliers may also have contributed to the incidence of error.
32. The Commission has recognised the need to address a number of the key weaknesses causing this high level of error and is taking action in three key areas: solicitor engagement, enhancing LSC Online data validation controls and bolstering the Commission's compliance and assurance work.
33. The Commission will also review the guidance provided to solicitors with regard to what fees they should be claiming and how claims are input onto LSC Online. Given the level of errors identified within my testing, in particular on family and immigration claims, I recommend the Commission reviews the structure of the fee regime and consider whether there is scope for simplification.
34. The Commission is already undertaking work to review the functionality of its controls within LSC Online to improve the data validation over claims submitted by solicitors. Enhanced input controls could prevent, for example, a firm of solicitors working outside London from claiming rates specific to work in London.
35. The Commission has established a dedicated team of 12 staff to conduct its Contract Compliance Audits from 2009/10 onwards. This should assist in enhancing the quality of the audit work done and consistency of judgements made. It has also committed to reviewing the guidance and training provided to its auditors to ensure that they identify and document all errors. The Commission also plans to extend the quality control checking of the results of the audit team's work to confirm that the CCA process is identifying all errors and treating them consistently.
36. I welcome the Commission's proposed actions and the setting of clear timelines and agreed accountabilities for these actions. I will be revisiting these issues as part of my audit of the Commission's 2009/10 financial statements.

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37. I recommend that the Commission revisits the policies in relation to recovering over claims from its suppliers, in particular the element of the policy which ignores partial errors in amounts claimed. The Commission should also review its use of sanctions against suppliers as a matter of urgency to ensure that these act as a necessary deterrent to solicitors from claiming inappropriate fees.

*Accuracy of Crown Court payments*

38. The Report highlights potential risks of significant overpayments which may be caused by errors or a lack of supporting documentation. The Commission has a Service Level Agreement with HMCS to oversee the payments of advocates for work in the Crown Courts. Under this agreement, HMCS is responsible for validating the claims. Given the level of error in these claims, the Commission should liaise with HMCS to consider how to ensure the controls operated by the Courts are more robust and identify errors in claims prior to payment. HMCS and the Commission are working together to address these issues. At present there are periodic joint internal audit reviews by HMCS and the Commission to assess the degree of compliance with the terms of the Service Level Agreements. The Commission needs to ensure that it secures sufficient, regular assurance on the operation of the Agreement to be able to confirm the accuracy and validity of claims paid via the Courts.

*Eligibility*

39. Since the Commission introduced means-testing in the Magistrates' Court in October 2006, its National Courts Team has undertaken profiling work in relation to the eligibility of applicants. The Team has developed this process throughout 2007/08 and 2008/09 to collate detailed information about the categories of applicants granted and refused legal aid; the value of legal aid provided to ineligible applicants, and where claimant eligibility is not fully

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- supported. This has helped to focus the Team's assurance work and to address the factors contributing to these errors.
40. The Commission faces a further challenge with the introduction of means assessment in Crown Courts planned for the latter part of 2009/10. It will need to carefully consider the controls to be established to confirm and provide assurance over client eligibility to support this initiative.
41. At present the Commission undertakes limited analysis of the results of its eligibility assessment of applicants receiving legal aid for Legal Help. While the CCA team considers the results for each solicitor and identifies whether recoupment or further training is needed, the results are not considered collectively to identify trends across all solicitors and different categories of applicant. This is also the case for cross-office eligibility testing of civil representation work.
42. I recommend that the Commission undertake profiling work across all areas of means-tested legal aid to identify categories of applicants deemed to be at greater risk of ineligibility and to quantify the value of legal aid granted to ineligible applicants, or where claimant eligibility is not fully supported. The Commission should communicate these results to all parties undertaking the means assessment. Where appropriate, the Commission should also ensure that suitable sanctions are imposed on solicitors for failing to comply with the Commission's means testing criteria.
43. I will be assessing how the Commission has tackled the issues raised in my report as part of my audit of the Commission's financial statements for 2009/10.
44. I have undertaken a separate examination, under section 6 of the National Audit Act 1983 and to be presented to Parliament under section 9 of that Act, into the Commission's Procurement of Criminal Legal Aid. I will be reporting the results of this examination shortly.

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21 October 2009

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