



National Audit Office

**REPORT BY THE
COMPTROLLER AND
AUDITOR GENERAL**

**HC 29
SESSION 2009–2010**

27 NOVEMBER 2009

The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission

Our vision is to help the nation spend wisely.

We promote the highest standards in financial management and reporting, the proper conduct of public business and beneficial change in the provision of public services.

The National Audit Office scrutinises public spending on behalf of Parliament. The Comptroller and Auditor General, Amyas Morse, is an Officer of the House of Commons. He is the head of the National Audit Office which employs some 900 staff. He and the National Audit Office are totally independent of Government. He certifies the accounts of all Government departments and a wide range of other public sector bodies; and he has statutory authority to report to Parliament on the economy, efficiency and effectiveness with which departments and other bodies have used their resources. Our work leads to savings and other efficiency gains worth many millions of pounds: at least £9 for every £1 spent running the Office.



National Audit Office

The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission

Ordered by the House of Commons
to be printed on 25 November 2009

Report by the Comptroller and Auditor General

HC 29 Session 2009–2010
27 November 2009

London: The Stationery Office
£14.35

This report has been
prepared under section 6
of the National Audit Act
1983 for presentation to
the House of Commons
in accordance with
Section 9 of the Act.

Amyas Morse
Comptroller and
Auditor General

National Audit Office

23 November 2009

This report examines the procurement of criminal legal aid in England and Wales by the Legal Services Commission (the Commission). There are two types of publicly funded legal aid. Civil legal aid helps people with problems such as debt and housing. Criminal legal aid provides assistance to people suspected of or charged with a criminal offence, both at police stations and in court.

© National Audit Office 2009

The text of this document may be reproduced free of charge in any format or medium providing that it is reproduced accurately and not in a misleading context.

The material must be acknowledged as National Audit Office copyright and the document title specified. Where third party material has been identified, permission from the respective copyright holder must be sought.

Contents

Summary **4**

Part One

The criminal legal aid
landscape **10**

Part Two

Procuring criminal legal aid
support in the police station and
magistrates' court **19**

Part Three

Procuring criminal legal aid
support at the Crown Court **26**

Appendix One

Study methodology **31**

The National Audit Office study team
consisted of:

David Boothby, Jon Cable,
Araz Enayati Rad,
Miguel Garcia-Sanchez and
Matthew Wilkins under the direction
of Rob Prideaux, with assistance
from Gill Gibson, Sally Hancock,
Alasdair Lea, Richard Ratcliffe and
Sen Rudran

This report can be found on the
National Audit Office website at
<http://www.nao.org.uk/legalaid09>

For further information about the
National Audit Office please contact:

National Audit Office
Press Office
157-197 Buckingham Palace Road
Victoria
London
SW1W 9SP

Tel: 020 7798 7400

Email: enquiries@nao.gsi.gov.uk

Summary

1 This report examines the procurement of criminal legal aid in England and Wales by the Legal Services Commission (the Commission). There are two types of publicly funded legal aid. Civil legal aid helps people with problems such as debt and housing. Criminal legal aid provides assistance to people suspected of or charged with a criminal offence both at police stations and in criminal courts. Legal aid is provided by solicitors, paralegals¹, higher court advocates, and barristers. Since 2000, it has been administered by the Commission, a non-departmental public body of the Ministry of Justice (the Ministry).

2 In 2008-09, expenditure on legal aid support was £2.09 billion: £1.18 billion on criminal legal aid and £0.91 billion on civil legal aid, covering 1.6 million and 1.3 million acts of assistance, respectively. The Commission spent an additional £125 million on the administration of civil and criminal legal aid. England and Wales spend more per capita on legal aid than any other comparable nation except Northern Ireland. This is partly because of a higher level of prosecutions than in many other countries.

3 We evaluated the efficiency and effectiveness of the Commission's procurement of criminal legal aid, including cost, access and eligibility, and the Commission's measures for assessing the quality of service delivered. The study methodology (Appendix 1) covered interventions supported by legal aid from the police station through to the Crown Court.

Key findings

The policy arrangements for legal aid are complex

4 The Ministry of Justice has a closer relationship with the Legal Services Commission than is typical between a sponsoring department and a non-departmental public body. This reflects the significance of legal aid expenditure of over £2 billion to the Ministry of Justice's annual budget of £10 billion. The Ministry of Justice has overall policy responsibility for criminal legal aid, and leads on most policy changes such as the introduction of means testing. The Commission leads on policy reforms relating to contracts and procurement. This division of responsibilities has sometimes led to confusion and duplication in the oversight of criminal legal aid. In addition to the Commission's policy staff, the Ministry's Access to Justice Directorate employs 34 staff on legal aid policy at a cost of £2 million a year. The Ministry is looking to redefine the relationship between the two organisations. In October 2009, it announced a review into the delivery and governance of legal aid to report by January 2010. Amongst other issues, the review will consider the relationship of the civil and criminal legal aid arms of the Commission with the Ministry.

¹ Individuals including accredited representatives who, while not qualified as a solicitor, will have another qualification entitling them to conduct legal work.

5 The Government's policy is to rebalance legal aid spending towards civil legal aid. In response, the Commission has worked to control the amount of expenditure incurred on criminal legal aid, and this has fallen in real terms by 12 per cent over the past five years. The cost of criminal legal aid provision is driven by a number of factors, including the complexities of the criminal justice system, and the level of crime, both of which are beyond the control of the Commission.

6 Under the overall policy direction of the Ministry of Justice, the Commission has primarily controlled criminal legal aid expenditure by implementing a series of significant reforms to the remuneration and eligibility of criminal legal aid. In 2006, Lord Carter of Coles published a review of the Commission's procurement of both civil and criminal legal aid. This established a schedule of reforms designed to produce a more market-based legal aid system, precursors for which were the introduction of graduated and fixed fees for criminal legal aid. The Government adopted most of Lord Carter's proposals in the document *Legal Aid Reform: the Way Ahead*.

7 The Commission is undergoing a major internal transformation to produce further cash savings, which also aim to make it a more effective commissioner of legal aid. The Commission is tasked with securing £193 million in annual net cashable savings over the 2007 Comprehensive Spending Review period, and plans to reduce staffing by a third by 2013. A new executive team was recruited in December 2008 to provide commissioning and business management experience, and there is an ongoing reorganisation and re-definition of roles for those staff responsible for managing relationships with legal firms. Through this re-organisation the Commission intends to deploy resources in proportion to the volume of criminal legal aid work commissioned from firms of different sizes. A key risk for the Commission will be whether it is able to develop the capability it needs to improve its performance as a commissioner.

The Commission needs to improve its knowledge of the suppliers and users of criminal legal aid

8 The Commission should do more to understand the market for criminal legal aid to help it make fully informed decisions. In particular, it lacks a firm grasp of the cost structures and profit margins of different types of legal aid firms and how these vary geographically. While it holds good information locally about its suppliers, through its Relationship Managers and Account Managers, who are responsible for managing the day-to-day relationships with individual firms, it does not bring this information together centrally. Better use of this local information, supplemented as necessary by further research of its suppliers, would help the Commission to establish whether it is paying a fair price for criminal legal aid. Such analysis would also help it forecast the impact of changes to criminal legal aid on the provision of the service.

9 The Government has stated its intention to move towards a system of Best Value Tendering for the procurement of criminal legal aid, under which the market price would be determined by competition between suppliers. Because of this decision, the Commission has concluded that it does not need to collect detailed information about each of its suppliers. However, there is a risk to the effective implementation of competitive tendering if the Commission fails to make the most of information about its suppliers that it already holds, or is readily available. Pilots proposed in Greater Manchester and Avon and Somerset in 2010 provide a further opportunity to enhance and act on its understanding of the legal aid market before it implements competitive tendering more widely.

10 There are tensions in the relationship between the Commission and the legal professions that have on occasion threatened the delivery of legal aid. Attempts by the Commission to change its contracting arrangements in the most complex Crown Court cases in 2007 resulted in many barristers declining to sign up to new contracts when the Commission proposed reduced hourly rates, while the consultation on Best Value Tendering provoked widespread opposition among solicitors. Two-fifths of respondents to our solicitors' survey perceived the Commission as "unhelpful" for reasons including a lack of understanding of the legal system. The Commission considers that inherent tension will arise in any relationship when controversial changes are introduced. Solicitors' firms generally report that they are satisfied with their relationships with their Relationship and Account Managers, with whom they are in more regular contact.

11 Only around half of people detained at the police station take up their right to free legal representation. The Commission has conducted research into why people do not take up legal aid at the police station and magistrates' court, but does not analyse the views of clients who choose to receive legal aid to evaluate its quality.

The Commission needs to improve its administration of criminal legal aid

12 The Commission's implementation of reforms to criminal legal aid has faced a number of difficulties. Most of these reforms have been designed to achieve cash savings, but we found that for different reasons, including the lack of legislative backing for piloting and the need for fast implementation, some reforms such as police station and magistrates' court revised fees were implemented without piloting and the introduction of measures such as Crown Court means testing have slipped. The Commission has not evaluated consistently the impact of the reforms. Delays such as those which occurred in implementing the new Litigators Graduated Fee Scheme have sometimes led to planned savings being delayed.

13 The data that the Commission uses to make payments for criminal legal aid services is inaccurate and incomplete. The Supplier Management System, which the Commission uses to pay firms for work at police stations and magistrates' courts, does not require providers to enter key information determining payments, such as the category of a court case. Moreover, we found the existing controls over the quality of data held by the Commission and over the accuracy of payments made to firms providing legal aid are not effective. In the review of files we conducted, suppliers could not produce over 20 per cent of files requested within the allotted time period.

14 The Commission controls expenditure on the most costly Crown Court cases with individual contracts and contract managers for each case, but it lacks the data necessary to ascertain the maximum savings possible from the use of these contracts. In 2008-09, the Commission spent £112 million on Very High Cost Criminal Cases. These have a separate arrangement under which cases longer than 40 days in court or with more than 10,000 pages of evidence are managed by individual contract managers who agree to the work which a defence team undertakes. However, in 2008-09, firms did not notify the Commission of £30 million worth of cases that should have qualified for individual contracts. The Commission introduced Very High Cost Criminal Cases in 2001. The Commission set itself a target to save 30 per cent of the cost of these cases from a baseline of 2003-04. The limited evidence available suggests it has achieved this target for the largest cases, but not for the lower value cases. It does not have sufficient data therefore to establish whether the threshold is set (in terms of trial length or amount of pages of evidence) at a level which it is most effective to use contracts for individual trials. The Commission does not know therefore whether contracting for these Crown Court cases offers value for money when compared to other types of payment.

15 The Commission has sought to fill the gaps in the self-regulation of the legal professions through a range of measures such as peer review. The Commission would prefer not to have to lead the assessment of the quality of firms' work as it believes the profession and its regulators should perform this role, and it wants to reduce its costs. Since it was introduced in 2005, the Commission has covered about three quarters of criminal legal aid firms through peer review. The Commission is now considering whether peer review should be more targeted on the basis of risk assessments. It also wants to work with firms and regulators to use existing systems of accreditation for police station and magistrates' court duty solicitors. The Commission presently has no measure by which to evaluate the performance of individual advocates in the Crown Court, but in liaison with the Bar Council and the Law Society is currently piloting a number of methods for quality assuring all advocates. The chosen approach is due for implementation in 2010.

Conclusion on Value for Money

16 We have assessed whether the Commission knows if it is paying the optimal price for criminal legal aid services, whether it has introduced reforms based on a sound knowledge of the market, and whether it has appropriate measures for assessing the quality of criminal legal aid provision. The Commission's position in the legal aid market should enable it to improve the efficiency and quality of legal aid provision while better controlling the costs of legal aid. At present, gaps in the Commission's knowledge about its supplier base prevent it from making the most of this position. In particular, we consider that the Commission has not marshalled the knowledge of its local managers well enough to develop a good understanding of the market for criminal legal aid, such as the cost structures of different types of firms and their profit margins.

17 We also conclude that there are significant weaknesses in the way criminal legal aid has been administered which the Commission needs to address before it can be confident it is procuring a cost effective service. The Commission has undertaken substantial reforms to how it procures legal aid services. The timetable for introducing these reforms has been challenging and the Commission has found it difficult to manage those changes. New schemes have not always been piloted. Implementation has often been delayed and post-implementation reviews have also sometimes been delayed, meaning the Commission does not always have timely evidence to establish whether planned savings have occurred. Furthermore, the Commission's ability to make payments to criminal legal aid suppliers is undermined by poor administration, as we found during this study that information provided by suppliers is not routinely checked and has a high risk of inaccuracy. Our findings demonstrate that the way criminal legal aid has been both administered and procured in England and Wales presents risks to the value for money provided to the taxpayer, as well as to the sustainability of the service.

Recommendations

18 The National Audit Office makes the following recommendations.

On legal aid policy

- a** **The current division of policy responsibilities between the Ministry and the Commission is confusing and poses a risk of duplication on some issues and a lack of coverage of others.** The Ministry should ensure that the new framework agreement governing this relationship provides certainty on the respective roles of its own staff and the Commission.
- b** **Despite recent reductions, the Ministry still spends approximately £2 million annually on legal aid policy work, which is in addition to the Commission's own administration budget.** The Ministry should review the level of staff involved in making legal aid policy in both organisations and look for opportunities to reduce this number.

On information about the suppliers and users of criminal legal aid

- c** **The Commission does not currently hold enough information centrally about its suppliers to be an intelligent commissioner.** The Commission should collate and analyse the information it already holds locally, supplemented as necessary by further research so that it is better informed about its supplier base. In particular, the Commission should use its Best Value Tendering pilots to gather and analyse relevant information about its suppliers to inform the further implementation of competition and to assess its likely impact on the provision of the service.
- d** **The Commission also holds little information on the users of legal aid and their perceptions of the services offered.** The Commission should consider further research on the reasons for the low level of take up in police stations and the consequences of suspects moving through the criminal justice system without representation.

On the administration of criminal legal aid

- e** **The Commission has been faced with implementing significant reforms to how it procures criminal legal aid. For a variety of reasons some reforms have not been piloted, some have not met their original timetable, and some have not to date been fully evaluated.** Starting with Best Value Tendering, and using Office of Government Commerce guidance, the Commission should pilot all major changes, evaluate the pilots, and provide a set timetable for their introduction including fixed dates for post-implementation reviews.
- f** **The Commission receives over a million claims for payment on criminal legal aid annually. The quality of data supporting those claims is poor and there are weaknesses in the Commission's financial controls over the accuracy of payments.** The Commission should improve the checking of data that firms provide in their claims as a matter of urgency to improve the accuracy of payments. In particular, for claims made for magistrates' court work, the Commission's Supplier Management System should be amended to incorporate improved validation checks.
- g** **The Commission has faced a number of difficulties in managing its Very High Cost Criminal Cases, including not always being notified of cases that are in practice a VHCC.** The Commission should work to better identify VHCCs and undertake further analysis of the costs of these cases to determine whether the thresholds for VHCCs should be changed, or whether it would provide better value for money to integrate some or all of them into the graduated fee schemes.
- h** **The Commission considers that the lead role in assuring the quality of work undertaken by suppliers should sit with their regulators and representative bodies.** In the absence of such universal quality measures provided by the professions, the Commission should ensure peer review remains the principle tool for assessing quality. It should also obtain user feedback forms from firms and ensure that the preferred method of measuring the quality of advocacy in the Crown Court is introduced in an expeditious way.

Part One

The criminal legal aid landscape

Introduction

1.1 Legal aid was established by the Legal Aid and Advice Act 1949. The Access to Justice Act 1999 established the Legal Services Commission, a non-departmental public body sponsored by the Ministry of Justice, with effect from April 2000.

1.2 In 2008-09, legal aid expenditure was £2.09 billion, with £0.91 billion spent on 1.3 million civil acts of assistance, and £1.18 billion on 1.6 million criminal acts of assistance. An additional £124.4 million was spent on administration. Most criminal legal aid acts of assistance happen in police stations and magistrates' courts, but most expenditure is at the Crown Court (**Figure 1**).

1.3 Criminal legal aid expenditure increased in real terms by 10 per cent between 2000-01 and 2008-09, while civil expenditure fell by nine per cent in the same period. However, as **Figure 2** shows, since 2003-04 criminal legal aid expenditure has decreased by 12 per cent in real terms, and civil legal aid expenditure by 15 per cent.

Figure 1

Legal aid activity and expenditure by criminal justice system sector, 2008-09

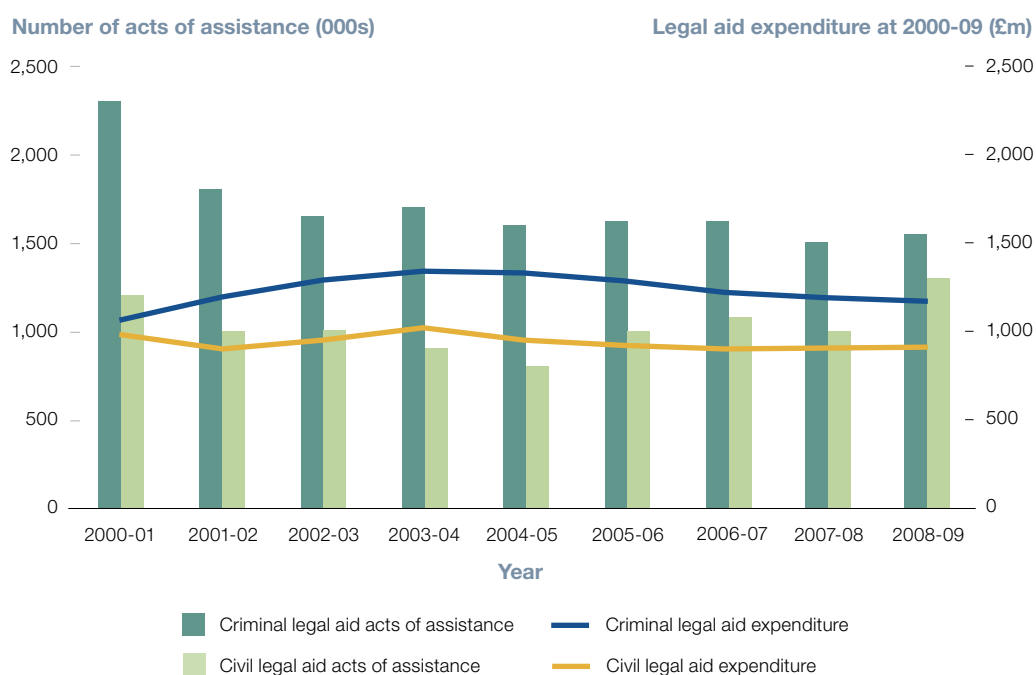
		Acts of assistance 000s	Total expenditure £
Police Station		871	192m
Magistrates' Court		560	291m
Crown Court	Non-VHCC	125	587m
	VHCC		112m
Total			1.18bn

Source: Legal Services Commission

1.4 Criminal legal aid covers advice and representation at the police station and the magistrates' court, and litigation and advocacy at the Crown Court. The latter includes Very High Cost Criminal Cases, the most complex cases, managed separately under contract by the Commission. **Figure 3** explains terms.

Figure 2

Criminal and civil legal acts of assistance and expenditure on legal aid 2000-01 to 2008-09



Source: Legal Services Commission

NOTE

Expenditure expressed at 2008-09 prices. The increase in civil legal aid acts of assistance in 2008-09 is in response to the economic climate.

Figure 3

Glossary

Litigation: Preparation for a trial and instructing the advocate.

Advocacy: Putting forward a defendant's case during legal proceedings.

Duty solicitor: A solicitor available to those who do not have access to their own solicitor.

Paralegal: Individuals including accredited representatives who, while not qualified as solicitors will have another qualification for conducting legal work.

Acts of assistance: Help given to a legal aid client.

Source: National Audit Office

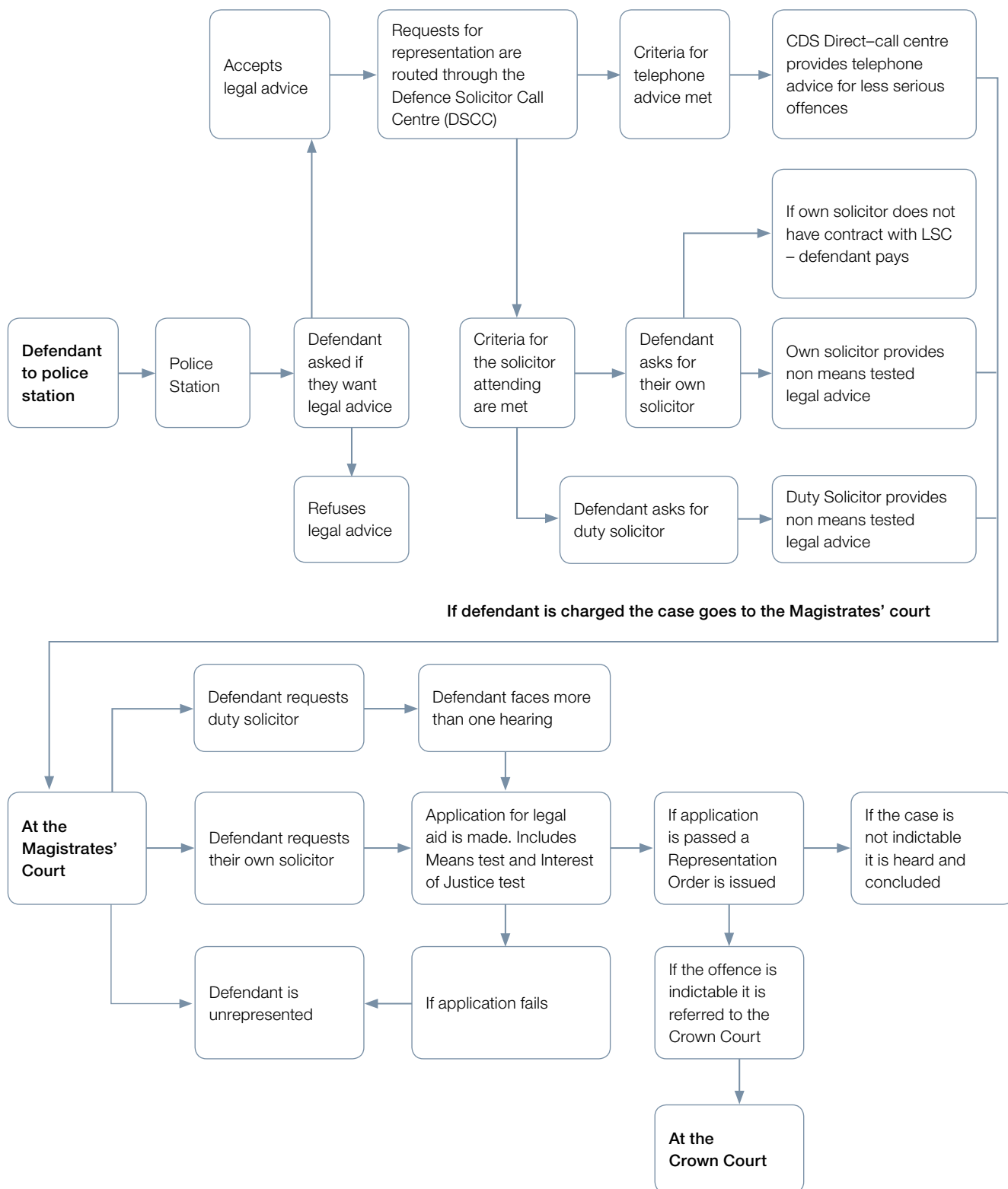
1.5 Initial contact with criminal legal aid for most users occurs when they are arrested and taken to a police station. Irrespective of income, at a police station advice is free and largely delivered in person. Where an offence is without risk of imprisonment advice may be by telephone. If a case is taken to the magistrates' court, defendants passing a means test and passing an Interest of Justice test are entitled to free advice in advance of court, as well as representation in court. More serious cases are heard at the Crown Court, where defendants are entitled to representation by an advocate supported by a litigator. The Ministry and the Commission also plan to introduce a means test in the Crown Court. **Figure 4** shows how a defendant accesses legal aid throughout the criminal justice system.

The administration of criminal legal aid

1.6 The Commission accounts for 20 per cent of the Ministry of Justice's budget of £10 billion. Under the 2007 Comprehensive Spending Review, the Ministry has to achieve £1 billion of savings by 2010-11. The Commission's share is £193 million annual net cash-releasing savings by 2010-11. The Ministry of Justice has overall policy responsibility for criminal legal aid, and leads on most policy changes. The Commission leads on policy reforms relating to contracts and procurement. This division of responsibilities has sometimes led to confusion in the oversight of criminal legal aid. It has resulted in greater involvement by the Ministry in Commission activities than is common between a non-departmental public body and its sponsor. In addition to the Commission's policy staff, the Ministry also employs 34 staff working on legal aid policy. The relationship between the Commission and the Ministry is governed by a framework document, which the Ministry is rewriting to clarify responsibilities.

1.7 The Commission is restructuring to maximise efficiency by reducing administration and moving from paying bills to commissioning legal aid. In December 2008, the Commission had a complete change of executive directors, recruiting individuals with external experience of commissioning and business transformation. As at 1 April 2009, the Commission's staffing total was 1,690, with a reduction of 590 scheduled by 2011. This restructuring is designed to reduce administrative costs to £70 million by 2012-13.

Figure 4
Legal aid at key stages of the criminal justice system



Comparing legal aid expenditure with other countries

1.8 The NAO compared criminal legal aid expenditure in England and Wales with other countries (**Figure 5**)². Our comparisons examined judicial systems within the United Kingdom, selected countries with similar judicial systems, selected European countries with some similarities in their legal aid systems to England and Wales, and our nearest European neighbour (France). The Commission spends £22 per capita on criminal legal aid, more than any other comparable developed nation except Northern Ireland. Differences are partly attributable to the greater defence costs inherent in an adversarial legal system, in contrast to jurisdictions where judges play a greater investigative role. Additionally, different forms of criminal legal aid are available in different countries, some of which will not have free face-to-face legal advice at the police station. The cost of legal aid per prosecution is less in England and Wales than in Scotland and Northern Ireland. The cost per prosecution in England and Wales is also closer to that of other countries than is the overall expenditure on legal aid.

Figure 5

Expenditure on criminal legal aid in selected jurisdictions

	Expenditure (£m)	Population in millions 2006	Expenditure per capita (£)	Prosecutions 2006	Expenditure per prosecution (£)
United Kingdom jurisdictions					
England and Wales	1,179	53.7	22.0	1,779,300	663
Northern Ireland	44	1.7	25.9	61,233	725.1
Scotland	111	5.1	21.8	149,500	739.1
Similar legal jurisdictions					
New Zealand	20	4.2	4.8	111,100	180.0
Canada	139	32.9	4.2	428,500	324.4
European countries with some similarities in legal aid systems					
Ireland	32	4.3	7.4	–	–
Finland	25	5.3	4.7	223,600	111.8
Netherlands	104	16.4	6.3	554,500	187.47
Other					
France	56	63.5	0.9	707,800	79.1

Source: National Audit Office analysis of published data

NOTE

Expenditure figures are for the latest available expenditure period.

² Comparisons between countries have to be treated with care because of differences in legal systems and in the reporting of data.

The reform of legal aid procurement

1.9 In July 2006, Lord Carter of Coles made recommendations designed to facilitate a market-based approach to legal aid procurement (the Carter report). These included moving from paying for work using hourly rates to fixed and graduated fees as a precursor to full competition. The Carter report stated that the reforms would likely see an increase in the average size of firms through growth and mergers. The report's recommendations should deliver efficiencies across the legal aid budget of £100 million as against expenditure in 2005-06, without compromising quality or access to services. The Government adopted many of these proposals in its report *Legal Aid Reform: the Way Ahead*, issued in November 2006.

1.10 The Carter report noted that the Commission's relationship with the profession was hostile, and this poor relationship persists. We surveyed 369 firms delivering criminal legal aid. Forty two per cent of respondents scored the Commission as 'unhelpful' in supporting their delivery of legal aid. Twenty nine per cent of those respondents said that the Commission lacked an understanding of the legal system, and 18 per cent cited the Commission's "constant change of the system, processes and rules."

The suppliers of criminal legal aid

1.11 Criminal legal aid is a public service delivered by the private sector. **Figure 6** sets out the providers. The figure for solicitors includes 2,500 criminal law Higher Court Advocates, primarily solicitors qualified to advocate at the Crown Court. In addition, there are 3,600 accredited representatives who provide advice and assistance at police stations. The Commission also contracts with 320 firms of solicitors and 154 barristers to undertake Very High Cost Criminal Cases at the Crown Court. Since 2005, the Commission has also provided telephone advice to clients at the police station.

Figure 6

Criminal legal aid suppliers

Legal professional	Role	Number of firms/ chambers in England and Wales	Number of practitioners	Number working in criminal legal aid
Solicitor	A legal practitioner undertaking aspects of legal advice/proceedings, sometimes including advocacy	10,297 firms	83,239	1,800 firms
Barrister	Primarily conducts advocacy at the Crown Court, including legal advice and representation	690 chambers	>15,000 barristers	Precise figures not available, although in 2009 the Bar Council reported that the number of criminal barristers is probably more than 5,000.

Source: Law Society/Bar Council/Legal Service Commission

The suppliers of criminal legal aid: solicitors' firms

1.12 Our survey included questions on firms' size and age structure. The supplier base for criminal legal aid at the police station and magistrates' court consists largely of small firms. On average, firms employ seven solicitors, of whom 3.4 full time equivalents work in criminal legal aid. Almost 10 per cent of firms have only one solicitor. In 2008-09, 77 per cent of solicitors firms' offices (firms under contract to the Commission may have more than one office) made claims to the Commission for criminal legal aid totalling less than £500,000 (**Figure 7**). In the same period, only six per cent of firms' offices made criminal legal aid claims exceeding £1 million.

1.13 Our survey included self-reporting questions on firms' criminal legal aid profit. Profit is understood as meaning before notional salaries, interest on partner capital and notional rent are excluded. On average, firms reported that criminal legal aid accounted for almost 60 per cent of turnover. Firms reported an average profit margin of 18.4 per cent in the last financial year, a fall from 21.6 per cent three years ago. They reported a wide range of profits from criminal legal aid, with 16 per cent of firms reporting no profit in the last financial year, and 37 per cent reporting profits above 20 per cent (**Figure 8**). Almost 80 per cent of firms which also conducted private legal work reported that criminal legal aid was less profitable.

1.14 Each year significant numbers of firms withdraw from criminal legal aid contracts, although new firms also tender for contracts. Commission data shows that 12 per cent of firms withdrew between February 2008 and July 2008, and seven per cent between August 2008 and March 2009. From our survey, 28 per cent of firms reported it unlikely they would be conducting criminal legal aid work in five years' time. Reasons included lack of profitability, the prospect of tendering, and retirement. Firms which had withdrawn from criminal legal aid contracts told us the main reason was that remuneration by the Commission paid unfavourably in comparison to other types of legal work.

Figure 7

Distribution of suppliers by size of claim from Legal Services Commission, 2008-09

Less than £0.5m	£0.5m-£1m	£1-£2m	£2-£3m	£3-£4m	More than £4m
1,785	378	122	19	2	2

Source: National Audit Office analysis of Legal Services Commission data

1.15 Despite the complexity of the supplier base, and significant material being held locally, the Commission does not have a database of solicitors' firms containing information necessary to understand the supplier base. In particular, the Commission does not have sufficient information about costs that firms incur in providing criminal legal aid and has not, for example, mapped the processes necessary to provide effective legal representation in police stations. Nor has it conducted an "open book" exercise with suppliers to establish the genuine costs of the activities necessary for representation.

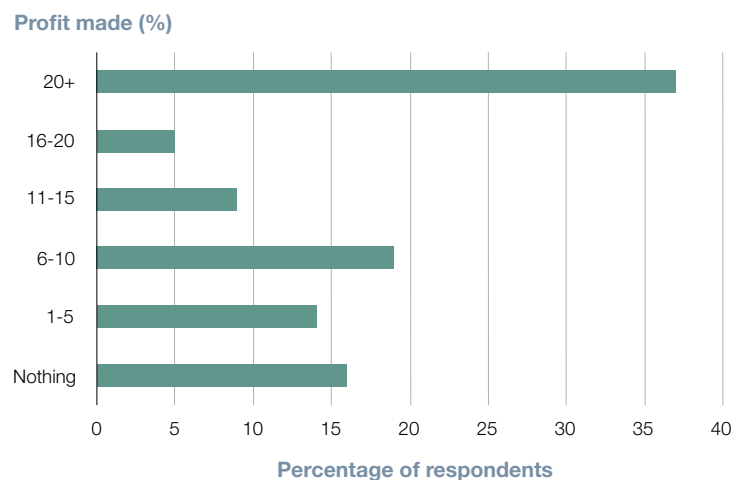
1.16 The Commission is also hindered by inaccuracies in the data it does hold. Initially it was unable to supply us with a record of firms that had withdrawn from criminal legal aid contracts. From the finalised list we contacted 21 firms which the Commission reported had withdrawn from criminal legal aid work. Nine of these firms told us they continued to undertake this work, although the Commission told us that these firms were only completing existing open cases.

Managing relationships with firms

1.17 The Commission oversees criminal legal aid firms in accordance with contracts through Account Managers, who liaise with 30-40 firms within a geographical area. Two-fifths of survey respondents had contact with their Account Managers at least monthly. Firms generally reported that they were satisfied with their relationship with their Account Managers.

Figure 8

Responses of firms to the question: What percentage profit did your firm make from its criminal legal aid work during the last financial year?



Source: National Audit Office survey of solicitor firms

1.18 As part of the Commission's transformation, the role of Account Managers is being divided, a reorganisation forecast to save 41 posts in 2009-10. Most Account Managers will become "Relationship Managers", collating information from peer reviews, audits, and key performance indicators to produce regular assessments of firms. Relationship Managers will be grouped into those with portfolios of around 10 larger firms, those with around 30 medium-sized firms, and those with around 100 small firms. The remaining Account Managers will be involved in audits of firms, considering issues such as supervision of work, financial management, and business planning.

The suppliers of criminal legal aid: barristers

1.19 The NAO also interviewed barristers about their experiences of criminal legal aid. While belonging to Chambers, barristers are self-employed. Many barristers interviewed by the NAO undertake both criminal defence and prosecution work, and indicated that the former pays more. Barristers we interviewed expressed concern about the long-term sustainability of the Criminal Bar, primarily because of the increased use of solicitors as Higher Court Advocates at the Crown Court (Part Three).

Part Two

Procuring criminal legal aid support in the police station and magistrates' court

Legal aid at the police station

2.1 In 2008-09, the Commission spent £192 million on 871,000 acts of assistance at police stations. Under the Police and Criminal Evidence Act 1984, any person detained at a police station is entitled to consult a solicitor privately. This is remunerated at no cost to the suspect, who should be informed of their entitlement by the police upon arrival in custody.

2.2 Although legal advice at the police station is free, the Commission estimates only around 50 per cent of those entitled take it up. The Commission has researched the reasons for low take-up. It found this is not necessarily because people do not know their rights, but suspects do not always choose to take advice, because, for example, they may already know the criminal justice system well. 206 of 212 detainees asked if they recalled being told about their right to legal aid said that they did, although only 31 per cent perceived they had been advised they had the right to free legal assistance. Thirty-three respondents said they “had not got any idea what was going on” at the police station.

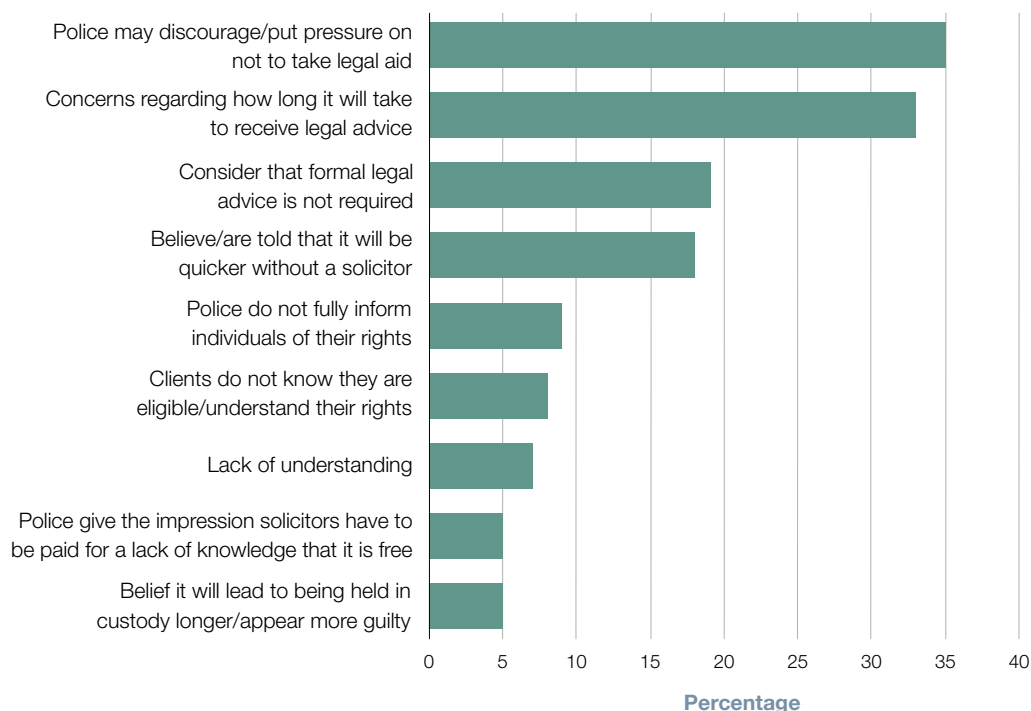
2.3 Our survey asked solicitors why they considered suspects did not take up legal aid at police stations (**Figure 9** overleaf). Thirty-five per cent of respondents stated this was because suspects were pressurised by the police, and 33 per cent said it was because people were concerned about the time it would take to receive legal advice.

2.4 Data also indicates solicitors can experience barriers to accessing their clients when trying to telephone police stations. For example, between April and October 2008, 29 per cent of calls from the Commission's Criminal Defence Service Direct advisers to police stations went unanswered.³

³ This is non-means tested legal advice direct to people detained by the police.

Figure 9

Solicitors' responses to the question: What, in your experience, is the most common reason why people do not claim legal aid at police stations?



Source: National Audit Office survey of solicitors

2.5 In January 2008, the Commission introduced fixed fees for legal advice at the police station, replacing hourly rates and travel and waiting allowances. England and Wales are divided into 245 areas, with fixed fees for each, ranging from £138.72 for police stations in Blackpool to £340.43 for attending a police station at Heathrow airport, which accounts for the complexities of dealing with airport cases. The introduction of fixed fees was not piloted due to a lack of time, and was designed to save £8 million a year. By May 2009, the Commission was to have completed a Post Implementation Review but this was delayed for at least three months because of other work. We have confirmed that the new arrangements saved £7.5 million in 2008-09.

2.6 We requested 250 solicitors' files for legal aid advice at police stations and 250 files at magistrates' courts for claims paid between 1 April and 31 December 2008. We only received 179 files for police station work within the three weeks we allowed for firms to respond, a similar timescale to that used by the Commission when calling for files.

2.7 A conservative estimate is that the value of the work which the Commission had paid for but for which we did not receive files in time for was over £20,000. The Commission told us that as a matter of urgency, it had asked firms why they had not submitted files and would withdraw payment for work for which firms were unable to provide evidence. Four months after our audit, 17 of the 500 files had still not been sent to the Commission.

2.8 In October 2007, the Commission began managing legal aid claims through an on-line Supplier Management System, which cost £9.4 million to develop. The system collapsed shortly after introduction and took ten months to restore at a cost of £6.3 million. Before making payments, the system checks that claims comply with firms' contracts. However, information provided by suppliers is not routinely checked, and has a high risk of inaccuracy. We found that suppliers are not required to state some key details that determine which fee they are entitled to, such as the category of magistrates' court case. Our in-depth analysis of 40 of the 369 files we reviewed, found that four files did not comply with contract specifications. The SMS system would allow the Commission to perform more quality control checks to ensure that the authorisation of payments is correct than it presently conducts.

2.9 The Comptroller and Auditor General qualified his opinion of the Commission's accounts for 2008-09 because of material errors on payments made to solicitors as well as for legal aid being granted to recipients for whom there was no proof of eligibility. The NAO estimates the Commission made £18.3 million of overpayments to solicitors in 2008-09, of which £5.6 million was to solicitors conducting criminal legal aid.

Legal aid at the magistrates' court

2.10 If a person is charged by police the case is referred to the magistrates' court. In 2008-09, the Commission funded 560,000 acts of assistance at the magistrates' court, costing £291 million. Of the 250 files we requested of legal aid work conducted at the magistrates' court, only 190 arrived. Amongst other issues, we wanted to understand the complexity of cases. We found, for example, that 76 of these cases had pre-hearings before a trial. Of these, three cases had three hearings and one had six. **Case example 1** is a case at the magistrates' court where the defendant received legal aid.

Case example 1

Legal aid at the magistrates' court

In June 2007, the defendant was charged with failure to provide a breath test. Initially the defendant was not granted legal aid, but the decision was reversed. The defendant pleaded not guilty at a hearing in July 2007. The defence then commissioned a medical report. The prosecution considered adding further charges. In response the defence commissioned a second medical report. The medical reports were not ready for the next hearing, which was deferred to October 2007. The trial was set for January 2008 to allow the prosecution to commission its own medical report. The defendant was found not guilty, and the total cost of legal aid was £1,943.21.

2.11 Defendants must pass a means test for legal aid at the magistrates' court, which was re-introduced in October 2006. An earlier means test had been abolished in 2000, because the cost of collecting contributions outweighed the savings, and did not cover administration costs. The Commission had to wait for appropriate primary legislation to introduce the new scheme but the legislation did not allow for piloting the scheme.

2.12 An initial means test assesses applicants' incomes, adjusted according to the number of their dependents. Defendants claiming prescribed means tested benefits are 'passported' through the test but remain subject to an Interest of Justice test. A full means test is conducted if the applicant's adjusted income is between £12,475 and £22,325. Applicants whose adjusted income exceeds £22,325 are refused funding unless they can prove hardship. Capital is not taken into consideration. In 2008-09, 562,000 people passed the means test and the Interest of Justice test – 93 per cent of those who applied for criminal legal aid. For 2008-09, the Commission calculated that the means test achieved a gross saving of £51.8 million at a cost of £20.3 million; a net saving of £31.5 million. We found that this saving was calculated on the basis of 2006-07 fees, however, which were higher than those in place in 2008-09. Consultation with magistrates suggests that reintroducing the means test has resulted in an increased number of defendants representing themselves in magistrates' courts. The Commission has yet to evaluate if this has occurred.

2.13 In April 2007, the Commission introduced revised standard fees for legal aid at the magistrates' court in 16 urban areas. Separate travel and waiting payments were abolished, perceived as an incentive to firms to act inefficiently. Outside the 16 areas, firms are still remunerated under pre-existing arrangements. The revised fees were designed to save £8 million a year but were introduced without piloting. A Post Implementation Review scheduled for completion by May 2009 was delayed by at least three months because of other work. The Commission was unable to supply sufficient evidence to fully support whether it has made the planned savings as a result of these fees.

Best Value Tendering

2.14 The Commission considered the introduction of police station fixed fees, and revised magistrates' fees essential for preparing the legal profession for Best Value Tendering. The principles of Best Value Tendering are that providers should bid for work as part of a competitive process while maintaining quality. *Legal Aid Reform: the Way Ahead* expected tendering to begin in October 2008. The Commission plans to begin pilots in Avon and Somerset and Greater Manchester in January 2010. Although it planned to introduce tendering nationwide by 2011, in July 2009 the Commission responded to a consultation with the profession by announcing this will not happen until 2013. This will allow the Commission to evaluate the pilots over two years. The Commission did not quantify the savings it expects to achieve from tendering.

2.15 The Commission's consultation on Best Value Tendering provoked widespread opposition among solicitors. The Law Society believed there were major practical difficulties in setting up a working tendering model. Firms argued the original implementation timetable was insufficient to evaluate the pilots. They contended that criminal law, unlike services with more predictable volumes of demand, cannot easily be standardised for procurement purposes. Many firms were concerned they would no longer be able to afford to conduct criminal legal aid work, and that those which survived would cut costs by reducing quality.

2.16 Following the decision to postpone Best Value Tendering, in August 2009 the Ministry announced a consultation on legal aid funding reforms. Key proposals included introducing fixed fees for experts employed in legal cases, reducing disparities between fees paid for legal representation in police stations, and simplifying payments made to litigators.

Assessing quality

2.17 The Commission has two main ways of assessing the quality of legal aid advice provided at police stations and magistrates' courts: the Specialist Quality Mark and Peer Review.

The Specialist Quality Mark

2.18 It is compulsory for firms with criminal legal aid contracts to hold the Commission's Specialist Quality Mark, under which they complete self assessments detailing matters such as resources, supervision of staff, and file management. In May 2008, the Commission established a joint working group with the Law Society to review the way the quality of legal aid services are assured. The findings were reported in December 2008. From 2010, as recommended by the joint working group, the Commission will accept the Law Society's 'Lexcel standard'⁴ as an alternative to the Specialist Quality Mark. The Commission is also proposing requiring solicitors to be accredited under schemes such as the Criminal Litigation Accreditation Scheme designed to assure the quality of service provided to clients in police stations.

⁴ Lexcel is the Law Society's practice management standard. To achieve the standard, law practices are assessed every year by an independent assessor to ensure they meet the required standards in areas such as client care, case management, and risk management.

Peer Review

2.19 The Commission funds the peer review of firms' work to measure the quality of advice received by the client, at a cost of £3.7 million a year. Peer review involves a trained, independent assessor from a panel of 161 solicitor assessors reviewing 15 files from each firm under review against clear criteria. The assessor gives an overall mark from one (excellent), to five, which results in contract termination. A level three rating marks work as being 'threshold competent'⁵. Firms that receive a level four rating have to be reassessed six months after the original evaluation, and must achieve a rating of three or above to retain their contract.

2.20 Peer review was launched in April 2005, and by 31 March 2009 1,383 criminal legal aid firms had been reviewed. Of these, 32 firms received a level one rating, 652 firms a level two, 607 a level three, and 92 firms a level four – meaning that seven per cent of firms have been reviewed as below threshold competent (**Figure 10**). No criminal legal aid supplier received a level five rating.

2.21 Three-quarters of solicitors' firms responding to our survey had had their work peer reviewed. They were divided over whether this was an effective means of ensuring quality. Thirty-four per cent believed it to be effective and 37 per cent considered it ineffective. Positive responses welcomed it as a qualified, practitioner-to-practitioner assessment of their work. Those who did not regard it as effective contended the process was subjective, and not one that could assess the standard of solicitors' performance and knowledge in court.

2.22 A quarter of criminal legal aid firms have not to date had their work peer reviewed and there is a backlog, with many peer reviews undertaken several years ago. The Commission has set a minimum quality threshold of a peer review level three for firms tendering for criminal legal aid under Best Value Tendering. Setting the threshold at level two would have excluded approximately 50 per cent of providers from bidding.

Figure 10
Peer Review Scores 2005-06 to 2008-09

Rating		Excellence – 1	Competence Plus – 2	Threshold Competence – 3	Below Competence – 4	Failure in Performance – 5
Financial Year	Total	Number with Rating (%)	Number with Rating (%)	Number with Rating (%)	Number with Rating (%)	Number with Rating (%)
2005-06	90	1 (1)	37 (41)	43 (48)	9 (10)	0 (0)
2006-07	332	10 (3)	172 (52)	127 (38)	23 (7)	0 (0)
2007-08	434	6 (1)	211 (49)	184 (42)	33 (8)	0 (0)
2008-09	527	15 (3)	232 (44)	253 (48)	27 (5)	0 (0)

Source: Legal Services Commission

5 Threshold competent means a firm performs basic functions such as recording clients' instructions appropriately, and communicates with the client.

Other measures of quality

2.23 The Commission considers that given the quality assurance development already achieved, and the establishment of independent regulators (the Solicitors Regulatory Authority and the Bar Standards Board) and an oversight regulator (the Legal Services Board), it should no longer be at the forefront of assessing the quality of suppliers' work. In a competitive market the Commission believes the profession and its regulators should take responsibility.

2.24 Until that point is reached the Commission believes there is considerable value in developing the process of accrediting individuals within the legal profession. It envisages a time when this and other assurance measures may mean less or no reliance on the Specialist Quality Mark. The Commission has also reviewed the value for money provided by peer review and considers the cost is not sustainable. The potential development of other quality assurance measures means that the Commission proposes in future to undertake peer reviews based on a risk analysis of firms and random sampling. In assessing risk the Commission will take into account other quality measures and intelligence gathered by Relationship Managers and Account Managers.

2.25 There are practical difficulties in obtaining the views of clients for criminal legal aid for whom providing feedback may not be a priority when their liberty is at risk. However, in our file review we found no evidence of users providing feedback about the quality of their legal advice. If such feedback exists it is not currently aggregated or evaluated by the Commission, although the Commission does require its in-house Public Defender Service to issue user feedback forms to legal aid clients. The Commission has also developed a new on-line tool where the public can give direct feedback on legal services; this is being piloted between October and December 2009.

2.26 Fifty-nine per cent of firms responding to our survey said that recent changes have had a negative impact upon the quality of the criminal aid service they supply. This may include occasions where solicitors had attended a police station when a client was arrested but did not attend later when their clients were charged, or took part in an identity parade.

Part Three

Procuring criminal legal aid support at the Crown Court

Legal aid at the Crown Court

3.1 Trials for serious offences are heard at the Crown Court. In 2008-09, the Commission funded 125,000 acts of assistance at the Crown Court at a cost of £699 million, £112 million of which was spent on 432 Very High Cost Criminal Cases. Legal defence at the Crown Court is conducted by litigators, who marshal evidence, and advocates, who present the defendant's case. **Case example 2** shows how the cost of legal aid can be driven by complexities across the criminal justice system.

Proposed introduction of Crown Court Means Testing

3.2 Publicly-funded legal advice and representation at the Crown Court is available to all, but the Commission, Ministry, and HM Courts Service have consulted on proposals to introduce means testing. This would determine whether a client is liable to make a contribution to their legal costs in the event of conviction. Acquitted defendants would automatically have their costs refunded. Respondents to the consultation expressed concern it could lead to an increased number of unrepresented defendants at the Crown Court. Trials of defendants without legal representation typically take longer and may be more costly.

Case example 2

Legal aid at the Crown Court

In February 2007, a defendant was charged with dangerous driving, and in July 2007 pleaded guilty to driving without due care and attention. This was not accepted by the magistrates' court. At a sentencing court in August 2007, the prosecution stated the appropriate charge was dangerous driving. At a plea hearing in September 2007, the defendant pleaded not guilty and elected for a Crown Court trial. At a plea hearing in December 2007 the defendant again pleaded not guilty. The trial was set for February 2008 but the defence called for an expert witness report which was delayed. The prosecution then also commissioned an expert's report. The trial took place over three days in June 2008. The defendant was found not guilty of dangerous driving, but guilty of driving without due care and attention and fined £500, plus costs and received five penalty points. The cost of legal aid including the expert's report was £1,131.23.

3.3 The introduction of means testing has been delayed by at least seven months, but a pilot is to begin in five areas in January 2010. The Commission estimates means testing will result in annual net cash savings of £50 million, but concedes delay has already cost £22 million in savings. In December 2008, the Office of Government Commerce carried out a Gateway Review on the project and concluded that successful delivery appeared unachievable. A lack of funding and poor governance arrangements were the main difficulties identified. To address the Office of Government Commerce recommendations, the Commission has given ownership of the project to a central project team, amended the Commission's risk strategy to include risks associated with means testing, and introduced a new implementation plan featuring milestones for measuring progress. An independent review by the Office of Government Commerce of the Commission's Action Plan to address the issues raised in the Gateway Review resulted in an Amber rating. A further Gateway Review began in October 2009.

Litigators' Graduated Fee Scheme

3.4 On 14 January 2008, the Commission introduced a litigators' graduated fee scheme for work to prepare Crown Court cases. Remuneration is based primarily on the nature of the alleged offence, whether the defendant pleads guilty or goes to a full trial, trial length, pages of prosecution evidence, and number of defendants. Many of the elements of this scheme were replicated from the long-standing Advocates Graduated Fee Scheme, and are broadly in line with that used by the Crown Prosecution Service to pay its litigators.

3.5 Details of the litigators' scheme were in draft in August 2006, but the scheme was not introduced for 15 months and not piloted, in part because the Commission believed a pilot would take too long. Validation of claims and payments made under the scheme is managed by the Commission. In 75 per cent of cases there is a discrepancy between the claim and the information the Commission receives from the courts, but the Commission does not have sanctions against HM Courts Service. The Commission is able to express its concern to HM Courts Service at steering and liaison groups to which both agencies belong.

3.6 The Commission's estimate is that the litigators' fee produced a saving of £15 million in 2008-09, a reduction from an earlier forecast of £28 million, but this level of saving is expected to rise significantly in future. The Commission has recently begun a post implementation review. Until that is complete, it cannot establish if the savings expected have been generated.

3.7 A concern raised by barristers was that the introduction of the scheme could mean it could become uneconomic for some solicitors to attend court to provide litigation support. In June 2009, the Bar Council responded to a Ministry of Justice consultation on the Criminal Defence Service (Funding) Amendment Order 2009, stating that litigators were regularly not attending Crown Court hearings.

Advocates Graduated Fee Scheme

3.8 An Advocates Graduated Fee Scheme has been in place since 1997. The Carter report recommended this scheme be revised to include enhanced payments for the first two days of a trial, and also to incorporate payments until then not covered by graduated fees. These amendments were introduced in 2007. Under the new arrangements, fees were increased by between 11 and 15 per cent, the first increase to advocates' payments in 10 years. As a result, the Commission forecast the cost it paid for advocacy would increase by £11 to £20 million a year. Barristers told us that while the advocates graduated fee scheme did not compare favourably with what they earn from private work, they viewed it positively as they considered it stable, remunerated them at a fair rate, and was sufficiently flexible to take account of many of the events in a trial likely to increase their workload.

The quality of criminal legal aid at the Crown Court

3.9 The Commission does not currently have procedures for assessing the quality of advocates at the Crown Court funded by legal aid. Barristers contend that the open market facilitates quality, as there are plenty of barristers from whom solicitors can choose and those who are successful have to be of a high quality to attract instruction from solicitors' firms. Since 2007, the Commission and the Ministry have been in collaboration with the professions about developing a quality assurance scheme for publicly-funded defence advocates. From July 2009, a pilot was running at four Crown Courts, evaluating options including simulated advocacy sessions and in-court observations of advocates' performance. A conclusion has not yet been reached on the most appropriate approach. The Commission and the Ministry plan to consult on a quality assurance scheme in early 2010 with implementation currently planned for later that year.

Higher Court Advocates

3.10 During interviews, barristers raised concerns about the increasing use of Higher Court Advocates. The Courts and Legal Services Act of 1990 allows solicitors to act as advocates at the Crown Court, a right strengthened by the 1999 Access to Justice Act. Barristers maintain that solicitor advocates do not acquire the same level of advocacy experience as a barrister by their typical career path in a set of Chambers, and that this affects the quality of defence they supply. According to Law Society figures, the number of criminal law Higher Court Advocates in England and Wales was 1,160 in 2004, and had risen to 2,582 in September 2009. Forty-five per cent of solicitors' firms we surveyed said they use Higher Court Advocates, and 33 per cent of firms reported their use had increased over the past five years. In consultation with the NAO, barristers suggested that firms experiencing a decline in their incomes from criminal legal aid are employing in-house solicitor advocates, because this enables them to use the same solicitor to access income from both graduated litigators' and advocates fees for the same case. Solicitor advocates must pass through an accreditation scheme before they are able to appear in the Crown Court. The aim of this is to achieve an equivalent level of skills as those of barristers. The Law Society is initiating a training package aimed at developing the skills of solicitor advocates.

Very High Cost Criminal Cases

3.11 The Commission manages the most complex Crown Court cases through a separate process termed Very High Cost Criminal Cases (VHCCs), introduced in 2001. These differ from other Crown Court cases in that they are not remunerated using graduated fees. Instead, the Commission's Complex Crime Unit manages each case through an individual contract, agreeing with solicitors and advocates in advance the work a case requires and the Commission is willing to pay for. It is at this stage that the Commission makes most savings by disallowing proposed work. This process occurs every three months, and solicitors and advocates subsequently submit evidence to support work undertaken. **Figure 11** shows how the Commission defines VHCCs. In 2008-09, the Commission let 432 VHCC contracts, and spent £112 million on such cases.

3.12 The Commission requires legal aid suppliers to inform it as soon as possible of cases they consider likely to become VHCCs. In 2008-09, the Commission made £30.4 million of retrospective legal aid payments in Crown Court cases which fitted the definition of VHCCs, but had not been identified by suppliers to enable the Commission to manage these cases under separate contracts.

Revising the arrangements for VHCCs

3.13 Until January 2008, the Commission signed separate contracts for each VHCC with the law firm providing the litigation and the advocates providing the defence. In July 2007, the Commission attempted to create a panel of solicitors and advocates and sign an overall contract with each member of this panel.

Figure 11 A Very High Cost Criminal Case (VHCC)

A case where the trial is likely to last:

- more than 40 days
- between 25 and 40 days and meets the criteria below.

Trials that last between 25 and 40 days are classified as VHCC if they are:

- terrorism prosecutions or
- Serious Fraud Office prosecutions.

or have two of the following:

- at least 10,000 pages of prosecution evidence
- at least 10,000 pages of unused or third party material
- more than five defendants
- the case is a fraud or serious drug case where the value exceeds £1 million.

Source: National Audit Office

3.14 By March 2008, a large number of solicitors had signed up to this contract but only 130 barristers had done so including only two Queens' Counsel, the most senior barristers. Approximately 70 Higher Court Advocates also joined the panel. This did not provide the advocates needed to provide legal aid in VHCC cases in England and Wales. The Bar Council contended that the remuneration offered to barristers compared unfavourably with other types of defence work, and that the contractual terms were unacceptable.

3.15 Negotiations with the Bar on a scheme to replace the panel arrangements began in summer 2008. In the interim one high profile criminal trial was declassified as a VHCC and paid using graduated fees so it was not delayed. For other cases non-panel advocates could be used. In November 2008, a five per cent increase in fees paid under VHCCs to barristers and solicitor advocates was introduced by the Commission.

3.16 In 2009 the Commission initiated a further consultation with the Bar over options to replace the compromise arrangements, and it extended the current VHCC contracts to July 2010. The Commission is currently considering its options for alternative schemes. The Bar Council is also producing its own proposals for the remuneration of complex cases, and submitted its draft scheme to the Commission in September 2009. The Commission is due to undertake a further consultation with the Bar Council in November 2009.

Evaluating the Value for Money of VHCCs

3.17 The aim of introducing VHCCs was to save 30 per cent of costs incurred on such cases against the baseline year of 2003-04. In 2007, the NAO evaluated the Commission's progress and expressed concern at the risk affecting the assumptions underpinning the savings calculation, such as the proportion of cases going to trial and the proportion of complex to simple cases.⁶ The Commission has not assembled sufficient data to alter the assumptions underpinning its calculations for savings from VHCCs.

3.18 The Ministry and the Commission have both undertaken research on the cost of VHCCs and how much trials paid as VHCCs would have cost if the defence teams had been remunerated using the graduated fee schemes. The limited evidence available suggests that for the largest Crown Court cases the Commission has achieved its target of spending an average of 30 per cent less on such cases and that these cases cost less under VHCC arrangements. For the smaller, lower value cases evidence suggests that cases are costing more than in 2003-04 and that the Commission would be paying less using the graduated fee schemes. Additionally, there are some omissions in the data the Commission collects from the Courts Service for VHCCs, such as what constitutes a full day in court. The Commission only started to routinely collect the data necessary to make robust cost comparisons between VHCCs and graduated fees in 2009. As a result, the Commission does not expect to make any change to the definition of a VHCC for the 2010 contracting round.

6 "The Efficiency Programme: A Second Review of Progress," (8 February 2007), HC: 156 I & II.

Appendix One

Study methodology

Method	Purpose
<p>1 Telephone survey</p> <p>A survey of 369 solicitors' firms delivering criminal legal aid in England and Wales.</p>	<p>To gather information about the supplier base, such as the size and profits of firms and their relationship with the Commission.</p>
<p>2 Case file review</p> <p>We examined 369 case files of legal advice and assistance at the police station and magistrates' court claimed for between April and December 2008.</p>	<p>To gather primary data on the service provided to clients through tests such as the number of case hearings and amount of time taken to reach a client.</p>
<p>3 Structured interviews</p> <p>Interviews with 18 barristers at 15 Chambers in London, Cardiff, Leeds, Birmingham, Bristol, Manchester, and Liverpool.</p>	<p>To ascertain the views of criminal barristers about the Commission's fees and administration.</p>
<p>4 Financial Analysis</p> <p>We analysed the Commission's financial data on criminal legal expenditure resulting from changes to fee arrangements and the reintroduction of the magistrates' court means test.</p>	<p>To establish whether the Commission has achieved savings from new processes.</p>
<p>5 Consultation with experts, representative bodies, and other stakeholders</p> <p>We consulted with a range of individuals and organisations including:</p> <p>Lord Carter of Coles Lord Justice Thomas The Law Society The Bar Council The Criminal Law Solicitors Association The Legal Aid Practitioners Group The Criminal Association of the Bar</p>	<p>To canvass the reactions of the supplier base to issues such as fee changes, and obtain advice on key methodologies, notably our international comparison.</p>

Method	Purpose
<p>6 International comparison</p> <p>We compared criminal legal aid expenditure and activity in England and Wales with that in countries selected either because they have a similar judicial system, or because they are similar European countries.</p>	<p>To ascertain differences in criminal legal aid expenditure between England and Wales and other jurisdictions.</p>
<p>7 Document review and interviews with key officials</p> <p>We examined the business cases and strategic plans for changes to legal aid remuneration, followed up by interviews with policy and operational staff and the LSC's Commissioners.</p>	<p>To establish the rationale and project management arrangements for reforms to legal aid remuneration.</p>
<p>8 Interviews with withdrawn providers</p> <p>Telephone interviews with firms which had withdrawn from criminal legal aid contracts with the Commission.</p>	<p>To understand why suppliers ceased conducting criminal legal aid.</p>

Source: National Audit Office



Design and Production by
NAO Marketing & Communications Team
DP Ref: 008951-001

This report has been printed on Consort 155 and contains material sourced from responsibly managed and sustainable forests certified in accordance with FSC (Forest Stewardship Council).

The wood pulp is totally recyclable and acid-free. Our printers also have full ISO 14001 environmental accreditation this ensures that they have effective procedures in place to manage waste and practices that may affect the environment.

Published by TSO (The Stationery Office) and available from:

Online

www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail

TSO

PO Box 29, Norwich, NR3 1GN

Telephone orders/General enquiries: 0870 600 5522

Order through the Parliamentary Hotline

Lo-Call 0845 7 023474

Fax orders: 0870 600 5533

E-mail: customer.services@tso.co.uk

Textphone: 0870 240 3701

The Parliamentary Bookshop

12 Bridge Street, Parliament Square,
London SW1A 2JX

Telephone orders/General enquiries 020 7219 3890

Fax orders: 020 7219 3866

Email: bookshop@parliament.uk

Internet: <http://www.bookshop.parliament.uk>

TSO@Blackwell and other Accredited Agents

Customers can also order publications from:

TSO Ireland

16 Arthur Street, Belfast BT1 4GD

028 9023 8451 Fax 028 9023 5401

£14.35

