



National Audit Office

**REPORT BY THE
COMPTROLLER AND
AUDITOR GENERAL**

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

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.