

# Use of Legal Services by the Criminal Justice System

June 2011

Criminal Justice Inspection  
Northern Ireland  
*a better justice system for all*





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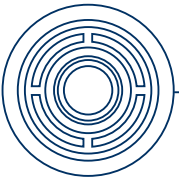
# Use of Legal Services by the Criminal Justice System

June 2011

Laid before the Northern Ireland Assembly under Section 49(2) of the Justice (Northern Ireland) Act 2002 (as amended by paragraph 7(2) of Schedule 13 to The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010) by the Department of Justice.

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## List of abbreviations

<b>CA</b>	Compensation Agency
<b>CJI</b>	Criminal Justice Inspection Northern Ireland
<b>CSO</b>	Crown Solicitor's Office
<b>DoJ</b>	Department of Justice
<b>DSO</b>	Departmental Solicitor's Office
<b>FSNI</b>	Forensic Science Northern Ireland
<b>NICTS</b>	Northern Ireland Courts and Tribunals Service
<b>NILSC</b>	Northern Ireland Legal Services Commission
<b>NIO</b>	Northern Ireland Office
<b>NIPS</b>	Northern Ireland Prison Service
<b>OPONI</b>	Office of the Police Ombudsman for Northern Ireland
<b>PBNI</b>	Probation Board for Northern Ireland
<b>PPS</b>	Public Prosecution Service for Northern Ireland
<b>PSNI</b>	Police Service of Northern Ireland
<b>VHCC</b>	Very High Cost Case
<b>YJA</b>	Youth Justice Agency



## Chief Inspector's Foreword

The criminal justice system is the largest purchaser of legal services in the public sector. Over the three year period 2007-10, the cost of criminal legal aid was £155 million. The cost of the Public Prosecution Service (PPS) was £106 million. In addition the legal services necessary to support the operational and corporate activities of other justice organisations was £36 million over the same period.

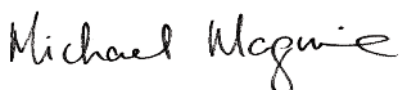
The purpose of the inspection was to assess the manner in which legal services were identified and resourced, determine the breakdown of legal expenditure and review procurement arrangements for external legal services. The inspection did not consider criminal legal aid in detail as this has recently been subject to work by the Northern Ireland Audit Office.

The inspection report has identified a number of changes required regarding the ways in which legal services are provided. In particular the purchasing of legal services lacks the discipline used and expected for other professional services. Standard competitive arrangements are embryonic (used mainly for the services of solicitors) with costs determined by a range of different fee structures which have lacked transparency and predictability. Many justice organisations were unaware of the actual costs until completion of the work and this can exceed the original estimates. This practice is generally considered unacceptable in other commercial environments, where the supplier of a service would be expected to provide an estimate of the costs of service provision and to justify and explain variations from these estimates. I can see no reason why the disciplines used in other areas of public expenditure should not apply to the provision of legal services.

The inspection report also highlighted the differential payments made to defence and prosecution counsel. There is a need to develop a common approach to achieve a convergence between the level of prosecution and legal aid fees.

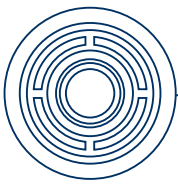
A significant and sustained improvement in value for money across the justice system requires a more co-ordinated and consistent approach by public sector buyers. The current fragmented approach linked to a plethora of different fee arrangements/schemes for different types of services (for example, criminal legal aid, civil work, prosecution and defence work) has hindered progress. The Department of Justice (DoJ) is best placed to take the lead in this regard.

This inspection was undertaken by CJI's James Corrigan. Special thanks to Stephen Wooler, formerly Chief Inspector of Her Majesty's Crown Prosecution Service Inspectorate, who greatly assisted also. My thanks to all those who participated in the inspection process.



**Dr Michael Maguire**

Chief Inspector of Criminal Justice in Northern Ireland  
June 2011



## Executive Summary

### Overall scope

The criminal justice system is the largest purchaser of legal services in the public sector accounting for around £100 million per annum (£105 million in 2009-10). The bulk of expenditure relates to the prosecution and defence of criminal cases. Overall the main heads of expenditure were:

- criminal legal aid which paid out £155 million to the private sector legal professions (solicitors and barristers) between 2007-08 and 2009-10. An additional £50.8 million was paid in criminal legal aid in 2010-11;
- the cost of the Public Prosecution Service (PPS) (£105.9 million over the same three years). This comprises its own salary costs (171 lawyers at the time of the inspection plus casework and organisational support) together with £21.7 million spent on barrister's fees over a three-year period to supplement its own resources in the Magistrates' Courts and prosecute cases in the Crown Court; and
- the legal services necessary to support the operational and corporate activities of the other criminal justice organisations, which amounted to £36 million over the same three-year period. It covers a broad range of mainly civil matters in areas such as advice on operational issues (for example police and prison officer powers) and assistance with civil litigation, responding to judicial reviews, public inquiries, staff discipline, employment law, freedom of information and procurement. Over half of this expenditure was via the Crown Solicitor's Office (CSO) (£18.9 million) broken down as £10 million on CSO professional fees and £8.9 million on external fees (£6.34 million on fees to legal counsel).

Criminal Justice Inspection Northern Ireland (CJI) decided not to inspect criminal legal aid spending in any detail as it was the subject of a concurrent review by the Northern Ireland Audit Office. Even so, there were aspects of the legal aid arrangements (and in particular, the level of fees paid relative to both England and Wales and prosecution fees) which had such a distorting effect that it was impossible not to comment.

### Publicly funded criminal casework

The criminal justice system spent £60 million on criminal legal aid in 2009-10. In the same period, the total expenditure of the PPS was £32.3 million. The PPS expenditure includes £5 million on counsel fees for the conduct of prosecutions and related advice.

The United Kingdom is considered to have one of the highest per capita spend on legal aid - with Northern Ireland expenditure running at approximately 20% higher than England and Wales. A comparison of specific legal aid cases, as used by the Northern Ireland Courts and Tribunals Service (NICTS) stated that standard legal aid fees could be as much as 50% higher than corresponding defence fees for a similar case in England and Wales. A separate review of cases, undertaken by the PPS in 2008, found that prosecution fees in Northern Ireland were 30% more expensive than those paid to prosecuting counsel in England and Wales. Inspectors can see no justification at the present time for legal costs (defence and prosecution) which are so different within the United Kingdom. Neither the cost of living nor the overheads of professional practice appear to be significantly different between Northern Ireland and England and Wales - indeed some costs are lower in Northern Ireland.

A particular concern to Inspectors was the difference in the fee levels between the prosecution and the defence. Data provided to Inspectors by the PPS shows that the defence were paid 29% more than the





prosecution across a sample of cases. The equivalent gap in England and Wales was 19%, though the Court Service in England and Wales aim to reduce this gap to 5% over a three-year period. This level of disparity puts the prosecution at a significant disadvantage when seeking to instruct counsel – a problem that is more concerning for Northern Ireland as the already large gap is considered (by the PPS) to have widened over the past two years.

The causes of this disparity are grounded in the use of two separate legal fee systems – one operated by the PPS and the other by the NICTS/Legal Services Commission. Discussions between the PPS and the NICTS over the past two years did involve the possibility of introducing a Graduated Fee Scheme, similar to that which is used in England and Wales. Projected efficiency savings for the PPS were estimated at around 30% per annum. The NICTS have instead decided to introduce a modified version of their existing legal aid scheme which is projected to deliver the required savings in line with the devolution settlement. The difficulty for the PPS is that the gap with the defence is likely to increase with the introduction of a Graduated Fee Scheme solely for the prosecution.

CJI can see no reason why the arrangements for assessing and paying two types of publicly funded criminal work should in the medium term, remain so substantially different – especially in their cost. It may be that in the short term, the price of gaining that commonality is some compromise which inhibits parity on the part of the PPS with England and Wales, but is based on defence fees significantly lower than paid during the period of this inspection. Inspectors see no basis for increasing prosecution fees. The PPS and the NICTS should agree a common strategy and timetable for achieving convergence between the level of prosecution and legal aid fees which maximises value for money as well as ensuring that departments operate within budget.

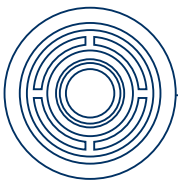
The impact of the different fee arrangements is exacerbated by the significantly greater availability of two counsel for the conduct of defence cases compared to the prosecution. In terms of offences being trialled at Crown Court, over 50% of defendant's cases in Northern Ireland were attended by two counsel compared to 11% for the prosecution – the proportion of indictable prosecution cases with two counsel in England and Wales was 5%. These findings accord strongly with the reality encountered by the PPS, who not uncommonly, are challenged by prosecuting counsel who have subsequently learned that their opponent has received substantially higher remuneration for the same case. The dissatisfaction is greater if the prosecution has been conducted by a single junior counsel and the other side has had two counsel each remunerated more highly.

An additional distorting factor was the higher than expected number of legal aid cases which attracted Very High Cost Case (VHCC) payments in the period covered by this inspection. The cumulative effect of these factors was reflected in the overall legal aid expenditure on counsel's fees, which in 2009-10 was approximately £14.5 million compared with the £5 million spent by the PPS.

### **Publicly funded civil casework**

Apart from the prosecution work of the PPS, most spending on legal services by the other criminal justice organisations relates to civil casework i.e. where a claimant (plaintiff) sues one or more of the criminal justice organisations for compensation and/or some other remedy(ies). For 2009-10, this includes much of the cost of internal legal services departments (£3.6 million), the use of the CSO (£4 million on CSO professional fees and £2 million on counsel fees) and the direct procurement and instruction of solicitors and barristers from the private sector (£2.7 million).

Civil legal services requirements cover a broad range of issues such as litigation, judicial review applications and inquests in the Coroners Court.



### **Findings common to all aspects of expenditure**

The provision of legal services has often been driven by historic and organisational change rather than the changing needs of public bodies. Although the consensus of the evidence received was that the arrangements did meet existing needs, this did not appear to be based on empirical evidence or analysis of the current options i.e. a comparative assessment of in-house legal departments, other public sector suppliers and external private sector sourcing. There is a need for the criminal justice organisations to collectively review the current arrangements to include benchmarking and market testing with internal resources and/or direct provision from the private sector.

The procurement of legal services from the private sector operates differently with regard to the two branches of the legal professions - in the case of solicitors, there is evidence that standard competitive procurement arrangements were increasingly being used to select a single provider or a panel of providers for specific areas of work (for example the Office of the Police Ombudsman for Northern Ireland (OPONI)). The arrangements for the procurement of barristers were less transparent in that no competitive public tendering has occurred. For example, all counsel for PPS prosecutions are chosen from a panel, which has been operational since 2009. A shared panel system is also used by the CSO and Departmental Solicitor's Office (DSO). The common feature of both panels is that they do not link inclusion on the panel with a commitment to undertake work at a particular fixed price or rate. Defence counsel in publicly funded legal aid cases are in the main, selected by private practice/sector solicitors.

Arrangements for quality assurance are generally weak across all aspects of the use of legal services in the criminal justice system. Inspectors found little evidence of any formal monitoring of quality and therefore limited scope to deal with issues of under-performance. Current developments in relation to criminal justice in England and Wales have relevance in terms of the widening remit of regionally based quality assessors and the development of a set of common advocacy standards.

The absence of standard public sector procurement arrangements for counsel has reinforced the archaic approach to the costing of legal work. The remuneration of barristers is on an individual case basis. Inspectors were told of little evidence of days required and limited information on invoices in support of time spent on specific legal cases. Inspectors did find some instances, where there was a prior agreement to an hourly rate.

The controls on legal fee costs have also been impeded by the common practice of applying for and the granting of uplift on costs – this has taken the form of special fee cases in the PPS. The main difficulty with such uplifts and special fees has been the relative lack of transparency on cost with the actual level of fees determined in the main by the supplier rather than the client. Similarly, the linkage of the legal aid arrangements for VHCCs to the estimated trial duration for certification as a VHCC and the claiming of fees without supporting evidence of the hours worked, had greatly increased the cost of that scheme.

Many justice organisations were unaware of the actual costs until completion of the work and this sometimes far exceeded the original estimate. This practice is generally considered unacceptable in other commercial environments where the supplier of a service would be expected to provide an overall fixed price or at least an hourly rate subject to the total fee to be paid.

Inspectors accept that an element of flexibility is advantageous in that the progress of some cases is not predictable. However, there should be a strong presumption that at least the basis of remuneration should be determined before counsel commences work. This is done in other jurisdictions. It might be agreement as to a brief fee and refreshers in the case of litigation or, where the amount of work is difficult to predict, an agreed hourly rate. In any event, it would need to be accompanied by a more structured recording of time than the Bar is currently accustomed to.



### **Issues specific to the Public Prosecution Service**

Since CJI's 2008 baseline inspection, the PPS has taken steps to better control its expenditure on counsel fees in both Magistrates' and the Crown Courts – achieving greater success in the latter. While there was an initial success in the Magistrates' Courts, costs did increase in 2010 due to the non-availability of PPS court staff. Inspectors recommend that the PPS should review the cost effectiveness of the distinction between the roles of directing lawyers and those who present cases at court.

The PPS panel was initiated after an advertisement and application process where those wishing to be considered were required to set out their competences. This brought increased transparency and opened up prosecution work to a wider range of counsel, though still confined to members of the Northern Ireland Bar. It is generally perceived, within the PPS and the legal professions, that defence work continues to be more appealing. This may be related to the reticence of some to undertake prosecution work for personal or professional reasons. It is also very likely to be related to the more attractive remuneration of defence work.

The size of the PPS panel is considered about right but the arrangements for the distribution of work do not always ensure that counsel assigned is the most suitable for the particular case. Inspectors welcome the steps taken towards a more broadly based prosecution panel and acknowledge that in this respect the PPS has achieved a more structured and transparent system. The panel was established on the basis that its composition would be reviewed after three years and the time is now right to undertake this work. Any review should consider the scope to broaden access to prosecution work thus enabling greater competition within the marketplace.

In the Crown Court, the PPS has considered the deployment of its own lawyers as advocates and a pilot scheme became operational in March 2011. This may include a gradual development of an in-house capacity to handle Crown Court cases. Outcome data shows counsel fee expenditure of £4.28 million in the Crown Court – a significant reduction on previous years when some special factors contributed. Nevertheless, an underlying reduction has occurred due to a more robust approach to the control of expenditure through restricting authorising permissions on the use of two counsel, and also making Assistant Directors responsible for authorising and negotiating special fees.

### **A more strategic approach for the future**

A significant and sustained improvement in value for money across the criminal justice system requires a more co-ordinated and consistent approach by public sector buyers. Whilst Inspectors acknowledge the differences between civil and criminal work (and to a lesser extent between prosecution and defence), there are some fundamental common principles, which should be applied to all uses of legal services. These principles need to address the fragmented nature of procurement, the sometimes conflicting nature of fee arrangements/schemes, and the need to ensure quality and value for money. Inspectors consider that the shared services model, which is being rolled-out across Government in areas such as human resources and finance, has potential to provide a framework for improved procurement and management of legal services.

The solution however requires a broader public sector response. The Department of Justice (DoJ) is best placed to take the lead in this regard and should expect advice from the Department of Finance and Personnel and the Central Procurement Directorate in taking this forward and aligning actions with other devolved parts of Government.



## Recommendations

### Strategic and cross-agency

- The criminal justice organisations should collectively review the use of legal services to include benchmarking and market testing of central government services, internal resources and/or direct provision from the private sector. They should also determine the scope for greater use of alternative dispute resolution approaches (*Paragraph 3.17*).
- The Department of Justice, which is leading on the development of a shared services approach to service delivery in the justice system, should incorporate the procurement and management of legal services as a key component of this work. It should expect the advice of the Department of Finance and Personnel and the Central Procurement Directorate and aim to align activity with other parts of the devolved Government (*Paragraph 3.22*).
- The cost of legal services should be determined at the commencement of an assignment (*Paragraph 3.28*).
- The PPS and the NICTS should agree a common strategy and timetable for achieving a convergence between the level of prosecution and legal aid fees (*Paragraph 4.49*).

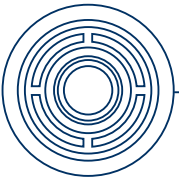
### Operational (Public Prosecution Service)

- The PPS should continue to monitor the deployment of prosecutors to court and should compare the number of court sessions covered against staff available. There should be clear expectations as to the number of court sessions to be covered by each prosecutor on a weekly basis (*Paragraph 4.6*).
- There is a need for a PPS review of the cost effectiveness of the distinction between the roles of directing lawyers and those who present cases in court (*Paragraph 4.9*).
- The PPS should strengthen and fully enforce its requirement for records of work to accompany all claims for fees to be paid on a non-scale or Very High Cost Case basis (*Paragraph 4.20*).
- The PPS should consider the guidance on the use of two counsel as used by the Crown Prosecution Service in England and Wales to determine what aspects might be adopted (*Paragraph 4.28*).
- The PPS should review the arrangements relating to its panel list of counsel prior to the review of its composition. This should include widening access to include barristers currently not members of the Northern Ireland Bar and to solicitor advocates (*Paragraph 4.58*).
- The PPS should implement a quality assurance scheme on advocacy skills, taking into account developments in England and Wales (*Paragraph 4.62*).
- The PPS should review the delivery of its court prosecution work, to include the development of in-house advocates and the scope to introduce an Advocate Depute role as used in Scotland i.e. counsel engaged on a full-time basis for a set period of time to conduct prosecutions (*Paragraph 4.66*).

Section



# Inspection Report





## CHAPTER 1:

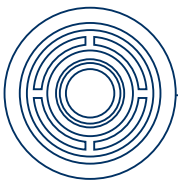
# Introduction



### Definition and scope

- 1.0 Legal services can be defined as those provided by solicitors, barristers (and sometimes paralegal staff) in the form of advice about legal issues and the conduct of legal proceedings in whatever legal fora they may be conducted. The definition used by the Bar Council of Northern Ireland (from their Code of Conduct 2010) includes *'the provision of legal advice, the drafting of documents, representing clients in any contentious and non-contentious matters in any court, tribunal, inquiry or hearing'*.
- 1.1 In Northern Ireland, the legal profession is split between solicitors and barristers. Solicitors have the overall care and conduct of their client's cases providing advice, preparatory work and representation in the lower courts, while also engaging barristers where necessary. The barristers act primarily as advocates, usually in the high court, defending or prosecuting criminal cases while also representing parties in a range of civil cases such as litigation. As of 2010, there were 2,300 solicitors practising in Northern Ireland (500 solicitor firms<sup>1</sup>) and over 600 barristers as members of the Bar Library of Northern Ireland of which about 10% are Queen's Counsel.
- 1.2 The requirements for legal services within the criminal justice system have always been substantial. The most obvious are the conduct of prosecutions and the defence of those accused of crime. This inspection will focus primarily on the former, which is exclusively delivered through publicly funded legal services. The defence of accused persons can either be funded by public legal aid arrangements or privately by individuals or organisations. The publicly funded defence arrangements are the subject of a separate ongoing review by the Northern Ireland Audit Office. There are however some important interdependencies which are addressed in this report.
- 1.3 Apart from criminal casework, the justice organisations also require legal services in areas such as advice on operational matters (for example police and prison officer powers) and legal input on a range of civil matters such as litigation, staff discipline, employment law, freedom of information, procurement etc. In this regard, the justice organisations are similar to most other parts of the public sector. It is also appropriate at this stage to stress that, although the inspection was confined to the criminal justice agencies falling within Criminal Justice Inspection Northern Ireland's (CJI) remit, the criminal justice system is itself just one segment of the wider public sector with no neat dividing line. Some of the report's findings and recommendations may therefore have relevance outside the criminal justice sector.
- 1.4 The procurement of professional services within the criminal justice system has been the subject of two previous thematic inspections by CJI - one broadly based on the procurement of goods and services and another more specifically focused on the

<sup>1</sup> A figure of approximately 500 solicitor firms was quoted in the Bain Report on Legal Services in Northern Ireland, which was published in 2006.



procurement and use of consultants. Both of these inspection reports made recommendations in terms of improving value for money and realising the benefits of using external professional services. The scope of this inspection is similar in that it covers the same justice organisations<sup>2</sup> and considers the procurement of external expertise against the provision of an internal legal services capacity. The broader aspects of the procurement of legal aid in England and Wales was covered in some detail in a report by Lord Carter.<sup>3</sup>

### Aims of the inspection

1.5 The Terms of Reference for the inspection are included at Appendix 1. The aims of the inspection were to:

- assess the manner in which any needs for legal services are identified and resourced;
- determine the breakdown of spending on professional legal services by the criminal justice organisations over a three-year period;
- review the procurement arrangements for external legal services including the identification of need, tendering and selection, management of projects and post-contract evaluation; and
- consider, on the basis of information received, what areas and issues require additional attention (for example how quality and standards are measured and delivered).

### Context

1.6 Any review of external spending by public bodies needs to take account of the current reductions in public sector spending, which requires improved efficiency and value for

money in the delivery of core services. The budgetary position of the justice organisations is also linked to the April 2010 devolution settlement, when the devolution of responsibility for the criminal justice system was transferred to the Northern Ireland Government. That settlement included additional short term funding, most particularly to meet legal aid requirements.

1.7 The inspection has taken place as there is increasing public interest in the costs of legal fees. Members of the Northern Ireland Assembly have for example, asked a number of questions in relation to legal fees including enquiring about legal costs in each of the Government departments.<sup>4</sup> The Minister of Justice in the Northern Ireland Executive has also highlighted the unsustainable costs associated with legal aid and the need to bring spending into line with that agreed in the April 2010 devolution settlement. The Minister also commissioned a review to develop proposals to improve 'Access to Justice' in September 2010.<sup>5</sup> One of the objectives of the review was to achieve better value for money including the identification of any opportunities for savings in the legal aid budget.

1.8 The United Kingdom Office of Fair Trading has raised concerns regarding the lack of price competition among barristers in Northern Ireland, which has inhibited choice for consumers including criminal justice organisations. The Bar Council responded in December 2010 with an amendment to its Code of Conduct to make it clear that those barristers operating in Northern Ireland are not prevented from competing freely on the level of fees charged to their clients.<sup>6</sup> The Bar Council has also agreed to

2 The inspected organisations include the PSNI, PPS, NICTS, NIPS, PBNI, YJA, FSNI, Compensation Agency and the OPONI. Expenditure by the Department of Justice has not been included (NIO expenditure was previously included in the procurement and use of consultants inspections).

3 Legal Aid: a market based approach to reform, Lord Carter's Review of Legal Aid Procurement, 2006.

4 A series of Assembly Questions were asked by Patsy McGlone MLA in October/November 2010 concerning the details of expenditure on legal services in government departments. The answer from the Department of Justice was confined to the period post April 2010 (i.e. devolution).

5 The Access to Justice Review published a Progress Report in March 2011. A final report will be published later in 2011.

6 Change to Code of Conduct for the Bar of Northern Ireland, The Bar Council of Northern Ireland, 22 December 2010.





make it easier for barristers from outside Northern Ireland to practise here by publicising that an abridged, flexible procedure is available for obtaining a temporary practising certificate.

- 1.9 An earlier Legal Services Review Group publication, known as the *Bain Report*<sup>7</sup>, produced a series of recommendations on legal services including oversight of the profession and the enhancement of competition. The report did not see any merit in introducing the ‘*competition models*’ proposed for England and Wales (for example multi-disciplinary practices) as they would be unlikely to increase competition. Instead, recommendations were made to open up direct access to barristers for advice and to the rights of audience of solicitor advocates in the higher courts. It also recommended that the Bar Council should consider its current rules relating to the rights of audience of employed barristers.
- 1.10 Value for money concerns are not confined to Northern Ireland. An announcement by the Justice Secretary for England and Wales stated his intention to reform legal aid and civil litigation costs to make the justice system ‘*quicker, cheaper and less combative wherever possible*’.<sup>8</sup> This included proposals to change the way in which lawyers are paid in criminal cases, i.e. move towards a competitive market to replace the current system of administratively set fee rates. There were also substantial proposals to reform the operation of civil litigation.
- 1.11 The National Recovery Plan for the Republic of Ireland referred specifically to the costs of professional services noting

that ‘*although accounting costs have fallen, the costs of legal services remain high*’.<sup>9</sup> The Plan called for greater competition in the professions together with a more structured approach to mediation in the legal system including the promotion of the use of alternative dispute resolution. There was also a stated intention to introduce new legislation to reduce legal costs as well as extend the use of public sector tendering for legal services.<sup>10</sup> The parliamentary Dáil Committee of Public Accounts published a report in January 2011 which recommended critical changes to the procurement of legal services.<sup>11</sup>

- 1.12 The European Commission has also reviewed competition in the professions including the use of legal services. A report published in 2004, looking at such services within the European Union, found restrictions in five areas – price fixing, recommended prices, advertising, entry requirements and reserved rights and regulations governing business structures.<sup>12</sup>

### Legal services provision

- 1.13 There are, in broad terms, two sources of legal services expertise – those who work within the public sector and those who are private sector practitioners working in commercial firms as solicitors or as members of the independent Bar. Many of the justice bodies retain their own internal legal services departments, which become the first option in terms of meeting specific needs. If these needs cannot be met internally, there is scope to use Government legal services in the form of the Crown Solicitor’s Office<sup>13</sup> (CSO) or the

7 Legal Services in Northern Ireland: Complaints, Regulation, Competition, Legal Services Review Group, 2006.

8 Lord Chancellor Kenneth Clarke, QC, MP Ministry of Justice News Release, 15th November 2010.

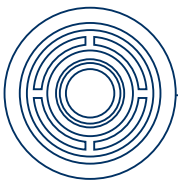
9 National Recovery Plan, 2010-14, Government of Ireland, p. 33.

10 The issue of restrictions on competition in legal services was covered in detail by a report of the Competition Authority ‘Competition in Professional Services: Solicitors and Barristers’ published in December 2006. It concluded that ‘*the market (Republic of Ireland) for legal services is permeated with unnecessary and disproportionate restrictions on competition and is in need of substantial reform*’.

11 Third interim report on the procurement of legal services by public bodies, Dáil Éireann Committee of Public Accounts, January 2011.

12 Report of Competition in the Professional Services, European Commission, February 2004.

13 The Crown Solicitor must make his services available to any Minister or department of the Government of the United Kingdom and may make his services available to any Northern Ireland Minister, Northern Ireland department, public body or holder of public office (Northern Ireland Constitution Act 1973, section 35). Following devolution, his office continues to act for the PPS on judicial review and for PSNI on a range of issues.



Departmental Solicitor's Office (DSO). Civil legal work on behalf of most of the criminal justice organisations has been carried out by the CSO since 1972. Prior to this, both civil and criminal cases were carried out by the Chief Crown Solicitor and a network of other regional Crown Solicitors. The devolution of criminal justice in April 2010 means that more of this work is now provided by the DSO. Some justice organisations have continued to use the CSO exclusively (for example the Police Service of Northern Ireland (PSNI)) or for bespoke civil work (for example the Public Prosecution Service (PPS)) while others have transferred all civil work to the DSO (for example the Northern Ireland Prison Service (NIPS) and the Northern Ireland Courts and Tribunals Service (NICTS)).

- 1.14 The CSO/DSO operate a hybrid model for legal services in that each body employs solicitors and barristers, but also instruct barristers from the independent (and private sector) Bar of Northern Ireland to provide, as and when required, opinions on legal issues and/or carry out advocacy in the courts. This is the standard separation of responsibilities and functions within the legal professions. The CSO has traditionally hard charged the justice sector bodies for its own professional services as well as passing on external fees such as those for counsel.
- 1.15 In addition to counsel procured via the CSO/DSO, most of the justice organisations have procured legal services directly from the private sector (outsourcing completely or instructing counsel). The most evident

example of this approach is the procurement of prosecution counsel by the PPS.

### Cost of legal services

- 1.16 This inspection was planned as part of a series focusing on improving efficiency and value for money across the criminal justice system. It takes place as more public attention is focused on the cost and value of publically funded legal services and follows the criticisms regarding the legal costs of public inquiries (for example, the Saville inquiry regarding Bloody Sunday had legal costs of over £100 million, the Billy Wright Inquiry had £9.8 million legal costs and the Rosemary Nelson inquiry had legal costs of over £16.9 million) and escalating expenditure on criminal and civil legal aid in Northern Ireland.<sup>14</sup>
- 1.17 The cost of criminal legal aid, which has direct implications for the prosecution, has doubled in just five years to reach £60 million<sup>15</sup> in 2009-10 – payments in this year were particularly high due to the number of late back payments processed by the Legal Services Commission. Spending on a per capita basis exceeds the levels in England and Wales which itself is considered one of the highest in recent comparative studies.<sup>16</sup> The National Audit Office in its report on the procurement on legal services stated that *'England and Wales spend more per capita on legal aid than any other comparable nation except Northern Ireland'*.<sup>17</sup> Expenditure on criminal legal aid in England and Wales has consistently fallen since 2003-04.<sup>18</sup> International comparisons must


14 The full costs of each public inquiry, including legal costs broken down as fees to counsel and solicitors, have been published by the NIO on its website. The Bloody Sunday legal costs have been broken down as £67.6 million relating to the inquiry and £32.6 million incurred by the Ministry of Defence.

15 Expenditure for criminal legal aid for 2010-11 was £50.8 million.

16 International comparisons of publicly funded legal services and justice systems, Roger Bowles & Amanda Perry, University of York, Ministry of Justice Research Series 14/09, October 2009. A separate Council of Europe report on European Judicial Systems (CEPEJ, 2006) referred to spending on legal aid in England and Wales as considerably higher than other European Union countries.

17 The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission, National Audit Office, 2009 p.4. The NAO reported that the expenditure per capita on criminal legal aid in Northern Ireland was 25.9% compared to England and Wales (22.0), Scotland (21.8), Ireland (7.4), Netherlands (6.3), New Zealand (4.8), Finland (4.7), Canada (4.2) and France (0.9).

18 The Chairman of the Bar Council of Northern Ireland has expressed concern about making comparisons with England and Wales and referred to the 'crisis' in that jurisdiction. He has called for a bespoke justice system for Northern Ireland which preserves a viable legal profession (See Belfast Telegraph 23 March 2011; The Bar Library News, 28 March 2011).

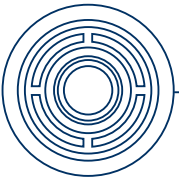


however be treated with caution, with limitations in comparisons particularly between common and civil law jurisdictions.<sup>19</sup>

- 1.18 An issue of importance in the costing of legal work is the degree to which it should be quantified and valued. Unlike most areas of business, including other professional services, the practice amongst barristers has been to not provide detailed breakdowns of work undertaken in order to underpin fees. Remuneration of barristers is on an individual case basis. There was little evidence of prior agreement, even with regard to preparatory work, on the number of days required and invoices rarely contained the details of work undertaken on specific cases. In some instances such as public inquiries, there may be prior agreement as to an hourly rate. In effect, clients such as those in the criminal justice system were presented with the total cost after completion of the work.
- 1.19 There is a lack of clarity around the arrangements for assessing the fees of barristers, which in part is linked to the different arrangements for criminal and civil work. The assessments have been based loosely on the form of scale fees used in the High Court or County Court, but may also be determined by taxation (i.e. arbitration) when necessary. However, the experience in the PPS and the Legal Services Commission for criminal work has been the use of exceptionality or special elements. These exceptions or special elements have attracted additional payments and uplifts to the standard or scale fees.
- 1.20 Whilst the principle of scale fees for both civil and criminal work still underpin the assessment of costs in individual cases, the actual workings within each segment have been modified resulting in a confusing plethora of practices and lack of transparency on how costs are determined.

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<sup>19</sup> The National Audit Office compared legal aid expenditure across nine jurisdictions including Northern Ireland. It did state that comparisons between countries have to be treated with care because of differences in legal systems and in the reporting of data.



## CHAPTER 2:

# Analysis of expenditure



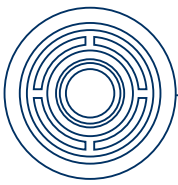
- 2.0 The financial data used in this report was provided either directly by each of the justice organisations or by permission through the Crown Solicitor's Office (CSO). It covers three financial years in the period from April 2007 to March 2010 inclusive.
- 2.1 The total amount of expenditure on legal services by the justice system was approximately £300 million for the three year period.<sup>20</sup> Over half of this expenditure (£155 million) related to criminal legal aid (defence), which was paid by the Northern Ireland Legal Services Commission. Criminal legal aid is the subject of a separate ongoing review by the Northern Ireland Audit Office and therefore will not be covered in detail in this inspection. Subsequent financial analysis in this report largely excludes legal aid expenditure.
- 2.2 Looking at the most recent year of available data (2009-10), spending on legal services (excluding legal aid) amounted to £45.1 million, which was a reduction of approximately £3 million on the previous two financial years (Table 1). This was attributable in the main to a reduction in overall spending in the PPS due to exceptional factors in the first two years.
- 2.3 The full expenditure of the PPS (£32.3 million in 2009-10) was included as all of its work relates to the provision of prosecutorial legal services and any dilution or substitution in that work would require an alternative source of legal and support services expertise. It must be noted however that the real costs of internal legal services in other justice organisations is likely to be under-reported as costs do not take account of corporate overheads such as finance.<sup>21</sup> A provision for pension costs would also need to be included in any direct comparison with the use of Government legal services or outsourcing

**Table 1: Expenditure on legal services by year**

	2007-08	2008-09	2009-10	TOTAL
<b>PPS</b>	£38,016,349	£35,513,647	£32,332,531	£105,862,527
<b>PSNI</b>	£5,234,686	£7,393,428	£7,914,327	£20,542,441
<b>NIPS</b>	£2,389,086	£1,939,066	£1,932,452	£6,260,604
<b>NICTS</b>	£1,560,484	£1,439,105	£1,783,600	£4,783,189
<b>Others</b>	£1,554,615	£1,520,058	£1,166,182	£4,240,855
<b>TOTAL</b>	<b>£48,755,220</b>	<b>£47,805,304</b>	<b>£45,129,092</b>	<b>£141,689,616</b>

<sup>20</sup> This does not include the costs of the judiciary and the Department of Justice, both of which are not subject to inspection by CJI. The NICTS Annual Report 2009-10 shows direct expenditure of £15 million for the judiciary which includes wages and salaries, social security, pensions and associated costs.

<sup>21</sup> The UK Government Legal Service has been developing indicators for measuring the size and cost of the Government's legal function. The costs of the overall government legal function include all employee costs, external legal services such as solicitors and counsel, training, publications, IT and accommodation.



to private sector legal practitioners.<sup>22</sup>

2.4 A breakdown of legal services spending by criminal justice organisations for 2009-10 is shown in Table 2. The expenditure is further split into three resource categories - internal legal services departments; CSO/DSO (i.e. Government legal services); and external private sector solicitors and barristers.

Disbursement costs, which include the fees paid to self-employed counsel as well as fees for various expert reports, are paid in the main to those who work in the private sector or undertake separate private work. Data supplied to Inspectors by the CSO shows that 66% of all disbursement costs in 2009-10 related to counsel fees – this amounted to £2.34 million. Fees to medical practitioners amounted to 14% of

**Table 2: Expenditure on legal services by criminal justice organisation 2009-10**

	Internal	CSO <sup>23</sup> /DSO	External	TOTAL
PPS	£27,283,035	£50,127	£4,999,369	£32,332,531
PSNI	£1,738,695	£4,849,725	£1,325,907	£7,914,327
NIPS	£0	£1,819,756	£112,696	£1,932,452
NICTS	£1,271,000	£397,600	£115,000	£1,783,600
NILSC	£122,000	£0	£236,000	£358,000
PBNI	£0	£16,825	£3,121	£19,946
YJA	£0	£47,762	£0	£47,762
FSNI	£0	£8,428	£0	£8,428
OPONI	£60,000	£0	£75,000	£135,000
CA	£200,000	£0	£249,000	£449,000
Others	£0	£13,685	£134,361	£148,046
<b>TOTAL</b>	<b>£30,674,730</b>	<b>£7,203,908</b>	<b>£7,250,454</b>	<b>£45,129,092</b>

2.5 Whilst all internal expenditure can be classified as belonging to the public sector and all external spending on solicitors and barristers is sourced from the private sector, the actual spending on Government legal services (i.e. principally the CSO) is a mixture of public and private sector. The professional fees of the CSO, which amounted to £4 million in 2009-10, is retained within the public sector (Table 3).

disbursement costs in 2009-10, which is a significant increase on the previous two years, due in the main to the need for medical reports on hearing loss claims in the Police Service of Northern Ireland (PSNI). The CSO rely on practitioners from the independent Bar as their solicitors did not have rights of audience in common with all other solicitors (i.e. right to appear and conduct proceedings) in the higher courts.<sup>24</sup>

**Table 3: Public/private sector spending on legal services 2007-10**

	2007-08	2008-09	2009-10	TOTAL
Internal	£30,392,388	£31,417,579	£30,674,730	£92,484,697
CSO prof. fees	£3,231,212	£2,668,019	£4,099,832	£9,999,063
CSO counsel fees <sup>25</sup>	£1,963,208	£2,341,429	£2,039,658	£6,344,295
External	£12,365,128	£10,638,460	£7,250,454	£30,254,042

22 The Bar Council for England and Wales commissioned a report in July 2009 (Europe Economics) into comparisons between in-house (CPS) and self-employed advocates of the Bar in England and Wales which concluded that there was a failure to assess all costs and benefits of the respective options.

23 CSO professional fees includes VAT at 17.5%. This can be re-claimed by the client justice organisations.

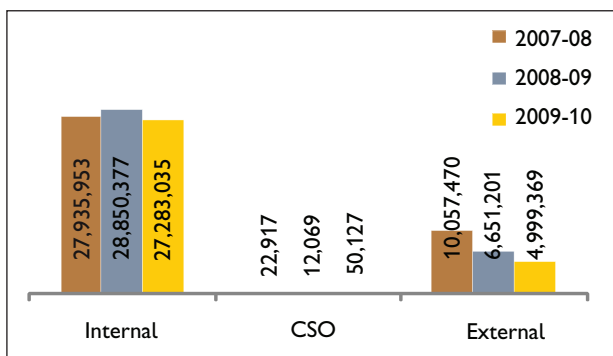
24 Rights of audience in the higher courts is the exclusive preserve of the Bar - section 106 (1) and (2) of the Judicature (NI) Act 1978. The Justice Bill (2011) includes an amendment to extend rights of audience in the High Court and Court of Appeal to solicitors. It is likely, at least in the short term, to only apply to a limited number of solicitors.



## Public Prosecution Service (PPS)

2.6 The PPS had the largest expenditure on legal services as its core activity is prosecution decision making and the conduct of criminal cases. The required expertise is provided by internal lawyers (171 at the time of this inspection) and support staff.

**Graph 1: PPS expenditure on legal services 2007-10 (£'s)**



2.7 The only external procurement of legal services for the purposes of prosecution is counsel fees which accounted for £21.7 million over the three years (Graph 1). This has however decreased from a high of £10.06 million in 2007-08 to £5 million in 2009-10, yet still representing about 15% of the overall PPS budget in 2009-10. The historically high level of counsel fees for 2007-08 was due to the inclusion of some exceptional lengthy and complex criminal cases as well as some accounting changes.

2.8 A detailed analysis of PPS spending on legal services as well as its internal capacity is included in Chapter 4.

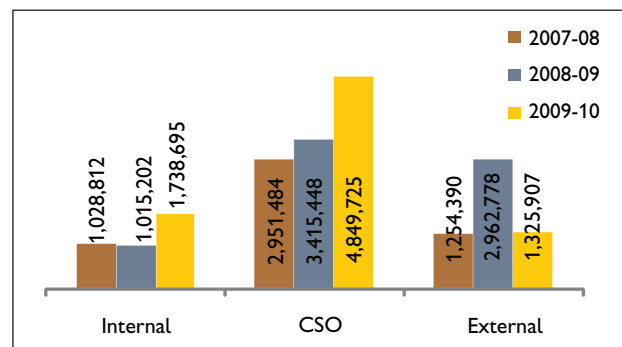
2.9 Apart from the PPS, most spending on legal services by the other criminal justice organisations relates to civil casework i.e. where a claimant (plaintiff) sues one or

more of the criminal justice organisations for compensation and/or some other remedy(ies).

## Police Service of Northern Ireland (PSNI)

2.10 The PSNI spent £20.5 million on legal services over the three years covered in this inspection (Table 1). This should be seen in the context of an organisation which had expenditure of over £1.2 billion (including £317 million pension costs) in 2009-10. The expenditure in 2009-10 was higher than the previous two years. The PSNI internal legal services branch is the largest such internal department in the criminal justice system with expenditure of £1.7 million in 2009-10 and 60 staff<sup>26</sup>, of which 10 were in-house own lawyers (including one apprentice solicitor). The majority of staff were temporary agency personnel (33) followed by civilian staff (26) and police officers (1).

**Graph 2: PSNI expenditure on legal services 2007-10 (£'s)**

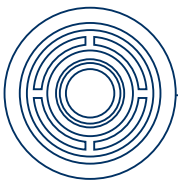


2.11 The cost of the branch has risen significantly in the last year due mainly to litigation requirements and increased commitments related to public inquiries and coroner's inquests – spending in 2009-10 increased by £720,000 compared with the previous year (Graph 2). Estimates for 2010-11 indicate a continuation of this expenditure trend.<sup>27</sup>

<sup>25</sup> Excludes non counsel fees such as medical reports and court stamps.

<sup>26</sup> Actual combined police, civilian and agency numbers as of 21 March 2011. The head of the branch is a Grade 5 rank followed by 6.5 Grade 6 rank legally qualified staff. The branch includes 1 police Inspector.

<sup>27</sup> In view of the indicators for the costing of the legal function (as proposed by UK Government Legal Services), the costs of internal legal services departments are in the main under-reported (i.e. omission of corporate costs). These additional costs can be accounted for by the use of a ready reckoner which attributes an additional percentage to the costs of specific posts. This can be up to 100% in some cases. Any comparisons between internal provision and CSO or private sector provision require all such costs to be included.



- 2.12 In addition to litigation and legacy work, the branch also provides specialist advice on operational matters, employment and human rights. The head of the PSNI legal services has been reviewing the work of the branch including implementing a time recording system for legal activities. This will facilitate a better understanding of its costs vis-à-vis services provided by CSO and/or private sector providers.
- 2.13 A comparison of the PSNI legal services branch with that provided by other police forces in England and Wales has some benefits in terms of future developments. The largest legal services directorate is in the Metropolitan Police Service which has overall responsibility for all legal services. Most work is handled internally but it has also established (after a tendering exercise) a panel of firms to whom work may be assigned. They work on the basis of a pre-determined rate and each assignment is on the basis of an agreed estimate as to the chargeable time which cannot be exceeded without further authority. The work undertaken on this basis is subject to sampling as to quality control by internal legal staff. The work of the internal unit itself is costed and analysed through a computer assisted system of time recording.
- 2.14 Progress on introducing external tendering of legal services within the Northern Ireland criminal justice system may be impeded by the current mix of national security matters, public interest immunity considerations and the specific security issues. There is scope however to extract increased value for money from existing arrangements, which Inspectors understand is already happening in relation to litigation cases.
- 2.15 There has been extensive consideration through the Association of Police Lawyers of different approaches to the provision of legal services in England and Wales. These have included the possibility of shared services and other forms of collaboration, especially between smaller forces in line with what the police themselves are doing. The impetus came from Government moves (which did not in fact come to fruition) towards amalgamation of police forces. For example, two relatively small adjoining forces have established an agreement to cover peaks and troughs in legal work and share specialisms by outsourcing to each other work for which they have no available capacity.
- 2.16 The general feeling amongst police lawyers is that in-house services are more cost effective – at least because unit costs are usually lower and also because outsourcing of work usually requires positive management (itself a resource commitment) if costs are not to drift upwards. Members of the Bar (in Northern Ireland as well as England and Wales) are not convinced with the validity of these cost comparisons.
- 2.17 Spending via the CSO has increased substantially over the three years covered by this inspection. It amounted to £4.85 million in 2009-10, £3.42 million in 2008-09 and £2.95 million in 2007-08. Much of this increase can be attributed to the volume of new hearing loss cases. A breakdown of the 2009-10 expenditure shows that £2.84 million was allocated to CSO professional fees with the remaining £2.01 million attributed to disbursement costs. In the case of the PSNI in particular, a significant proportion of disbursement relates to non-counsel fees. While the exact figure for each organisation was unavailable, it is known that 34% of total disbursement costs across the justice sector organisations (£690,000) did not relate to counsel fees. This included £290,000 on medical costs, most of which were fees to medical practitioners, and have related to PSNI cases.



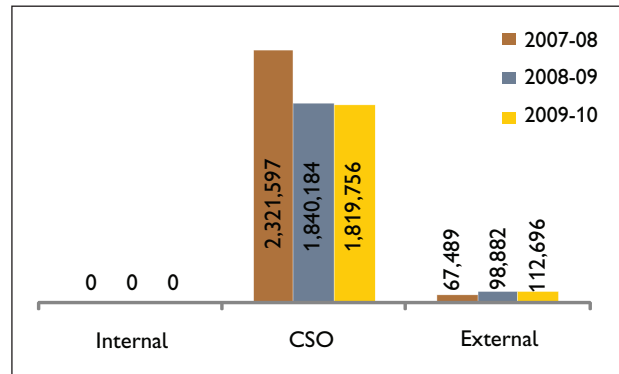


2.18 The Police Service spending on legal services direct from the private sector<sup>28</sup> relates in part to work that the Service found more expedient to go directly to private practitioners (for example immediate Proceeds of Crime Act applications) and to the work associated with public inquiries. This amounted to £5.54 million over the three financial years. It has decreased significantly in the past year falling from £2.96 million in 2008-09 to £1.33 million in 2009-10. A fuller breakdown of the expenditure provided by the PSNI shows that most of the expenditure refers to legacy work, particularly in relation to public inquiries – this accounted for £4.3 million over the three years.

### Northern Ireland Prison Service (NIPS)

2.19 The total net operating cost for the NIPS in 2009-10 was £140 million. The Prison Service does not have an internal legal services department as its needs have been met by the CSO or through the Northern Ireland Office, which had CSO staff embedded within the department. Since April 2010, legal services needs are undertaken by the DSO. For the three years of this inspection, the NIPS spent a total of £6.28 million on legal services of which almost £6 million related to amounts billed by the CSO<sup>29</sup> (professional fees and external disbursement costs) and £279,000 related to work undertaken directly for the NIPS by private practitioners (solicitors and barristers). Spending on legal services via the CSO and directly on private practitioners would be expected to be relatively high as the NIPS do not retain an internal legal services department (Graph 3).

**Graph 3: NIPS expenditure on legal services 2007-10 (£'s)**



2.20 The largest item of expenditure relates to the Billy Wright inquiry which incurred a legal bill of £2.6 million for the three-year period. Work associated with judicial reviews amounted to £851,000 via the CSO over the three years. The remaining area of high legal costs related to the claims unit (litigation) which incurred a legal bill from CSO of £390,000 over the three years.

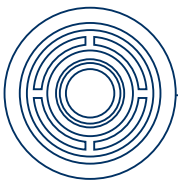
### Northern Ireland Courts and Tribunals Service (NICTS)

2.21 The net operating cost for the NICTS in 2009-10 was £162 million – this is broken down as £57.7 million for the pre-devolution Courts Service, £104 million for the Legal Services Commission (i.e. legal aid) and £1.6 million for the Judicial Appointments Commission. Total expenditure by the Courts Service on legal services (including aspects of policy and legislation advice provided by legally qualified staff) amounted to £4.78 million over the three years (Graph 4).<sup>30</sup>

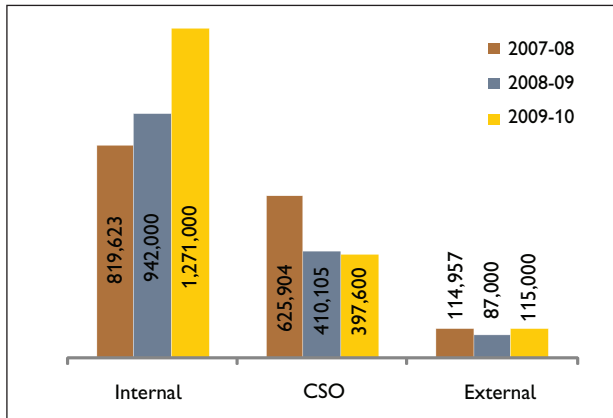
28 Work that is procured from solicitors (other than CSO) or counsel instructed directly by PSNI.

29 Expenditure data on CSO expenditure provided by NIPS does not reconcile with that billed by the CSO. NIPS financial data, based on general ledger accrual figures, shows CSO expenditure of £4.8 million over the three financial years.

30 The NICTS estimate that about 40% of the costs shown relate directly to the provision of legal services. The remaining costs relate to legally qualified staff whose primary function is the development and assessment of policy and legislative proposals on the courts, tribunals and enforcement of judgments.



**Graph 4: NICTS expenditure on legal services 2007-10 (£'s)**



2.22 The Criminal and Coroners Policy Division, and Civil Policy and Tribunal Reform Division have a staff complement of 26, encompassing legally qualified, policy and administrative staff.<sup>31</sup> The cost of the two units in 2009-10 was £1.13 million. An additional £137,000 relates to staff in the Public Legal Services Division.

2.23 A significant proportion of the overall costs incurred related to policy and legislative functions and to the provision of advice on matters relating to civil and administrative justice. Both Divisions are primarily engaged in the formulation of policy relating to the jurisdiction and powers of the courts and tribunals and on the preparation of court related primary and secondary legislation.<sup>32</sup> It is estimated by the NICTS that around 30% of costs incurred in relation to the Criminal Division relate to the provision of advice on matters regarding the criminal justice system. A similar proportion of costs incurred by the Civil Division relate to the provision of advice on civil and administrative justice. A small proportion of the work of both divisions belongs to civil litigation. Overall it is estimated by the NICTS that £300,000 of the unit costs during 2009-10 relate to litigation and the advice relevant to the criminal justice system.

2.24 Some legally qualified staff were also appointed by the NICTS to the Office of the Lord Chief Justice, the Coroner's Service, the Office of the Social Security and Child Support Commissioners and to the Office of the Official Solicitor. These staff were engaged in supporting the judiciary and civil service matters.

2.25 The NICTS (pre-devolution) expenditure on the CSO was £397,000 in 2009-10, £410,000 in 2008-09 and £626,000 in 2007-08. Recent figures for the first six months of 2010-11 showed CSO expenditure of £112,000 which also related to work undertaken by CSO before devolution of policing and justice functions. CSO expenditure from 2007-10 primarily relates to judicial review applications relating to judicial decisions. It also incorporates expenditure on personal injury litigation and counsel acting on behalf of the Official Solicitor and the Coroners Service. Since devolution, DSO rather than CSO have been instructed to act on matters relating to the NICTS and the judiciary.

### Northern Ireland Legal Services Commission (NILSC)

2.26 The NILSC is a non-departmental public body of the Department of Justice (DoJ). The sponsorship of the Commission is undertaken via the public legal services division of the NICTS with the division also responsible for the formulation and implementation of legal aid policy and the reform of publicly funded legal services. It had a total expenditure of £104.3 million in 2009-10. Most of this expenditure relates to the payment of legal fees in relation to legal aid, which is split between criminal and civil payments. Criminal legal aid has amounted to £155.1 million over the last three financial years with the highest amount payable in 2009-10 (£60 million).

31 A number of NICTS legal staff are seconded to the office of the Lord Chief Justice, the coroner and to the office of the Official Solicitor. This expenditure is not included in internal NICTS legal services data.

32 Interim proposals from the Review of 'Access to Justice' point towards the integration of all aspects of criminal and civil legal aid policy, and sponsorship of the service delivery body, within a strong access to justice directorate in the Department of Justice.



2.27 The nature of the Legal Services Commission's business of administering civil legal aid schemes (as responsibility for civil legal aid policy development lies with the Commission), taking forward a programme of civil legal aid reform means that it requires a range of legal services. There is a legal team of two lawyers within the Commission engaging counsel to provide additional advice and representation. There are also a number of lawyers who perform civil adjudication decision making functions. The Legal Services Commission also use panels of lawyers to perform functions in relation to civil appeals, criminal assessments, recommendations in relation to civil remuneration and appeals in which the Commission has an actual or perceived conflict of interest. The cost of its own internal legal department was £122,000 in 2009-10.

2.28 No payments were made to the CSO or DSO over the period covered by this inspection.

2.29 Excluding legal aid payments, the Commission has on occasion used private legal services providers for specialised work in contract/commercial, employment law and debt recovery. Three firms of solicitors have been procured through an open tendering process with a cost of £40,000 in 2009-10.

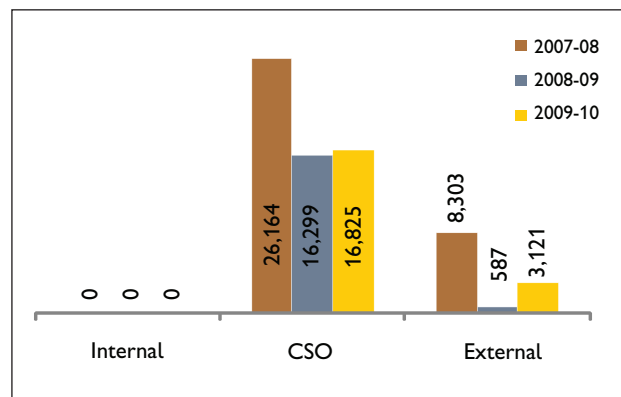
2.30 As criminal legal aid, including the work of the Legal Service Commission is the subject of a separate ongoing review by the Northern Ireland Audit Office, CJI does not propose to look at these issues in detail in this inspection. It is also the intention of CJI to undertake an inspection in relation to corporate governance in the Legal Services Commission at a later date.

**Probation Board for Northern Ireland (PBNI)**

2.31 The total expenditure of the PBNI in 2009-10 was £20.9 million. The total amount spent on legal services over the three-year

period was a relatively small £71,000. The PBNI does not have its own internal legal services department. Instead all of its legal requirements for the three-year period of this inspection were met by the CSO or procured directly from private sector providers.

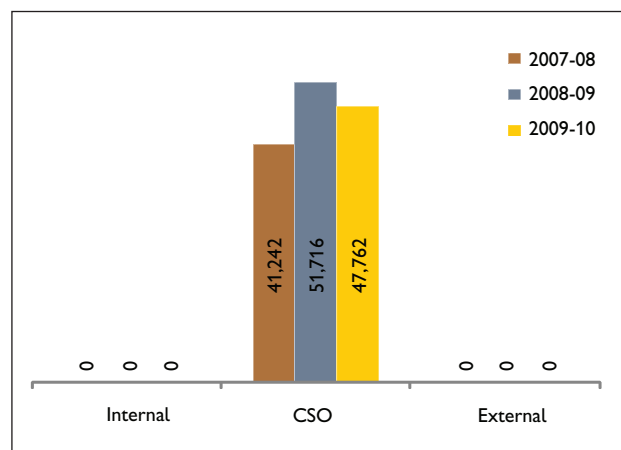
**Graph 5: PBNI expenditure on legal services 2007-10 (£'s)**

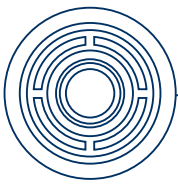


**Youth Justice Agency (YJA)**

2.32 The net operating cost of the YJA in 2009-10 was £23.5 million. The annual accounts refer to 'professional services and advisory costs', though there is no specific reference to legal costs or fees. The YJA does not have an internal legal services department. Total spending on legal services for the three years amounted to £141,000 all of which was procured via the CSO.

**Graph 6: YJA expenditure on legal services 2007-10 (£'s)**





2.33 The YJA has used the CSO for a range of legal services ranging from one-off legal advice on specific issues, but primarily assisting and representing the YJA in tribunal and compensation claims. A response to an Assembly Question showed that £500 was incurred by the YJA for direct legal advice during the first six months of 2010-11.

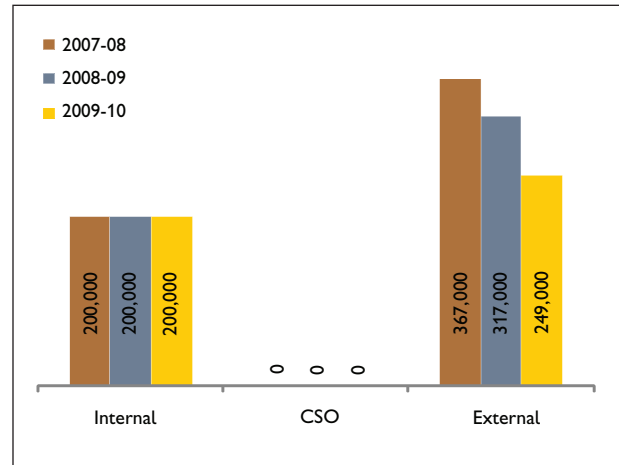
### The Compensation Agency (CA)

2.34 The CA was established in April 1992 to support the victims of criminal damage and criminal injuries, as well as actions taken under the Justice and Security (Northern Ireland) Act 2007. The process of evaluating and settling each of the claims has required considerable internal and external legal expertise.

2.35 The net operating cost for the Compensation Agency in 2009-10 was £17.4 million, which represents a major reduction on the £53.5 million costs in 2008-09. This is accounted for by the large decrease in claims and costs under the existing legislation. The agency paid out £27 million in compensation in 2009-10. Over the three-year period for this inspection, the agency spent £1.5 million on legal services.

2.36 The CA maintains its own legal services department which consists of four solicitors (2.9 full time equivalent posts), who have been seconded from the Department of Finance and Personnel and on loan to the DoJ. In view of the decreasing workload, the secondment arrangements require attention by the agency and the Department of Finance and Personnel. The annual cost is estimated at about £200,000 to the agency. Legal staff work on a range of duties including administrating claims, providing advice on resolution, negotiation and settlement of claims, direction of proofs and court work/advocacy.

**Graph 7: Compensation Agency expenditure on legal services 2007-10 (£'s)**



2.37 The Agency has not used the CSO in the period covered by this inspection, though it was used for judicial reviews in the past. Its legal requirements are met through the DSO or through the use of solicitors and instructed counsel with a total cost of £933,000 over the three years. Financial figures provided in response to an Assembly Question showed that expenditure on legal fees for the first six months of 2010-11 was £61,000 via the DSO and £138,000 to counsel.

2.38 The legal costs of the Compensation Agency are two fold - the fees associated with the Agency and those of the claimant (plaintiff). The fees for counsel acting on behalf of the Agency are determined on the basis of County Court Scale Costs. However there has been a view within the legal profession that these County Court scale fees do not reflect the actual costs incurred by counsel. This has resulted in the practice of 'uplifts' in fee level including up to 100% above the standard scale fees in some cases reported to Inspectors. Where there is dispute, cases can be taxed by the County Court Judge and paid according to the amount allowed on taxation. The Compensation Agency can lodge a High Court appeal (as it has in the past) to an order for costs made by a County Court Judge.



2.39 While the fees of counsel acting for the claimant are also reimbursed by the Agency, their level has traditionally been linked to the award of costs – there is no scale fees/guidance for costs relating to an award in excess of £250,000. In practice, this has meant often lengthy and detailed negotiations between the two parties on these Very High Cost Cases (VHCCs). However, in default of agreement, the claimant’s legal representative may apply to court to have the Judge certify the amount of costs.

2.40 A concern raised by Senior Management in the Agency was that its own counsel did not provide assistance and advice to Agency solicitors on such occasions. The counsel acting on behalf of the Compensation Agency took the view that because of a conflict of interest i.e. they are arguing against their own financial interest, that they would not act for the Agency in costs applications. In these circumstances, the Agency’s own solicitor has represented the Agency in court and has been opposed by the solicitor and counsel for the claimant – the solicitor for the Agency was not permitted to be present for part of the substantive hearing in Judge’s Chambers due to their status as a solicitor. It is the view of Senior Management in the Agency that this arrangement has not delivered value for money to the public purse.

2.41 It is not clear to Inspectors why in principle a body such as the Compensation Agency should not be able to negotiate its own fees with counsel irrespective of the fees determined for counsel representing the plaintiff.

#### **Forensic Science Northern Ireland (FSNI)**

2.42 The FSNI had gross expenditure of £11.7 million in 2009-10. Most of its costs are met by its customers with the PSNI accounting for the largest amount of its income (£9.75 million). The Agency had

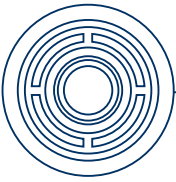
216 staff in 2009-10. There is no internal legal services department. Instead the Agency has stated that it relies on using the CSO, Northern Ireland Office (NIO) legal advisor (pre-devolution), DSO (post-devolution) and advice from the DoJ or the Central Procurement Directorate. Total expenditure on legal services for the three years amounted to £22,000.

2.43 During the pre-devolution period of this inspection, the FSNI used the CSO and the NIO legal advisor – the services of the latter were not charged as the Agency was part of the NIO. Work that the CSO did not have the capacity to undertake relating to the new accommodation project was procured and paid for by the NIO.

#### **Office of the Police Ombudsman for Northern Ireland (OPONI)**

2.44 The OPONI had net operating expenditure of £8.9 million in 2009-10. Expenditure on legal services over the three years was £405,000. The Police Ombudsman retains a full-time position for Director of Legal Services. The role includes the provision of advice across a broad range of areas including the relatively large number of judicial reviews. The Director of Legal Services is also responsible for the procurement and management of external legal expertise. In the interests of independence, the decision was taken not to use the CSO or the DSO for this expertise. Instead a separate tender for legal services was undertaken which resulted in the selection of a panel of lawyers for five separate categories of services – judicial reviews, Coroner’s Court inquests, employment law, legal advice and civil litigation. The amount of expenditure is between £50,000 and £60,000 per annum. In addition, the Police Ombudsman’s office has spent about £25,000 to £30,000 per annum on counsel fees in areas such as legal advice on cases and reports.





## **The Parole Commissioners for Northern Ireland**

- 2.45 The Parole Commissioners, led by a Chief Commissioner, makes decisions about the release of individual prisoners. The Commissioners are a court-like body with an emphasis on legal proceedings. All panel chairs for example have a legal background and defendants (parolees) are represented by solicitors and barristers, who operate within an adversarial environment. When a case is before the Parole Commissioners, the prisoner appears or is represented and is most often legally aided. In the period before devolution, the CSO acted on behalf of the Secretary of State. Expenditure data from the NIPS also shows expenditure, via the CSO, in relation to life sentence reviews.
- 2.46 The overall expenditure of the Parole Commissioners for 2009-10 was £893,000. The annual accounts of the organisation include costs associated with legal services, which amounted to £461,000 for the three years of this inspection. In addition to the panel requirements, the Parole Commissioners have required independent representation on three relatively complex judicial reviews within the last three years, one of which went to the House of Lords.

## CHAPTER 3:

# Buying and managing legal services



3.0 The focus of this chapter is on the procurement and management of legal services including work undertaken by the Crown Solicitor's Office (CSO) and Departmental Solicitor's Office (DSO). All of the justice organisations are purchasers of legal services. While the presence of internal legal departments does reduce the need to purchase external services, they invariably do not meet the full range and quantity of legal requirements.

### Legal services requirements

3.1 One of the areas of greatest need for justice organisations is the work associated with litigation. While litigation from users of the justice system (for example, arrested persons, victims, witnesses and prisoners) has continued at a relatively steady rate, the influx of litigation claims from current and former employees has mushroomed in recent years. This has been most evident in the case of the Police Service of Northern Ireland (PSNI) where over 15,000 claims were being dealt with in October 2010. These included over 5,000 hearing loss and 5,500 post-traumatic stress claims - the latter taking the form of collective class actions.

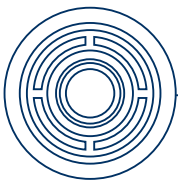
3.2 The impact of the increased workload and associated costs can be severe for organisations such as the PSNI with the immediate need to determine what legal services can realistically be undertaken in-house, and what needs to be externally procured. The PSNI legal services branch established a litigation unit in September

2009, which had 13.5 staff in October 2010 (3.5 employed on an agency basis).

3.3 However most of the work associated with hearing loss claims in particular has been outsourced to the CSO. Indeed, the CSO has told Inspectors that one third of all its work was devoted to PSNI requirements. The use of the CSO in these circumstances is clearly necessary and provides the PSNI with the added flexibility to adjust quickly to changing circumstances, such as fluctuations in the number of cases and alternative resolution methods. For example, the head of the branch has confirmed that the PSNI is undertaking more pre-proceedings work with the objective to reduce the number of cases going to court. This should also help to reduce the reliance on the CSO and the associated costs.

3.4 The method of dealing with hearing loss claims is in part determined by the approach taken by the claimant(s) and the resulting response of the CSO, which acts on instructions from the PSNI. A key consideration is to deal with the case in the most efficient way, which where appropriate, can result in an out of court settlement.

3.5 Dealing with litigation is an activity which is well suited to internal legal services departments in that much of the work is standard, often repetitive and best undertaken by organisations familiar with the circumstances of each case. It is for this reason that most internal legal services departments have a litigation section, and



call on external expertise when required. This type of expertise is needed for more complex cases - i.e. security implications; public interest immunity issues; or where the volume of claims received exceed the capacity of an internal legal services department. Both of these circumstances apply to the PSNI. Their legal services branch has stated that its medium to longer term intention is to undertake most litigation work in-house when normal patterns of claims return. This is a common sense approach as it would not be sustainable to have such a large internal legal services branch.

3.6 Apart from litigation, the other growth area for legal services is the requirement to meet the needs of public inquiries and Coroner's Court inquests, especially those with a legacy from the 'Troubles'. Many of these inquiries and inquests have had a direct interface with one or more of the justice organisations and specific resource concerns were raised by some of the justice organisations in meetings with Inspectors. The Northern Ireland Prison Service (NIPS) for example had legal costs of £2.6 million in relation to the Billy Wright Inquiry<sup>33</sup> over the three years covered by this inspection - the final cost will be significantly higher. The eventual costs of other inquiries such as Nelson<sup>34</sup>, Hamill<sup>35</sup> and Smithwick<sup>36</sup> will be substantial for some justice organisations.

3.7 The present and future growth of this sector is also demonstrated by the transfer of a legacy support unit into the PSNI legal services branch in June 2010. The unit had 30 staff (28 agency) in place in October 2010, which represented over 50% of staff numbers in the entire branch. This has allowed the branch to undertake a greater

amount of work prior to sending instructions to the CSO.

3.8 Judicial review applications have been another area of expansion with most organisations experiencing significant growth and related costs in recent years. The head of the NIPS stated that his organisation had dealt with hundreds of judicial reviews in recent years. This was confirmed by the DSO who stated that a typical week would bring the initiation of two new judicial review applications related to the Prison Service. A breakdown of legal services expenditure provided by the NIPS shows a cost of £834,000 for the three years, which included a doubling of expenditure in the most recent year. The Northern Ireland Courts and Tribunals Services (NICTS) stated that they had 45 judicial review applications in the period April 2008 to November 2011, though just nine related to the Department/Ministerial decisions. The rest were judicial reviews involving the judiciary. The Public Prosecution Service (PPS) stated that they had five judicial reviews for the three-year period which had direct costs of £13,000 to the organisation via the CSO. Judicial reviews can be complex, especially those dealing with a point of law, and with parties incurring increasing costs. Some judicial reviews proceed through the High Court, Court of Appeal and to the Supreme Court.

3.9 The more routine and predictable work of legal services relates to areas such as employment disputes, commercial contracts, accommodation and estate issues. While much of this can be undertaken in-house, the increasing complexity of the law is pushing justice organisations more frequently towards specialist advice via the

33 The Billy Wright Inquiry Report was published in September 2010.

34 The Rosemary Nelson Inquiry was announced by the Secretary of State for Northern Ireland, the Rt. Hon Paul Murphy MP on 16 November 2004. It published its final report on the 23 May 2011.

35 The Robert Hamill Inquiry completed its report in February 2011. The report will not be published until the conclusion of criminal legal proceedings.

36 The Smithwick Inquiry was established by the Irish Dail and Seanad in 2005 to inquire into suggestions that members of An Garda Síochána or other employees of the State colluded in the fatal shootings of two senior RUC officers.



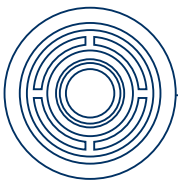


CSO/DSO or directly to external solicitors and barristers. The NICTS used an Office of Government Commerce framework contract to select firms of solicitors for its Private Finance Initiative project on Laganside courts complex.

- 3.10 It is evident that the criminal justice organisations, like other parts of the public sector, will continue to have legal services needs and that actual demand is likely to fluctuate depending on factors such as the numbers and scale of public inquiries, inquests in the Coroner's Courts and levels of litigation. The larger justice organisations will continue to have significant in-house legal departments, which need to maintain a core capacity as well as the flexibility to respond to specific developments. There will however be a continued need to procure specific services from within Government legal services and/or directly from solicitors and barristers.
- 3.11 The central provision of legal services has a long tradition in Government, often driven by historic and organisational change rather than the changing needs of public bodies. Those parts of the criminal justice system in Northern Ireland which had civil law cases to be dealt with and/or advice needed in relation to civil law matters, had these needs met primarily by the CSO since 1972. The needs of other Northern Ireland Government departments have been met by the DSO since the centralisation of legal services in 1980. The recent devolution of criminal justice means that for most justice organisations, the DSO is now the normal provider.
- 3.12 Whilst the CSO and the DSO are located within Government and take instructions from their client justice sector organisations, their lawyers do not have rights of audience in the higher courts. The split of responsibilities between solicitors and barristers mean that the CSO and DSO must rely, like other organisations, on counsel from the private sector

independent Bar to conduct proceedings in the higher courts and related advice. In the three-year period of this inspection, the CSO procured services to the value of £10 million from the private sector on behalf of their justice sector clients (Table 3). Approximately £6.3 million of the three-year disbursement costs were fees paid to counsel.

- 3.13 The CSO and DSO have operated a panel system for the use of counsel since 1993 with the last counsel being selected in 2003. There is a shared senior panel which has 14 senior counsel on it and then the 'A', 'B' and 'C' panels with counsel of differing years of call on them. All counsel are selected by CSO/DSO on the basis of their advocacy experience, advisory experience, government litigation experience, written communication skills/drafting ability and teamwork skills. In addition, a Senior Crown Counsel and Junior Crown Counsel for Northern Ireland have been appointed to undertake the most sensitive and wide implication type cases. Deployment is from all the panels, though selection by CSO/DSO depends on the type of case and the amount of experience that counsel needs for dealing with it.
- 3.14 The devolution of criminal justice in April 2010 means that the DSO is now the principal provider for the justice agencies as well as other parts of Government. The actual transition arrangements are more complex in that some organisations have continued to use the CSO for legacy work, which was initiated prior to devolution. Others such as the PSNI and to a lesser extent the PPS, have continued to use the CSO. The position of the PSNI, and on occasion the PPS, is different to other parts of the justice sector in that elements of their work have national security implications, involve work with the security services and involve public interest immunity considerations where Certificates are signed off by the Secretary of State for Northern Ireland. This may curtail



movement or transfer of PSNI legal services requirements. The operational independence of the Chief Constable also means that the PSNI have more freedom to choose their preferred provider of legal services.

- 3.15 The two largest purchasers of legal services had service level agreements in place with the CSO. In relation to the PSNI, there is a main service level agreement with the Chief Constable and a separate one for hearing loss cases. The NIPS also had a service level agreement with the CSO, though this is redundant with the transfer to the DSO. Both organisations recognise the value of having service level agreements in place and this is particularly relevant in light of the amount of work involved. The issue as to whether other organisations should develop service level agreements for the terms of its relationship with the DSO is a matter which should be determined by each organisation depending on the value of work involved and the level of service received. The essential point is that there should be some mechanism in place to monitor service delivery and help evaluate value for money. At present, the general view of the justice organisations is that service and value for money from the CSO and DSO is generally good although there has not been any detailed analysis of the options – for example through comparative benchmarking with similar services delivered in-house or direct procurement from the private sector.
- 3.16 The use of the CSO and the DSO, including benchmarking and value for money considerations, should be considered in the broader context of the central delivery of legal services within Government. The development and expansion of central legal services, as covered in Chapter 1, shows that the process was evolutionary rather than guided by the changing requirements of the client organisations (in this case the criminal justice sector). The view of

Inspectors is that the delivery of legal services has become fragmented though this does not necessarily mean that it does not represent value for money (in a cost and quality perspective). Indeed, the view of buyers in the main justice organisations was that the CSO has delivered a good service in recent years and that there has been good collaborative working arrangements between CSO staff and in-house lawyers.

- 3.17 The issue for the justice organisations is to better assess the value of this service and whether it continues to best meet their needs in the context of the alternative options (in-house, direct procurement from the private sector and/or alternative dispute resolution mechanisms). Alternative dispute resolution forms an important element of the ongoing ‘Access to Justice’ Review, being conducted for the Minister of Justice.<sup>37</sup> Inspectors recommend that **the criminal justice organisations should collectively review the use of legal services to include benchmarking and market testing of central government services, internal resources and/or direct provision from the private sector. They should also determine the scope for greater use of alternative dispute resolution approaches.**

#### Procurement from the private sector

- 3.18 Criminal and civil legal aid, and much of court prosecutions are all public services delivered by the private sector. A notable feature of Northern Ireland is the relatively high number of practitioners, often working as sole traders or in relatively small solicitors’ firms. Members of the Bar are private practitioners joined through membership of a professional representative organisation in the form of the Bar Council.
- 3.19 The procurement of solicitors has increasingly been undertaken via standard public procurement arrangements i.e.

<sup>37</sup> The Progress Report of the Access to Justice Review Northern Ireland referred to the importance of alternative dispute resolution and stated that its final report will include course of action that will develop alternative dispute resolution.



competitive publicly advertised tenders. Inspectors saw examples of this approach in the Office of the Police Ombudsman for Northern Ireland (OPONI) and the Prisoner Ombudsman, both of which choose panels of firms for selected bundles of work. Each of the firms included fees rates per hour for specific types of work.

3.20 The arrangements for the procurement of counsel are less structured and transparent in that the marketplace is less competitive, most noticeably on price, meaning that standard procurement arrangements have less relevance. The practice, within the CSO/DSO, and also in the PPS, is to establish a panel(s) of counsel, which are selected on the basis of competences and experience. The level of fees is not a determinant of that process. Such matters are dealt with on an individual case basis with assessments based loosely on guidance from County Court or High Court scale fees. In other words, the procurement process is based on the competences of the barrister rather than the cost of the service. Whilst the intention of the panel system may be to develop a level playing field for opportunities, the practice as reported to Inspectors is that there has been little uniformity in fee methodology.

3.21 This non-standard approach to public sector procurement is not unique to the justice system in that a similar approach applies to other Government requirements for legal services. This is a clear indication of the unique aspects of the market rather than the nature of the criminal justice system. Indeed, the Central Procurement Directorate in the Department of Finance and Personnel do not have a Framework Contract for legal services unlike the situation for other professional services such as consultancy and information technology. Whilst this is an issue for Government as a whole, there would appear to be considerable scope for a more state led approach to the procurement of legal services which takes account of its

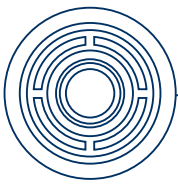
considerable purchasing power as a main buyer.

3.22 The benefits of a more co-ordinated and consistent public sector approach to legal fees would be substantial for the state sector as a whole, allowing greater access to justice within available resources, as well as ensuring the quality of the services delivered. Inspectors consider that the shared services model, which is being rolled-out across Government in areas such as human resources and finance, has potential to improve the procurement and management of legal services. It is recommended that **the Department of Justice, which is leading on the development of a shared services approach to service delivery in the justice system, should incorporate the procurement and management of legal services as a key component of this work. It should expect the advice of the Department of Finance and Personnel and the Central Procurement Directorate and aim to align activity with other parts of the devolved Government.**

### Management of legal services

3.23 Responsibility for the management of legal services, as with any other service, rests with the purchasing body. The standard approach to the better management of contracts is through a service level agreement which sets out the terms of the relationship. The service level agreement can also facilitate the collection of better performance information.

3.24 The largest purchasers (i.e. the PSNI and the NIPS) have service level agreements with the CSO, though the latter does not have any arrangement in place with the DSO as its current provider. No service level agreements exist between individual justice organisations and their suppliers of legal services. The separate arrangements between the PPS and private counsel are covered in detail in the next chapter.



## Value for money

- 3.25 Assessing value for money of any service is more problematic than that of goods, as services are less readily comparable, and measures such as quality include an element of subjectivity. There are nevertheless standards (for example, skills and experiences) as well as cost which are used across a broad range of professional services.
- 3.26 The evidence gathered in this inspection and supported by other reviews of legal services is that the cost of the service, predominantly criminal work, was seldom determined before the service was procured. Whilst there was loose adherence to scale fees, which also took account of scale fees used in the High Court or County Court for assessing costs where taxation (arbitration) was necessary, the reality was that they were by-passed on the basis of exceptionality and special circumstances – it is these cases which were unpredictable and accounted for a high proportion of overall expenditure – this has been the case for the PPS and the Legal Services Commission for criminal cases. The introduction of fixed fees for criminal legal aid, under the 2009 and 2011 Rules, does according to the NICTS, remove the exceptionality and special circumstances in the Magistrates' Court and the Crown Court.
- 3.27 The main difficulty with these uplifts and special fees has been the relative lack of transparency on cost with the actual level of fees determined in the main by the supplier rather than by agreement with the client. Many justice organisations have been unaware of the actual costs until completion of the work and this sometimes far exceeded the original estimate. This practice is generally considered unacceptable in other commercial environments where the supplier of a service would be expected to provide an hourly or daily rate, or an overall price for the service.
- 3.28 Inspectors accept that an element of flexibility is advantageous in that the progress of certain cases are not predictable. The problem for the justice system is that this flexibility has been systematically used to justify a widespread inflation in legal fees where uplifts and special cases became the norm rather than the exception. The result has been a significant increase in fees paid for criminal prosecution, legal aid and certain civil work (for example the Compensation Agency) over recent years. Accepting that criminal legal aid now has fixed fees and that some areas of civil work (for example public inquiries) have had an hourly rate fixed at the outset, **Inspectors recommend the cost of legal services should be determined at the commencement of an assignment.** It is envisaged by the PPS that any pre-committal advice should be paid to counsel on a known hourly rate.
- 3.29 The second element of value relates to an assessment of quality. It is difficult to judge the quality of service provided by a solicitor or a barrister even after it has been delivered or to compare the quality of service offered by different practitioners. Frequent buyers, such as the larger justice organisations, should be better informed, but there is a reluctance to assess the various sources of information available at least in any formal way. The issue of assessing the quality of prosecution counsel is covered in more detail in Chapter 4 and has relevance for other forms of legal services as well as other buyers such as the CSO and DSO. CJI is also proposing to undertake an inspection on the PPS including the quality of advocacy in 2011-12.



## CHAPTER 4:

# Prosecutions



4.0 The cost of criminal prosecutions can be broadly determined by the expenditure of the Public Prosecution Service (PPS), though the prosecution process is also augmented by the investigative work of the police and input of experts in forensic science and pathology. The PPS expenditure of £32.3 million in 2009-10 therefore does not represent the total input of the prosecution. The PPS spending has included the cost of 171 in-house lawyers (£7.54 million) and external counsel (£5 million). The cost of other legal services in relation to corporate and organisational issues was relatively small at about £78,000<sup>38</sup> over a three-year period.

### Baseline and follow-up reports

4.1 CJI examined the use of these resources in its baseline inspection of the PPS<sup>39</sup> and also in its follow-up inspection published in June 2009. While the conduct of cases in the Magistrates' Courts is mainly by in-house public prosecutors, the baseline report found undue reliance by the PPS on agents (external legal practitioners). The report stated that high costs associated with the use of agents in the Magistrates' Courts was linked to the manner in which the Bar required fees to be assessed from cases dealt with on a sessional basis.<sup>40</sup>

4.2 All cases in the Crown Court are handled by counsel instructed by the PPS. Inspectors expressed concern in the baseline report around the weaknesses in

the management of fees which meant that there was a substantial disparity between levels of expenditure in Northern Ireland and those paid elsewhere in the United Kingdom – possibly up to the order of 470% on certain types of cases. This was attributable to three main factors – exceptional expenditure on very large cases, higher level of fees paid in Northern Ireland compared with England and Wales, and a much higher proportion of cases in Northern Ireland where both prosecution and defence instructed two counsel. A fundamental re-appraisal of the arrangements for assessing and paying fees was recommended.

### Use of counsel in the Magistrates' Courts

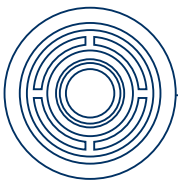
4.3 The expectation of Senior Management in the PPS has been that in-house prosecutors would handle the vast majority of cases in the Magistrates' Courts. This was initially delayed due to factors such as limited experience of new prosecutors and the resource implications of the division between the directing lawyers and those responsible for the presentation of cases in court.

4.4 The CJI follow-up report recorded increased deployment of PPS lawyers to courts in all regions (albeit with variations) especially in the period immediately preceding the inspection. In the period from September to November 2008, the monthly spend on counsel to represent the PPS in the

<sup>38</sup> This includes approximately £13,000 on judicial reviews over the three years.

<sup>39</sup> An inspection of the Public Prosecution Service of Northern Ireland, CJI, July 2007

<sup>40</sup> A sessional fee is paid when counsel is instructed to handle all cases in a list for a morning, afternoon or both.



Magistrates' Courts fell to £7,000 whereas the average monthly spend for the preceding financial year was £32,000.

- 4.5 However, the position has not been sustained. Outcome data for 2009-10 shows counsel fee expenditure of £294,000 (split £201,000 as to scale fees and £93,000 as to special fees) excluding departmental cases, i.e. those emanating from other government departments as opposed to the police. This is once again approaching the high levels found at the time of the baseline inspection. The situation has persisted into 2010-11 with payments to counsel at the Magistrates' Courts averaging £34,706 for each of the months from April to July. Senior Managers acknowledge the rise which they attribute in part to an increase of 12% in Magistrates' Courts caseload and also to the continuing and recently increased need to cover maternity leave among prosecutors.
- 4.6 Senior Managers have sought to address the situation by imposing tighter controls on the use of counsel agents with limits being set for each of the regions. A more extensive and thorough management information system was in place at the time of the inspection. Inspectors consider that it is important that **the PPS should continue to monitor the deployment of prosecutors to court and should compare the number of court sessions covered against staff available. There should be clear expectations as to the number of court sessions to be covered by each prosecutor on a weekly basis.**
- 4.7 A difficulty for the PPS on sessional fees resulted from a professional rule introduced by the Bar prohibiting the agreement of a composite fee when counsel was instructed to handle all cases at a particular sitting of a court. Instead, each case attracted an

individual fee, which included the many adjournments which routinely occur. Consequently, the fees payable for a day in court with a busy list made up of adjournments and small cases could amount to between £1,000 and £1,500, which is a disproportionate remuneration for a barrister likely to be of relatively limited experience. The going rate for this in England and Wales would be in the order of £250.

- 4.8 Inspectors are aware that the Bar Council did amend its Code of Conduct in December 2010 following concerns around lack of competition raised by the Office of Fair Trading.<sup>41</sup> The amendment to the Bar's Code of Conduct, had in the opinion of the Office of Fair Trading, encouraged price competition among barristers and improved choice for consumers. The Bar Council has informed Inspectors that sessional fees are precluded – though there does appear to be some ambiguity in light of the amendment to the Code as to whether barristers can accept cases on a sessional fee basis in the Magistrates' Court.
- 4.9 Prosecution Service Managers sought to control costs in the short term by requiring counsel to be used only for the purposes of specific cases, usually contested ones, rather than to cover courts on a sessional basis. This has contained costs but can also reduce flexibility and risks some deskilling of public prosecutors if they do not gain trial experience. The PPS has also utilised some 'locum prosecutors' at a fixed daily rate. In the longer term, it is the intention of the PPS to link guidance on fees in the Magistrates' Courts to the proposed introduction of a graduated fee scheme (modelled on one used by the Crown Prosecution Service in England and Wales) for cases in the Crown Court. This may include provision for sessional fees where appropriate. Inspectors believe that would

<sup>41</sup> Paragraph 32 Code made in response to the OFT states that 'no provision of this code or any previous code would prevent a barrister from charging a fee for any work undertaken by him on any basis or by any method he considers appropriate or from competing with other barristers in respect of the level of fee providing that such basis or method...?'

be the right long term approach although it does not obviate the need to strive for maximum efficiency in the deployment of the PPS's own prosecutors. In that context, **there is a need for a PPS review of the cost effectiveness of the distinction between the roles of directing lawyers and those who present cases in court.**

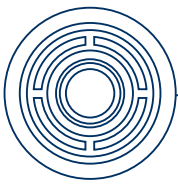
### Use of counsel in the Crown Courts

- 4.10 Outcome data for 2009-10 shows counsel fee expenditure in the Crown Court of £4.28 million (split £772,000 as to scale fees and £3.51 million as to special fees) excluding departmental cases. This represents a significant reduction on the previous two years - the exact amount attributable to the Crown Court and Magistrates' Courts was not available to Inspectors as this data was first collected by the PPS for 2009-10.
- 4.11 The PPS has stated that much of the reduction in fees over the three-year period was attributable to 'one-off' non-recurring blockbuster cases such as those arising from the Northern Bank robbery and the Omagh bombing. In addition, there had been some changes to the procedures for accruing fee expenditure and this had affected the figures. Nevertheless an underlying reduction has occurred due to a more robust approach to the control of expenditure through restricting the right for authorising the use of two counsel and also making Assistant Directors responsible for authorising and negotiating special fees. It has not been possible to quantify the savings made from these measures as distinct from the other factors mentioned.
- 4.12 The overall fee expenditure of almost £5.0 million in 2009-10 compares with the criminal legal aid expenditure on counsel of £8.5 million in standard cases together with around £6 million on Very High Cost Cases (VHCCs) (based on the five-year average).

### Steps taken to control expenditure in Crown Court cases

- 4.13 Although the PPS is seeking to change the structure of its arrangements for remunerating counsel, it has continued to operate the same system of scale fees and special fees which pertained at the time of the CJI baseline inspection. Scale fees provide fixed rates of remuneration depending on the hearing type and court venue. The rates are considered to be relatively low by the legal profession and this has resulted in counsel claiming to be paid on the basis of 'special fees' in a high proportion of cases. Such claims have been made on the basis that counsel did not accept the level of scale fees and to the fact that they are seldom refused the uplift to special fees.
- 4.14 Other than in cases where a Queen's Counsel (i.e. Senior Counsel) is instructed, there is only limited guidance (promulgated by the Senior Assistant Director in April 2008) for determining whether a case should be remunerated as 'special' and the amount to be paid. There are some very broad links to the rates paid for defence work under the 2005 Legal Aid regulations<sup>42</sup>. While the provision of guidance has been welcome, it appears to have made little impact on the level of special fees.
- 4.15 The PPS estimate that the level of fees paid to counsel have been substantially higher than that paid to counsel in England and Wales, as the closest comparator criminal justice system. Two studies have provided clarity in this regard. The first comparison was undertaken as part of the original CJI baseline inspection which included an audit of a random sample of 42 Magistrates' Courts and Crown Court cases in which counsel had been instructed. It found that simple scale fees for specific hearing types such as mentions and arraignments were approximately 50% lower than those for similar services in England and Wales.

<sup>42</sup> Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (The 2005 Rules).



However, for hearings or cases attracting special or non-scale fees, the costs were on average around two and a half times higher.<sup>43</sup>

- 4.16 A second review was conducted by the PPS itself in conjunction with the Crown Prosecution Service for England and Wales. This was undertaken as part of a project to determine the feasibility of introducing the more structured graduated fee scheme in Northern Ireland. It involved the analysis of a sample of 287 PPS cases against the Graduated Fee Scheme (prosecution) operated by the Crown Prosecution Service under the 2005 Legal Aid scheme. The PPS carried out an additional exercise in relation to a smaller sample of cases completed in early 2009.
- 4.17 The main findings were broadly similar to that reported in the earlier CJI report i.e. that the overall level of Crown Court fees was more than double that in England and Wales and that some scale fees were lower. The results of this exercise formed the basis of the PPS response to the NICTS consultation on Legal Aid for Crown Court proceedings in late 2010.
- 4.18 The PPS concluded, on the advice of its Project Board, that a Graduated Fee Scheme along the lines of the Crown Prosecution Service would be appropriate. Such schemes provide for the calculation of fees on an individual case basis through a model which takes account of the nature of the charges, number of defendants, volume of evidence to be considered and the actual length of trial. It also avoids reliance on discretion. Such a scheme is attractive because it provides arrangements which are transparent, predictable and offer value for money for the public purse as well as fair remuneration to the Bar. The PPS consulted the Bar and, although its support was not forthcoming, planned to implement the scheme from 1 August 2010. In the event,

the NICTS published a consultation paper on the *'Remuneration of Defence Representation in the Crown Court'* in September 2010. The PPS were aware that this would be occurring and also that its proposals could have significant impact because of the relativities between prosecution and defence fees. It therefore postponed implementation. Inspectors understand the reasoning of the PPS (having access to the minutes and working papers of the Project Board) but consider that immediate changes are necessary as the scheme which the PPS continues to operate is no longer satisfactory.

- 4.19 An additional and serious weakness of the present arrangements is the frequent lack of adequate information to inform a fair assessment of fees. Normal business or commercial practice is for charges to be agreed in advance, or for work to be undertaken on the basis of a clear agreement as to how those charges will be calculated on completion – usually the amount of time taken and an agreed rate. A recurring theme in our discussions with Senior Managers across the criminal justice sector was the difficulty experienced in obtaining from counsel, information about the amount of work undertaken. Attempts dating back as far as 2002 to require that all *"claims for non-scale fees... must be accompanied by a copy of the form recording the work done"* have for the most part been unsuccessful.
- 4.20 Whilst the more mechanical nature of a Graduated Fee Scheme would render such a record unnecessary for most cases, there is likely to remain a small group of cases (for example VHCC) expected to last over 40 days where payment will be on an ex post facto basis determined by a scale of rates and time actually taken. Proper time recording is essential in such cases. It is recommended that **the PPS should**

<sup>43</sup> Any comparison must take account of differences such as the varying forms of legal proceedings, the absence of full work records on some files and the relatively small sample used in that inspection.



**strengthen and fully enforce its requirement for records of work to accompany all claims for fees to be paid on a non-scale or Very High Cost Case basis.**

- 4.21 A second weakness is that the same case may attract both scale and special fees. Where the case for special fees is accepted at the outset, the interim steps (for example short hearings for mention) will still be paid on a scale fee basis with those elements being paid as the case progresses. A case which starts life as a scale fee case may change if counsel decides that the remuneration would be insufficient in which case payments are likely to be put on hold until assessment. It used to be the case that PPS systems could not then identify the totality of costs applicable to an individual case. However, PPS finance systems are now substantially stronger but it can still be difficult to identify all the costs of an individual case. The introduction of graduated fees would help in this regard.
- 4.22 It is the view of Inspectors that a strengthening of current arrangements is essential so that the PPS may have a better ability to understand and control committed, current and future expenditure on counsel fees. These new arrangements need to be based on procuring best value for money on fees and have the ability to compare the costs of external fees against the deployment of the Prosecution Service's own staff in the Crown Court.

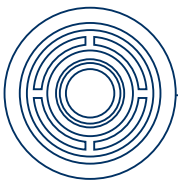
### **Use of two counsel**

- 4.23 The CJI baseline report on the PPS was critical of the Service's inconsistent approach to circumstances where both senior and junior counsel, rather than junior counsel alone were instructed. A number of cases were identified where leading counsel had been instructed unnecessarily.

- 4.24 Guidance issued by the Senior Assistant Director in January 2008 established a requirement for the written consent of the relevant Regional Prosecutor or Assistant Director prior to instruction of Senior Counsel in all except three categories of case - homicide/attempted murder; rape/attempted rape; and fatal road traffic accidents. Even then, the use of Senior Counsel should not be automatic and each case should be considered on its own merits. The justifications are complex or novel legal issues or factual complexity, seriousness or significant public interest, in which the use of a Senior Counsel would bring added value.
- 4.25 The PPS instructed senior counsel (or occasionally two junior counsel) in approximately 11% of its indictable cases in the Crown Court. This contrasts with 5% for the Crown Prosecution Service in England and Wales.<sup>44</sup> However, the percentage is significantly less than with regard to the defence (publicly funded legal aid cases). The NICTS advises that two counsel are authorised (either by a District Judge on committal or by the Crown Court) in about 33% of Crown Court cases (including over 50% of indictable cases<sup>45</sup>).
- 4.26 The PPS is confident that its new approach has brought significant (albeit unquantifiable) savings without any compromise to the effectiveness of the prosecution process. It does recognise however the importance of two issues. First, it remains the case that, despite the new approach, the PPS instructs senior counsel in more cases than its counterparts in England and Wales; and secondly, the disparity in the use of Senior Counsel between prosecution and defence can easily create the perception on the part of the public (and, the PPS fear, also on the part of juries) that some prosecutions are not being treated as seriously as they should be. Victims in particular may feel that the

<sup>44</sup> The figure of 5% was used by the NICTS in its evidence to the Committee for Justice, 20 May 2010.

<sup>45</sup> A written answer to an Assembly Question in March 2011 revealed that two counsel were instructed in around 51% of Crown Court cases involving indictable offences in the period 1 August 2010 to 31 January 2011.



interests of the defendant(s) are receiving more consideration than their own. The perception is exacerbated in those situations where a case is prosecuted by a single junior counsel and has several defendants each represented by two counsel. One PPS Business Manager described the scenario when a junior counsel prosecuted a multi-defendant wounding case with each accused represented by two counsel, some of whom were also accompanied by pupil (trainee) barristers.

- 4.27 The two issues are clearly linked as the second factor may on occasion sway the decision in favour of two counsel when, looked at objectively, nothing is likely to be added from a professional perspective. This issue is covered in more detail in the section dealing with the interface between prosecutions and legally aided defence work.
- 4.28 A strength of the arrangements in place in the PPS at the time of this inspection was that decisions were in the hands of a small number of experienced and senior lawyers who had access to, and knowledge of the individual difficulties and/or sensitivities of each case where the question of two counsel was been considered. This has facilitated a more consistent approach. However, Inspectors consider that there is merit in using the rather fuller guidance used across the Crown Prosecution Service in England and Wales which articulates the appropriate considerations in a clear and pragmatic manner including identifying the merits and disadvantages of the different permutations of legal representation which are available. It is accompanied by a succinct decision chart. It is recommended that **the PPS should consider the guidance on the use of two counsel as used by the Crown Prosecution Service in England and Wales to determine what aspects might be adopted.**

- 4.29 It would be expected that experienced junior counsel should be able to prosecute the vast majority of cases before the Crown Court in a fully effective manner. CJI has received no evidence to suggest that members of the Bar of Northern Ireland are less competent than their counterparts elsewhere in the UK.

### Interface with publicly funded legal aid

- 4.30 The PPS is responsible for the conduct of all prosecutions in Northern Ireland except for some specialist frauds investigated and prosecuted by the Serious Fraud Office. All cases are prepared in-house by PPS staff with the prosecution of most Magistrates' Court cases undertaken by PPS staff, while all Crown Court cases are prosecuted by external counsel.
- 4.31 The PPS decides whether one or two counsel should be instructed and maintains panels (now regional) from which counsel is assigned. The PPS is responsible for the fee scales (where applicable) and the agreement/assessment of non-scale fees or those payable in VHCC - those expected to last over 40 days. The PPS is also responsible for payment of the fees. They are charged to its own budget and the PPS must operate within that budget.
- 4.32 The vesting of such full responsibility in the PPS also gives rise to the obligation to ensure that expenditure accords fully with the principles of public finance including securing value for money. As stated earlier in this chapter, there is further scope to improve value for money in this respect. However, Inspectors recognise that the PPS is by no means the only player in the market for legal services and its ability to secure better arrangements is influenced by the general legal market and more specifically, that relating to publicly funded work.



4.33 Responsibility for criminal (and civil) legal aid arrangements rested with the Lord Chancellor prior to devolution although it was handled on behalf of his Department by the Northern Ireland Courts Service as it then was. It is envisaged that the policy responsibility for legal aid will eventually rest with the Department of Justice. Responsibility for criminal legal aid remains with the NICTS, which is an executive agency of the Department of Justice, while responsibility for civil legal aid policy rests with the Legal Services Commission. It is unusual to have such policy responsibility vested in an executive agency. Inspectors understand that this issue forms part of the ongoing review into *Access to Justice*, which was commissioned by the Minister of Justice and is due for publication in summer 2011.

4.34 The NICTS therefore develops policy and sets the level of fees for solicitors who handle and prepare cases, and the fees of counsel that they instruct (see Appendix 2). However, decisions about eligibility and the merits of applications for criminal legal aid in individual cases are dealt with by Judges in the courts, including the extent of representation. The Legal Services Commission for Northern Ireland is responsible for administering the criminal scheme and makes payments on the basis of claims received. Its role in relation to criminal legal aid was therefore likened to that of paying agent by its Senior Management. Inspectors understand that the ongoing review by the Northern Ireland Audit Office, which is due to report in summer 2011, will deal with this issue in some detail.

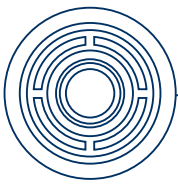
4.35 Interviewees in this inspection attributed the relatively high level of legal fees to the sympathetic treatment of legal aid during *'the Troubles'* and the strong influence of the legal professions themselves under the previous (1992) arrangements by the Appropriate Authority which comprised representatives of the Bar, the Law Society

and lay representatives whose ability to challenge was relatively limited. Despite being blamed for what are generally acknowledged to be high fees, the 2005 legal aid rules in effect brought about a significant reduction in standard fees. Even so, the consultation paper published by the NICTS points out that a comparison of remuneration levels indicated that spending per capita on legal aid generally in Northern Ireland is 20% higher than the rest of the United Kingdom, and standard fees paid in Northern Ireland under the 2005 rules could be as much as 50% higher than the corresponding fees paid for a similar case under the graduated fee scheme system in England and Wales. In terms of ensuring a fair trial, the Northern Ireland scheme is more generous than any other in Europe.<sup>46</sup>

4.36 A number of specific problems were raised by the Legal Services Commission in discussion with Inspectors. The first issue concerned the concept of *'exceptionality'*, which enabled counsel to argue that a case had specific characteristics which made it exceptional and justified an uplift in standard fees. The fact that in excess of 90% of expenditure had become non-standard suggests that the test of exceptionality had been unduly diluted. In this context, there was a striking similarity with the difficulties surrounding *'special fees'* for prosecution work. The current position of the NICTS and the Legal Services Commission is that *'exceptionality'* is no longer a problem (i.e. with the introduction of 2005 and 2009 rules).

4.37 The second issue was that the classification of cases estimated to exceed 25 days as VHCC triggered a higher level of payments, irrespective of whether they reached that threshold. The working assumption was that there would be about five VHCCs per year, whereas there have been approximately 55. In reality many estimates overstated the likely length. The Legal Services Commission explained that it was in reality

<sup>46</sup> Paragraph 6.2 of the NICTS impact assessment.



difficult to challenge such estimates, usually emanating from senior counsel who must be accepted as having a working knowledge of the relevant case, even though their own experience suggested that the vast majority of estimates would have been on the high side. The evidence is that this practice of inflated estimates has substantially increased costs.<sup>47</sup>

4.38 Another significant factor in the high cost of criminal legal aid was the proportion of cases in which two counsel are instructed – over 50% of indictable cases. Decisions on the instruction of two counsel for the defence in a criminal case are taken on the basis of authorisation, either by a District Judge on committal or by the Crown Court, where the interests of justice or the right to a fair trial requires it.

4.39 Inspectors have already recommended that the PPS adopt for its purposes, guidance issued within the Crown Prosecution Service. A similar approach from the defence has merit. Inspectors have noted that regulations are being introduced to tighten the criteria and procedures for assigning two counsel in Crown Court cases.<sup>48</sup>

4.40 An additional similarity between the arrangements for prosecution and defence work was the apparent lack of information forthcoming from practitioners for work undertaken on the basis for fees claimed. Once again, the principles of public accounting require that claims be properly evidenced, which requires a move away from the use of brief fees - still more prevalent in civil legal aid cases. Inspectors understand that Crown Court legal aid cases are no longer remunerated based on a brief fee and that barristers are required to maintain a contemporaneous record of their costs and use it to provide a detailed breakdown of their bill.

4.41 The data received by CJI demonstrates that prosecution costs in Northern Ireland are higher than prosecution costs elsewhere in the United Kingdom. However the gap is not as great as that in relation to legal aid in Northern Ireland compared to England and Wales which the NICTS estimates at 50%. This is borne out by the results of an exercise carried out by the PPS which compared two samples of cases to ascertain the relative costs of the cases in those samples under the:

- Graduated Fee Scheme the PPS proposes to adopt (currently on hold);
- fees under the existing legal aid rules; and
- fees which would apply under the revised rules proposed in the consultation paper.

4.42 The PPS assessment shows that prosecution counsel would be paid between 55% and 128% more if the PPS adopted a Graduated Fee Scheme which was based on the level of fees provided for in the revised legal aid rules - these are the rules advocated by the NICTS in its consultation document. The percentage difference would be even higher if the level of fees established by the existing legal aid rules (known as the '2005 rules') were made the basis of a PPS Graduated Fee Scheme. If legal aid was to remain at its present level, the difference would be between 95% and 185%. The disparity between the lower and higher percentages was due to examination of different cases at different times. Data provided to Inspectors by the PPS shows that the defence were paid 29% more than the prosecution across a sample of cases. The equivalent gap in England and Wales was 19%, though the Court Service in England and Wales aim to reduce this gap to 5% over a three-year period. This level of disparity puts the prosecution at a significant disadvantage when seeking to instruct

47 The use of 'exceptionality' and 'VHCCs' has been addressed in the new 2011 legal aid rules which abolished VHCCs and replaced it with a standard fee system on the length of the trial.

48 The Minister, in a written response to an Assembly Question (18 March 2011), stated that he intended 'to introduce new criteria to determine when two counsel can be instructed in criminal cases in the Crown Court'.



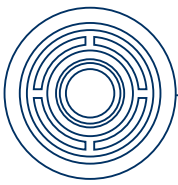
counsel – a problem that is more concerning for Northern Ireland as the already large gap is considered (by the PPS) to have widened over the past two years.

- 4.43 These findings accord strongly with the reality encountered by the PPS who not uncommonly are challenged by prosecuting counsel who have subsequently learned that their opposing counsel has received substantially higher remuneration for the same case. The dissatisfaction is greater if the prosecution has been conducted by a single junior counsel and the other side has had two counsel each remunerated more highly. Such scenarios are not infrequent.
- 4.44 There has been some co-operation between the PPS and the NICTS in that the latter were invited to (and did) attend the PPS Project Board developing the proposals for graduated fees for prosecutors. However, the degree of continuing liaison has not been sufficient to avoid an unsatisfactory situation developing. This difference of opinion was clearly demonstrated in the PPS submission to the NICTS legal aid proposals.
- 4.45 Inspectors can see no reason why the arrangements for assessing and paying two types of publicly funded criminal work should in the medium term remain so substantially different - especially in their cost. Nor can there be any justification at the present time for a level of costs so different to that elsewhere in the United Kingdom. Neither the cost of living nor the overheads of professional practice appear to be significantly different between Northern Ireland and England and Wales. The Bar Council have submitted to the Committee for Justice that the amount of evidence adduced by the PPS is less, and therefore this would influence graduated fees adversely, but Inspectors do not accept that argument. However, the Northern Ireland administration should not be overly bound by what happens elsewhere even though it is an important factor and funding comes

ultimately from the same public purse.

- 4.46 The NICTS acknowledges that the best prospect of controlling the cost of publicly funded criminal work is through a shared approach with the PPS. However, its focus in 2010 has been on the need to control its own spiralling legal aid budget - which rose to £102 million in 2010-11. Under the devolution package announced by the Prime Minister in October 2009, the resource budget for the Legal Services Commission was set at £85 million until 2012-13, after which the budget will reduce to £79 million from 2013-14. Subsequently, this has been reduced to £75 million through the Assembly budgetary process. In addition, further access to the contingency fund of up to £39 million was made available to meet legal aid and other court pressures. The NICTS informed CJI in May 2011 that just £2.8 million remained in the contingency fund after allocations to the Legal Services Commission - £17 million for 2009-10 and £19.2 million allocated in 2010-11.
- 4.47 The NICTS therefore needed to find an urgent solution. Options considered included the introduction of a system of graduated fees similar to that in England and Wales and comparable to the one proposed by the PPS. However, the introduction of a Graduated Fee Scheme was strongly resisted by the Bar and the Law Society and it did not address the main driver of increasing costs – the Very High Cost Cases. In addition, it was believed that savings from the Graduated Fee Scheme could not be achieved as quickly as was necessary to bring the legal aid budget back to what had been agreed.
- 4.48 The new rules introduced in April 2011 made a reduction of 20% to standard fees payable to counsel in the Crown Court together with the removal of all elements associated with the difficulties of the case i.e. the basis of claims for 'exceptional fees'. There would no longer be separate arrangements for Very High Cost Cases.





To replace these, the standard fees have been extended to cover all trials lasting beyond 25 days (which is the present time limit) and up to 80 days.


- 4.49 This is a pragmatic course requiring the Bar to accept a significant reduction. But it does leave unacceptable disparities with the prosecution in the short term. Inspectors consider that the present situation is not sustainable. Setting aside the extent of disparity with England and Wales, the disparity between prosecution and defence is unjustified and inequitable. It is essential that the PPS and the NICTS (in due course, the Department of Justice) work together to develop systems with maximum commonality both as to structures and the level of fees. This might be based on a Graduated Fee Scheme but the mechanics are not as important as the requirements of fairness and affordability. It may be that in the short term, the price of gaining that commonality is of some compromise which inhibits parity on the part of the PPS with England and Wales, but is based on defence fees significantly lower than at present. It is recommended that **the PPS and the NICTS should agree a common strategy and timetable for achieving a convergence between the level of prosecution and legal aid fees.**

#### **Selection of counsel: the panel system**

- 4.50 The standard approach to the procurement of barristers has been through the creation of a panel list which is then used to select individuals for specific cases – a similar panel approach is used by the CSO/DSO for most legal services procurement within Government. The panel approach is broadly similar to the structure of framework contracts, which are often used in the procurement of other professional services.
- 4.51 The current PPS panel has been operational since April 2009. It was initiated after an advertisement and application process where those wishing to be considered were required to set out their competences.<sup>49</sup> This brought increased transparency and opened up prosecution work to a wider range of counsel. The competition was based on written submissions supported by references. It is generally perceived, within the PPS and the legal professions that many barristers have not been attracted to this work. This may be related to the reticence of some to undertake prosecution work for personal or professional reasons. It is also very likely to be related to the more attractive remuneration of defence work. A number of those appointed lacked any experience of criminal work whilst some had previously undertaken only defence work.
- 4.52 The junior PPS panel includes 46 barristers (inclusive of three nominated counsel). It is the view of Inspectors that this number is about right on the basis of a Crown Court caseload of approximately 1,700 per year; this offers on average just less than 37 cases to each member. Actual distribution is not and could not be numerically that even however. The senior panel includes 18 barristers (inclusive of three nominated counsel).
- 4.53 Further consideration is needed to identify the optimum method of managing the work between panel members. While there is no stated expectation that membership of the panel leads to a specific amount of prosecution work, there is a view that the work will be shared amongst members of the panel. This has been reinforced by the division of the junior panel into regional groups with members of each regional panel specialising in prosecution work in that region. The position is complicated however by a lack of clarity around the criteria for appointment of ‘*nominated juniors*’ and their role. They have a special status justified by ‘*wide experience*’ and form part of the Belfast panel whilst also being the main recipients

<sup>49</sup> The ‘Junior Panel’ attracted 64 applications while the ‘Senior Panel’ had 19 applications.





of work emanating from the Fraud and Central Departments of PPS. They are also required to undergo a higher level of security vetting. Guidance requires that they be considered for heavy cases arising in all regional offices. There is the potential to create an imbalance of work unless the position is carefully monitored. There should also be a clear mechanism for avoiding any possible conflicts of interest.

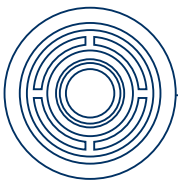
- 4.54 The division of the panel into regional groups occurred in early 2010 to align legal services with the geographical coverage of cases. While Senior Managers have felt that this had been beneficial, there was a belief at operational level that the size of the ‘mini-panels’ (about eight to nine) did not provide the full range of skills and experience necessary to ensure that counsel assigned was the most suitable for the particular case. Where geographical factors limited the flexibility for counsel to work between court centres, the limitations were more acute. Some panels would also benefit from more female prosecutors while Belfast in particular was thought to require some more experienced prosecutors because of the mix of cases there.

### Allocation of work

- 4.55 There appears to be different approaches to the distribution of work within the PPS. Fresh guidance was promulgated in September 2010, which emphasised the importance of a strict rotation approach subject to the needs of ensuring that, where a specialism is required, appropriate counsel is assigned with the counsel passed over receiving the next brief. Others suggest that more judgement is exercised on a ‘horses for courses’ basis by exercising the override provision. The PPS maintains quite detailed records as to the assignment of work, what is accepted or declined by individual counsel and the value of the work. It is clear that there are variations and some counsel who have received less work have

in the past queried that fact. Such recording is relatively new and Inspectors think there is more scope for analysing the distribution to ensure that such fluctuations are for good cause as well as for identifying any mis-matches between panel and workload.

- 4.56 The panel was established on the basis that it would be reviewed after three years. No formal procedure has been specified and it is important that this be clarified before the review point is reached. The process needs to avoid undue bureaucracy whilst ensuring that those whose performance has been unsatisfactory can be replaced by stronger practitioners.
- 4.57 Inspectors did however receive some significant criticisms of its present panel arrangements – some relating to the experience of those selected; others to the effects of the division of the panel into regions; and the approach to assigning counsel to individual cases. At the same time, Inspectors welcome the steps taken towards a more broadly based prosecution panel and acknowledge that in this respect the PPS has achieved a more structured and transparent system than others in the criminal justice system. Managers need to build on this whilst addressing the concerns mentioned above. Inspectors believe that there is also scope to widen access opportunities to those currently not members of the Northern Ireland Bar and also to solicitor advocates - this should help to open up competition within the marketplace whilst drawing on additional expertise.
- 4.58 It is recommended that **the PPS should review the arrangements relating to its panel list of counsel prior to the review of its composition. This should include widening access to include barristers currently not members of the Northern Ireland Bar and to solicitor advocates.**




## Quality of work

- 4.59 The extent of quality monitoring and management of counsel was limited in that the PPS is reliant on its court-based staff to record any concerns. Few of these staff have specific legal training and many will be relatively inexperienced in court business. Reports are therefore likely to be ad hoc and limited to non-legal issues (for example timeliness and presentation skills of counsel). Nevertheless there is an acknowledgement from Senior Managers that there is a 'range of performance' and Inspectors are aware of some specific concerns that were raised. There are no clear channels for following these up with appropriate feedback or other action if applicable. Inspectors also observed that there needs to be procedures for the fair removal of unsatisfactory performers without awaiting the full review of the list.
- 4.60 These findings are similar to those found in an earlier CJI baseline inspection of the PPS. It found that *'all the counsel seen were competent, although we considered that the performance of some could be better. The need for a higher overall level of advocacy was confirmed by the judiciary and other practitioners. There would be benefit in increasing the pool of counsel available to do prosecution work, and we welcome the PPS initiative in this aspect.'*
- 4.61 This inspection has not involved the quite extensive observations which would be necessary to form a definitive and overall view of the quality of Crown Court advocacy. The evidence we have gathered suggests that not all those on the panel necessarily represent the best available, and some senior counsel who used to prosecute did not apply for this panel. To the extent that this may be the case, it is not possible to judge whether that reflects imperfection in the selection process, the unfavourable level of fees paid to prosecutors compared with the defence, or some other cause.
- 4.62 Some work has been done on assessing the quality of counsel in other jurisdictions. For example, Her Majesty's Crown Prosecution Service Inspectorate examined the quality of advocacy in courts in England and Wales, though the resources required were extensive and the Inspectorate's own resources had to be supplemented by the use of associate Inspectors. The Legal Service Commission in England and Wales was also seeking to develop a methodology for assessing the quality of defence advocates. The Crown Prosecution Service in England and Wales has also utilised its own staff to gather information on prosecution counsel in court, though this tends to be focused on issues such as timeliness, handling of relations with victims and witnesses and communication skills, rather than case preparation and the basis of the legal argument. Some specialist assessors have also been engaged for the latter. Inspectors recommend that **the PPS should implement a quality assurance scheme on advocacy skills, taking into account developments in England and Wales.** Inspectors understand that the PPS recognise the value of a quality assurance scheme on advocacy skills and intend to introduce an assessment mechanism during 2011-12.

## Challenges faced by the Public Prosecution Service

- 4.63 The PPS has made considerable progress in responding to previous criticisms made in the CJI baseline and follow-up reports. The financial systems for managing expenditure are much stronger with steps taken towards an improved fee structure, better arrangements for selecting counsel and the unnecessary use of two counsel has reduced. There is much to be done before Senior Managers can be satisfied that the arrangements for determining the number and mix of the prosecution team and for remunerating them consistently deliver best value. The common thread linking the issues is the strong influence of external



factors over which they have only limited influence. These include the better remuneration paid under legal aid, the extent to which the defence are authorised to engage two counsel and the relatively high level of legal fees in Northern Ireland generally. This was the subject of comment from several of those consulted by Inspectors.

4.64 The most direct way of influencing a market is through the introduction of competition. The PPS is at present exclusively dependent on the Bar for the presentation of its cases in the Crown Court. There is scope for the development of alternatives. The most obvious is through the deployment of the PPS's own staff to undertake Crown Court work after appropriate training and development. The present situation whereby public prosecutors rely on external lawyers for the prosecution of their cases is a most unusual one scarcely found anywhere else in the world. Members of the Procurator Fiscal Service in Scotland routinely conduct cases before juries and have done so for many years; the Crown Prosecution Service in England and Wales has moved strongly in that direction in the last decade. The recently retired Director of Public Prosecutions for Northern Ireland, Sir Alasdair Fraser committed the PPS to such a course in April 2009 albeit without any commitment as to a timescale.<sup>50</sup> Inspectors endorse that approach and are confident that the PPS would be astute to the need for an incremental approach.

4.65 The model used in Scotland is distinctively different in that a considerable amount of court-based prosecutions are undertaken directly by the staff of the Procurators Fiscal and also by Advocate Deputes. Advocate Deputes are not civil servants or employees of the Scottish Government legal services. They are engaged as Deputes to the Lord Advocate to appear in the High Court,

Appeals Court and Supreme Court on a standard commitment of 220 working days per calendar year for a period of three years in the first instance. Pro-rata payments are made for days worked in excess of the standard 220-day commitment. They must not engage in criminal defence work during their time as Advocate Depute. The total cost of Advocate Deputes for the calendar year 2009-10 was set at £3,251,819 with an average annual remuneration of £104,897.

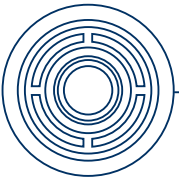
4.66 **The PPS should review the delivery of its court prosecution work, to include the development of in-house advocates and the scope to introduce an Advocate Depute role as used in Scotland i.e. counsel engaged on a full-time basis for a set period of time to conduct prosecutions.**

4.67 The skills and experience required by trial advocates cannot be acquired through formal training alone and must be honed over a significant period. The medium to long term objective for the PPS should be a 'mixed economy' with in-house prosecutors and the Bar each undertaking a share of the work. Benchmarking and comparison of both costs and quality, based on reliable management information, should inform decisions as to the balance between the two.

4.68 Other steps to influence the PPS's operating environment are dependent on collaboration with other criminal justice agencies, most specifically the NICTS which currently has policy responsibility for criminal legal aid. A previous section of this chapter describes the relationships between legal aid arrangements and prosecution costs. The disparities between prosecution and defence in terms of the level of fees and the extent to which representation is by two counsel needs to be addressed in close liaison with the NICTS.

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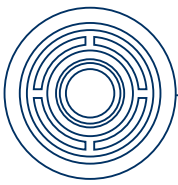
<sup>50</sup> The PPS has informed Inspectors that it has appointed three Higher Court Advocates in March 2011. This is part of a 12-month pilot project to test the concept



Section



# Appendices



# Appendix 1: Terms of Reference

## Thematic inspection of the use of Legal Services by the Criminal Justice System

### Scope

Criminal Justice Inspection Northern Ireland (CJI) is proposing to undertake a thematic inspection of the use of professional legal services by the criminal justice organisations in Northern Ireland. This will include the direct costs associated with the investigation and prosecution of alleged offences as well as the cost of legal services to support the business of the relevant organisations in areas such as human resources, IT and telecommunications, property, major projects and general commercial matters. It will look at the balance between different sources of expertise (in-house, other public sector providers and the external private sector). It will not review criminal legal aid fees, although these will form part of the information gathering since the processes and the level of fees have an important bearing on the environment in which the criminal justice organisations operate.

### Context

The ongoing and proposed reductions in public sector spending is placing an increasing focus on value for money in all external spending, most particularly professional services such as management consultancy and legal services. An inspection on the use of external consultants by the criminal justice system was published by CJI in 2009.

The procurement of legal services can be separated into three distinctive stages - identification of needs, sourcing options including tendering, selection, management of contracts for external supply, and realisation of benefits and outcomes. There are three options available to justice organisations - the use of internal legal departments/lawyers, the procurement of more specialist advice from within the public sector via the Crown Solicitor's Office and/or Departmental Solicitor's Office, and the purchase of legal services from the private sector. Market testing may be a means of comparing the merits of internal and external sourcing.

The inspection will seek to collate by category the different types of sourcing and commissioning on legal services. As an example, the Crown Solicitor's Office (CSO) has a panel of private counsel for the provision of legal services to its clients. The Public Prosecution Service (PPS) has a separate panel of counsel for specialist legal advice and prosecution of cases, primarily in the Crown Court. It uses its own legal staff for the vast majority of work in the Magistrates' Courts.

The importance of being able to monitor and assess the quality of legal services, including value for money, is a critical issue for this inspection and will be examined in the context of recent advocacy standards established by the PPS and is likely to involve a review of sample cases within the PPS and other justice organisations. Comparative analysis (including comparators in other jurisdictions), where feasible and relevant will be used by Inspectors.





## Aims of the inspection

The aims of the inspection are to:

- assess the manner in which any need for legal services are identified and resourced;
- determine the breakdown of spending on professional legal services by the criminal justice organisations over a three-year period;
- review the procurement arrangements for external legal services including the identification of need, tendering and selection, management of projects and post-contract evaluation; and
- consider, on the basis of information received, what areas and issues require additional attention (for example, how quality and standards are measured and delivered).

It is the intention of Inspectors, following their initial assessment of expenditure and other data, to make preliminary judgements on issues/organisations which require greater consideration as part of the fieldwork. This will also help to determine the range and numbers of interviews in each of the justice organisations.

## Methodology

### Preparation

The preparatory phase will include:

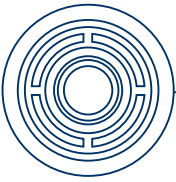
- preparation and agreement on the Terms of Reference;
- identification of any relevant research, studies, audits and inspections on the procurement of professional legal services;
- determination of information and data needs (including exploratory meetings with key organisations); and
- requesting documentation and statistics from the justice organisations and other relevant stakeholders such as the CSO. A breakdown of all spending on legal services will be requested for the most recent three-year period.

### Research and review of documentation

A review of all relevant documentation will be conducted. Quantitative analysis will be conducted of financial and procurement data supplied by the justice organisations.

### Hypothesis formation

The hypothesis testing phase of the review will take place following the initial assessment of the data and information received by justice and other organisations. This is likely to inform the targeting and setting of subsequent areas of investigation. A set of questions will be developed for the semi-structured interviews.

**Fieldwork**

The actual fieldwork of the inspection (interviews and meetings with key staff in the justice organisations) is scheduled to commence in mid-September 2010.

It is intended that interviews will be conducted with senior management (for example finance directors), heads of legal services departments, procurement staff and project managers, where legal services are used and procured. It is also proposed to meet with representatives of the Law Society and Bar Council.

In addition, it is proposed that a review of a sample of criminal cases (where external legal services were used) will be undertaken to assess the quality of legal services including advocacy in court. Inspectors will determine a sample of cases in conjunction with the relevant organisation(s).

**Writing up report**

The drafting of the inspection report will commence after the fieldwork in late October 2010.

**Reporting and action plan**

A final report will be published in 2011.



# Appendix 2: Remuneration of legal aid cases disposed of in criminal and civil courts

## Criminal Proceedings

### Magistrates' Courts

The Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009 ('2009 Rules') provide for standard fees payable to solicitors and counsel engaged in publicly funded criminal cases heard in the Magistrates' Courts and County Court appeals.

The fees are payable by category of offence and the nature of the disposal of the case. Standard fees are payable for most cases but hourly rates of payment are payable for Very High Cost Cases (VHCCs).

The 2009 Rules are administered by the Northern Ireland Legal Services Commission. Provision is made for solicitors and counsel to appeal to the Taxing Master to challenge the fees determined in a particular case.

### Crown Court

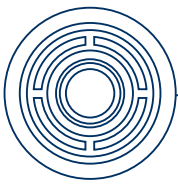
The levels of remuneration for cases disposed of at the Crown Court are set out in the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005.

The Rules provide a system of standard fees for guilty pleas and for trials lasting up to 25 days. The fee payable is dependant on the method of disposal and the duration of the trial (if applicable). Additional fees are payable in respect of applications made to the court during the case.

There are separate provisions for VHCCs which are defined as trials that '*... would be likely to exceed 25 days.*' When a case is certified as a VHCC hourly rates are paid for preparation with separate fees payable for non-preparatory work and for advocacy. The rates payable for VHCCs were amended in 2009 to bring the rates into line with those payable in England and Wales. The new rates are set out in the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2009.

The Rules also make provision for exceptionality. Solicitors can apply for additional hours if the case is considered to be exceptional. The additional funding the Northern Ireland Legal Services Commission (NILSC) may apply for solicitors cannot exceed 175% of the standard fee. Advocates can apply for exceptionality, with the amount allowed for exceptionality dependant on the class of offence. If the NILSC considers the case to be wholly exceptional, it may approve funding up to the maximum allowed and refer the case to the Taxing Master who may approve such further funding as they consider to be reasonable.

The Northern Ireland Courts and Tribunals Service (NICTS) removed the provisions in relation to VHCCs and exceptionality when the new Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011, came into operation on 13 April 2011.



The 2011 Rules:

- remove provisions in respect of VHCCs;
- remove provisions in respect of exceptionality;
- reduce the levels of standard fees payable to solicitors by 25%;
- reduce the levels of standard fees payable to counsel by 20%;
- introduce enhanced Guilty Plea 2 fees dependant on the number of pages of prosecution evidence;
- extend the grid of standard fees payable for trials to trials lasting up to 80 days; and
- introduce new fees for solicitors when the number of pages of prosecution evidence exceeds 750.

### **Court of Appeal**

Legal aid for appeals from the Crown Court and from the Court of Appeal to the House of Lords are governed by the Criminal Appeal (Northern Ireland Act) 1980. The fees payable are assessed and determined by the Taxing Master.

### **Civil Proceedings**

Remuneration to solicitor and counsel in the various tiers of the civil courts is governed by Schedule 2 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.

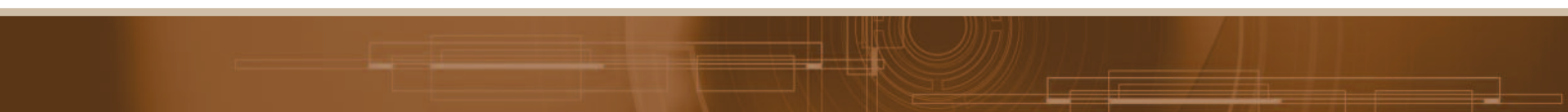
Schedule 2 of the 1981 Order provides that the sums allowed to counsel in connection with proceedings in the House of Lords, Court of Appeal and the High Court, shall be 95% of the amount allowed on taxation. The sums allowed to solicitors will be the full amount allowed on taxation of the costs on account of disbursements and 95% of the amount allowed on account of profit costs.

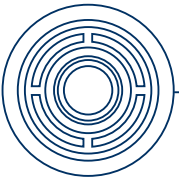
In relation to County Court cases, the Commission have in effect adopted the County Court Scale Costs. Cases can be taxed by the County Court Judge where he has authority to do so. Where the costs are taxed the full amount allowed on taxation will be paid.

A limit applies to the sums allowed to solicitors or counsel in County Court proceedings. There is provision for the Judge to certify that the limit shall not apply in exceptional cases. The Legal Aid (Remuneration of Solicitors and Counsel in County Court Proceedings) Order (Northern Ireland) 1981 provides more detail.

There is also relevant legislative provision in the Legal Aid (Remuneration of Solicitors and Counsel in Authorised Summary Proceedings) Order (Northern Ireland) 1981.


For the remaining cases, the NILSC set fees themselves. A table of these fees is to be published shortly by the NILSC.











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