

*Oifig an Ard-Aigbne*

THE OFFICE OF THE ATTORNEY GENERAL



GOVERNMENT OF IRELAND



CHIEF STATE SOLICITOR'S OFFICE

OIFIG AN PHRÍOMH-ATURNAE STÁIT

## **Value for Money and Policy Review Initiative**

### **Administration of the Attorney General's Scheme**

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## **Executive Summary**

This report is a review of the Administration of the Attorney General's Scheme (the Scheme) that has been made under the Value for Money and Policy Review Initiative.

The Initiative was originally launched in 1997 and forms part of the financial management thematic area of the Public Service Modernisation Programme under the Strategic Management Initiative. Its basic aims are to analyse the efficiency and effectiveness of Government programmes of expenditure, to assess the achievement of value for money, reaffirm the continuing justification of the allocation of public money to the programmes and consider the potential for efficiency and cost savings. The initiative was renamed the "Value for Money and Policy Review" initiative in 2005.

This Value for Money and Policy Review examines overall Scheme expenditure in the period 2001 to 2007, divided between an earlier period from 2001 to 2004 and a later period from 2005 to 2007 when improved financial information became available. It considers the administrative and organisational arrangements and ways in which the Scheme's efficiency and effectiveness might be improved. The evaluation relied on information received from the Office of the Chief State Solicitor, the Office of the Attorney General and the Department of Justice, Equality and Law Reform (DJELR). The Report incorporates the views of external stakeholders, who were consulted on an informal basis.

The expenditure review team (the Team) was comprised of Mr Matt Shaw (Principal Solicitor, CSSO and Lead Evaluator) assisted by Ms Celaine Rath (CSSO). The Team reported to a Steering Committee comprised of Mr Colm Dunne (external consultant, Chairperson), Mr Kevin Matthews (Assistant Chief State Solicitor, CSSO), Mr Christopher O'Toole (Advisory Counsel, AGO), Mr Paul Gibney (Change Management Unit, AGO), Mr Joseph Brady (Professional Accountant, AGO/CSSO) and Mr Ken Gorman (Change Management Unit, AGO, Secretary to the Committee), later replaced by Ms Anne Balfe, (Change Management Unit, AGO), who was subsequently replaced by Malcolm Cooney (Change Management Unit, AGO).

The conclusions of the review are as follows:

### **Expenditure**

Scheme expenditure has varied in a range of €1 million to €1.8 million per year for the period 2001 to 2007. This is approximately 2.5% of expenditure under the Criminal Legal Aid Scheme. The transfer of the administration of the Attorney General's Scheme to the DJELR on an agency basis, from February 2007 is a positive step from a Value for Money perspective.

The normal pattern is that bail related expenditure is in the range of 60% to 70% of overall Scheme expenditure but there are no other discernible trends in the level of payments as the Scheme is demand led. In particular, non-bail payments may fluctuate widely from one year to another.

The administrative overhead for operating the Scheme is estimated at €90,000 per year. The improvement in financial management systems in July 2004 has improved the reliability of

underlying information relevant to the performance of the Scheme but does not provide for a separate analysis of bail and non-bail payments.

### **Cost effectiveness**

Scheme payments for bail applications made to solicitors and counsel cover scale fees and expenses which are set out in a scale of fees. The number of items on invoices increases the administrative resources to process the invoices for payment.

Payments in respect of bail cases under the Scheme are higher than payments under the Criminal Legal Aid Scheme because the hearings involving the Scheme take place in the High Court which commands a higher fee and because of the allowances for expenses which are built into the Scheme. For non-bail cases, payments are on a par with those made to State counsel and are cost effective when compared to the potential payout on foot of an order for costs.

### **Process efficiency**

There is scope for streamlining the process for establishing means if a requirement was introduced for the provision of one statement of means covering both criminal legal aid as well all ancillary matters, including bail, in all courts including applications to the High Court. Until a single statement of means may be introduced, the introduction of a requirement for a formal statement of means to be submitted to the court prior to any application being considered, would tighten up the implementation of this aspect of the Scheme.

### **Administrative efficiency**

The system for processing bail payments is cumbersome, leading to potential delays in the processing of files due to the number of data items to be recorded and verified.

Delays which had arisen in the period up to 2004 in the system for the administration of payments have been largely addressed although there remain situations where the establishment of an appropriate fee and the lack of provision of the necessary supporting documentation can lead to payment delays.

### **Effectiveness**

The key objective of the Scheme is to provide legal aid to persons, (falling outside the criminal legal aid system), whose liberty may be at risk however, the provision of such legal aid does not fit within the mission and current strategy of the Office and is more appropriate to those of the DJELR which took over the administration of the Scheme on a non-statutory and agency basis on 1 February, 2007.

The combining of the administration of the Attorney General's Scheme payments with the larger administration of criminal legal aid would deliver administrative processing efficiencies.

It is generally accepted by previous reviews of the Scheme that it would be preferable for it to be placed on a statutory basis and transferred under the aegis of the Criminal Legal Aid Scheme. There is a balance to be struck between the clarity and rigidity required to comply

with a statutory scheme and the need for discretion to maintain an element of flexibility to cater for exceptional situations that can arise from time to time.

No specific routine financial reports on the Scheme are produced although ad-hoc information is occasionally provided to the CSSO/AGO Management Advisory Committee.

# 1. Introduction

## The Office of the Attorney General

1.1. The Attorney General is the legal adviser to the Government and a constitutional officer.

1.2. The mission statement of the Office of the Attorney General (the Office) is to provide the highest standard of professional legal services to Government, Departments and Offices. The administration of a form of legal assistance to certain persons before the Courts does not form part of the core functions of the Office but is the response on behalf of the State to a gap in provision for legal aid which has been met to date by this ad hoc Scheme administered by the Office up to 31 January 2007. The administration of new cases from 1 February 2007 has been taken over by the DJELR on an agency basis but the financial accountability for the Scheme remains through the CSSO Vote.

1.3. The clients of the Attorney General and of the Office are the executive branch of Government, that is to say the Government as a whole, its individual members and the Departments they head. (Because of the doctrine of the separation of powers, it is important to note that the Attorney General does not, as a general rule, furnish legal advice to other branches of Government, that is to say the legislative or judicial branches, or to the President. Nor does the Attorney General furnish legal advice to members of the public.) By virtue of Article 30.1 of the Constitution and Section 6 of the Ministers and Secretaries Act 1924 and the ninth part of the Schedule to that Act, the Attorney General has control and responsibility for the Office of the Parliamentary Counsel to the Government and the Office of the Chief State Solicitor.

1.4. The main functions of the Office are:

- To provide legal advice to Government, Departments and Offices.
- To draft legislation.
- To provide litigation services.
- To provide solicitor services, including conveyancing and other transactional services.

1.5. The role of the Office, including all its officers, is to assist and advise the Attorney General in carrying out the functions of advising Government and in performing the functions specifically conferred by the Constitution and legislation. Under the Public Service Management Act 1997 authority for management of the Office, monitoring policies that affect the Office and the delivery of specified outputs devolves on the Head of the Office, who is the Director General.

## Criminal Legal Aid

1.6. The current system of criminal legal aid is governed by the Criminal Justice Legal Aid Act 1962. Prior to its establishment there was no statutory scheme for the provision of legal aid to persons without means and such representation was provided on an *ad hoc* basis. This led to the enactment of the aforementioned legislation which still governs the operation of the

Criminal Legal Aid Scheme in Ireland today. The Criminal Justice (Legal Aid) Regulations 1965 implemented the operation of the Criminal Legal Aid Scheme and established conditions for its operation. These regulations set out the fees and expenses (including reasonable disbursements) payable to solicitors and counsel for work under the Criminal Legal Aid Scheme. Such payments, primarily in the District Court, are currently governed by the Criminal Justice (Legal Aid) Regulations 2003.

1.7. Fees in the Higher Courts (Circuit Criminal Court, Central Criminal Court and the Special Criminal Court) are determined by reference to the fees which the Director of Public Prosecutions pays to prosecution counsel.

### **The Attorney General's Scheme**

1.8. The Attorney General's Scheme (the Scheme) facilitates access for individuals to the courts in certain cases where access may be inhibited due to lack of means. The level of expenditure is determined by the demand for application of the Scheme.

1.9. The objective of the Scheme is to provide legal representation in certain types of proceedings to persons who are unable to pay for such representation and where other forms of legal aid are not available. Assistance for legal representation is available for extradition matters, bail applications, *habeas corpus* applications and certain judicial review cases where the liberty of the person is involved. The Scheme is necessary because there is a perceived gap in legal aid provision. The role of the Office is to perform an administration process for the Scheme which is not a legal service as described in the Statement of Strategy 2008 - 2010.

1.10. An applicant under the Scheme is required to apply to the judge at the commencement of the case to indicate that the Scheme will be sought. This signifies that costs will not be applied for at the end of the case. In legal proceedings costs usually follow the event and if a party loses he or she must bear his or her own costs and the costs of the other side. Application for the Scheme is on the basis that the party does not have the means to instruct a lawyer and is indicating that application for payment will be made under the Scheme and that no order for costs will be sought, this means

- there will be no order for costs against the State if the applicant succeeds and the applicant's solicitor and barrister will be paid under the Scheme or
- If the applicant fails, the applicant's solicitor and counsel are paid under the Scheme.

1.11. In addition to the question of means there will usually be some issue involving a risk to the applicant's liberty. In bail cases or *habeas corpus* applications where the applicant is in custody there is no doubt about the issue of the liberty of the subject. The judge in his or her order recommends the Scheme but payment under the Scheme remains a matter for the discretion of the Attorney General.

1.12. A full description of the Scheme is set out in **Appendix 1**.

### Origin of the Scheme

1.13. In 1967, arising out of the application of *Woods* [1970] IR154 an undertaking was given in the Supreme Court on behalf of the then Attorney General and the Minister for Finance to the effect that in respect of an application for *habeas corpus*, the State would defray the fees payable to solicitor and counsel where applicants were not in a financial position to engage such professional representation. The judgment of the Chief Justice contains the following statement

*“where on an application by or on behalf of a prisoner who was not, for personal reasons, in a position to procure the services of counsel and solicitor, the High Court or this Court, as the case may be, considers it proper that counsel and solicitor should be assigned on a prisoners behalf, the Attorney General would defray the cost”.*

This led to the development of an *ad hoc* administrative scheme for payment of fees in certain types of cases that has become known as the Attorney General's Scheme. At that time the Office of the Director of Public Prosecutions had not been established and the Attorney General was responsible for all criminal prosecutions on indictment. The Scheme has been revised on a number of occasions including 1991, 1992, 1998, 2000 and 2005. The most recent revision, in 2005, was to take into account the amendment of the Extradition Act 1965 and the introduction of the European Arrest Warrant procedure. The Scheme has no statutory basis.

### Operation of the Scheme

1.14. The Scheme applies to situations not covered by criminal legal aid. It includes the following areas of litigation in the High and the Supreme Court.

- *Habeas corpus* applications.
- Bail motions.
- Certain types of judicial review proceedings concerned with criminal matters or matters where the liberty of the individual is at issue.
- European Arrest Warrants and applications under the Extradition Act 1965 as amended.

1.15. The Scheme arose because of a perceived lacuna in the criminal legal aid system. Article 40 of Bunreacht na hÉireann confers rights on individuals, including, in a broad sense, the right of access to the courts and specifically confers on the High Court jurisdiction to hear *habeas corpus* applications. However, criminal legal aid did not extend to these cases. In addition the European Convention on Human Rights provides in Article 6(3) (c) that a person charged with a criminal offence has the right *“to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”* The provision of legal aid by the State fulfils its obligation to vindicate key human rights and rights conferred by the Constitution. The Scheme represents a small part of the provision of legal aid in the State.

1.16. The Scheme is an administrative scheme set up with funds made available by the Oireachtas. Up to 1 February, 2007 the Chief State Solicitor administered the Scheme on behalf of the Attorney General. It is not an alternative to costs. A person wishing to obtain



from a court a recommendation to the Attorney General that the Scheme be applied must make his or her application (personally or through his or her lawyer) at the commencement of the proceedings and must obtain the recommendation of the judge. Providing financial assistance is not seen as part of the core functions of the Office.

### **Value for Money and Policy Review Initiative**

1.17. The Public Service Management Act 1997 and the Comptroller and Auditor General (Amendment) Act 1993 set the background for Value for Money and Policy Reviews (the reviews). The objectives of a review are to analyse Exchequer spending in a systematic manner and to provide a basis on which more informed decisions can be made. It is one of a range of modernisation initiatives aimed at moving public sector management away from the traditional focus on inputs to concentrate more on the achievement of results.

1.18. The aims of the reviews are

- *to provide a systematic analysis of what is actually being achieved by expenditure in each programme; and*
- *To provide a basis on which more informed decisions can be made on priorities within and between expenditure programmes.*

The review process involves examining objectives, considering the extent to which the rationale, efficiency, effectiveness, impact and continued relevance of these objectives remain valid and warrant resource allocation on the current and planned scale, and checking how far objectives have been achieved and how efficiently this has been done.

### **Objectives of this Review**

1.19. This is the first review to be undertaken jointly in the Office and the Chief State Solicitor's Office (CSSO). The subject of this review is relevant to both Offices.

1.20. The overall objective of the review is to consider the value for money derived from expenditure under the Scheme in terms of the provision of services paid for under the Scheme, what these services achieve in the context of the legal system and what changes might be made to improve the overall administration of the Scheme.

1.21. The specific objectives of this review were to:

- (a) Establish the primary areas of expenditure under the Scheme and review trends in payments over the period 2001 to 2007;
- (b) Evaluate the extent to which the current and future objectives of the Scheme are being realised taking into account the mission and current strategy of the Office;
- (c) Consider whether there are better alternative means by which the objectives of the Scheme might be met; and
- (d) Suggest suitable performance indicators for monitoring and evaluating the performance of the Scheme in the future.

### *Scope of this review*

1.22. An initial review was carried out in 2005 and examined expenditure on the Scheme for the years 2001 to 2004. It focused on the administration of the Scheme, which begins on receipt of a recommendation for payment from the Court. More recent initiatives to improve the administration and record keeping were also considered. In 2008, the review was extended to cover the years 2005 to 2007.

1.23. As the making of a recommendation for payment under the Scheme is a matter of discretion for the Court this is not within the scope of this review.

### *Methodology*

1.24. The review team (the Team) was comprised of Mr Matt Shaw (Principal Solicitor, CSSO and Lead Evaluator) assisted by Ms Celaine Rath (CSSO). The Team reported to a Steering Committee comprised of Mr Colm Dunne (external consultant, Chairperson), Mr Kevin Matthews (Assistant Chief State Solicitor, CSSO), Mr Christopher O' Toole (Advisory Counsel, AGO), Mr Paul Gibney (Change Management Unit, AGO), Mr Joseph Brady (Professional Accountant, AGO/CSSO) and Mr Ken Gorman (Change Management Unit, AGO, Secretary to the Committee) later replaced by Ms. Anne Balfe, (Change Management Unit, AGO) who was subsequently replaced by Malcolm Cooney (Change Management Unit, AGO).

1.25. Relevant reports and documents setting out the origin of the Scheme were considered. Particular reviews that referred to the Scheme (including the Pringle Report, 1977; The Tormey Report, 1981 and the final report of the Criminal Legal Aid Review Committee, 2002) were also considered. A list of the documents reviewed is in **Appendix 2**. Data on the expenditure of the Scheme was extracted from the accounting records of the period under review and from underlying systems. Relevant payment data for the Scheme was extracted and analysed. A sample of payments in each year from 2001 to 2003 was extracted and examined.

1.26. Consultations were held with some key stakeholders in both the Office of the Attorney General and the Office of the Chief State Solicitor.

### *Format of the Report*

1.27. The remainder of the report is organised in four chapters covering the review objectives.

- Chapter two examines payments under the Scheme between 2001 and 2007.
- Chapter three considers the efficiency of the Scheme and suggests performance indicators for the future monitoring and evaluation of the Scheme.
- Chapter four outlines the options for improving the effectiveness of the Scheme and alternative proposals for its administration.
- Chapter five outlines the conclusions and recommendations.

## 2. Expenditure Review

2.1. This Chapter is concerned with the following review objective:

*Establish the primary areas of expenditure under the Scheme and review trends in payments over the period 2001 to 2007.*

2.2. Expenditure from 2001 to 2004 under the Scheme can be divided between expenditure on bail motions and non-bail expenditure. Significant data availability problems were encountered for this period. In a further effort to establish the main areas of expenditure under the Scheme, reference was made to the underlying accounting records. The source files of transaction vouchers were used to extract basic information about the primary areas of expenditure for 2001 to 2004. Following the introduction of a new financial management system in July 2004, a more detailed expenditure analysis is made for the years 2005 to 2007.

### Scheme expenditure in comparison with Criminal Legal Aid expenditure

2.3. The expenditure on the Scheme and on the Criminal Legal Aid was compared in the table below to provide a context for further analysis of the administration of the Scheme. The table shows that the Scheme is a very small fraction (average around 2.5%) of the Criminal Legal Aid Scheme.

**Table 1 Scheme expenditure compared to Criminal Legal aid 2001-2007**

	2001	2002	2003	2004	2005	2006	2007
	€'000	€'000	€'000	€'000	€'000	€'000	€'000
Criminal Legal Aid	25,189	28,868	37,346*	34,134	40,195	42,089	46,356
AG Scheme	904**	1,070**	1,184**	982**	1,081	1,751	1,648

Notes:

\* Figure includes a supplementary estimate

\*\* Figures are for bail fee related payments only, a separate amount of non-bail fee payments could not be extracted but it is estimated that these ranged from €300,000 to €600,000 per year in the years 2001 to 2004.

### Scheme expenditure review - 2001 to 2004

2.4. The main purpose for which accounting records were kept in the period up to July 2004 was for internal control purposes and to support the production of the Appropriation Account. The accounting system was not designed to support an in-depth analysis of expenditure. The following paragraphs set out the information on bail and non-bail payments that was capable of being established from the records.

#### *Expenditure on Bail Fees*

2.5. The amounts recorded for bail payments excluding VAT were as in Table 2 below.

**Table 2: Bail payments – 2001 to 2004**

	2001	2002	2003	2004
Bail	€'000	€'000	€'000	€'000
Total bail fees in subhead C of CSSO Vote	904	1,070	1,184	982

2.6. The expenditure review team assembled the following extracted information on bail fee payments excluding VAT shown in Table 3, from the accounting records for the years under consideration.

**Table 3: Analysis of Bail Fee Payments – 2001 to 2004**

Month	Number of payments				Amount (€)			
	2001	2002	2003	2004	2001	2002	2003	2004
					€	€	€	€
January	48	113	14	191	49,136	47,152	38,582	45,409
February	9	178	56	702	8,167	68,543	51,285	218,675
March	40	16	78	95	95,454	4,943	101,497	20,837
April	136	155	81	241	57,043	70,830	145,426	98,303
May	136	93	412	323	48,029	38,377	218,507	75,642
June	93	64	193	278	33,935	38,093	55,996	63,096
July	232	510	393	–	150,391	254,191	229,672	(226)
August	216	179	88	3	121,780	115,550	70,222	14,778
September	125	330	191	1	55,970	94,842	119,456	3,741
October	143	138	51	98	48,456	40,498	(10,461)	47,628
November	365	21	186	39	172,761	79,660	105,221	38,946
December	152	69	158	195	62,662	217,408	58,335	355,131
<b>Totals</b>	<b>1,695</b>	<b>2,064</b>	<b>1,901</b>	<b>2,166</b>	<b>903,784</b>	<b>1,070,087</b>	<b>1,183,738</b>	<b>981,960</b>

2.7. The 2001 amounts are converted from the original Irish pound amounts. The table shows that on average there were between 141 and 172 bail payments per month, but that the figure varied widely from month to month. There is no apparent trend. The Office migrated to a new financial system in July 2004 and accordingly the processing of payments was affected by the changeover to the new system. The backlog from this change was substantially cleared by the end of 2004.

### *Non bail Payments*

2.8. Non-bail payments made under the Scheme are not separately identifiable from other General Law expenses expenditure recorded in the subhead. As the number of payments through the subhead is large, it was not economically feasible at this stage, to conduct the degree of analysis necessary at the level of the transaction vouchers to accurately establish the amount of non-bail payments under the Scheme.

2.9. Expenditure on non-bail fees fluctuates widely and is difficult to predict as it depends entirely on the nature of the cases being heard. For example, a scrutiny of the payment voucher files indicated that non-bail payments may have fluctuated between €300,000 and €600,000 between 2001 and 2004. These figures relate to judicial review, extradition and *habeas corpus* cases. Claims in respect of European Arrest Warrants did not commence until 2004.

2.10. Based on the information in Table 2 and paragraph 2.9, it can be concluded that approximate annual Scheme expenditure was between €1.2 million and €1.8 million in the years 2001 to 2004. A rough estimate is that bail related payments in a normal year account for 60% to 70% of overall Scheme expenditure.

## Scheme Expenditure review - 2005 to 2007

2.11. As part of the implementation of the Management Information Framework initiative in the Office, a new accounting system was introduced with effect from July 2004. The new system has extensive expenditure analysis capabilities and the coding structure for subhead C expenditure in the Office of the Chief State Solicitor has been specifically designed to support an improved analytical capability for Scheme expenditure.

2.12. According to financial extracts from the new system, Scheme payments for the three years from 2005 to 2007 were as set out in the following table. The table is based on payments made but it is not expected that the accrual position at the end of each year would materially distort any conclusions reached on the data presented.

**Table 4: Total Scheme payments – 2005 to 2007**

Description	2007	2006	2005
	€	€	€
AGS Brief Fee	985,576	678,396	427,757
AGS Refresher	47,296	129,443	44,096
AGS Written Submissions	32,519	61,445	26,982
AGS Leave Application	12,463	31,805	23,275
AGS Consent Order	0	6,353	14,944
AGS Solicitors Professional Fee	405,701	460,902	305,511
AGS Attending place of detention	126,284	89,350	59,160
AGS Notice of Motion	50,277	43,902	29,643
AGS Affidavit	91,212	84,913	54,486
AGS Postages and sundry outlay	50,553	68,992	39,299
AGS Travelling Expenses	19,717	20,186	10,487
Other fees	112,768	75,405	45,678
Total payments	€1,934,364	€1,751,092	€1,081,318

2.13. While the table provides a more accurate picture of Scheme payments than could be determined in the years 2001 to 2004, the general conclusions that can be reached are similar to those established for the earlier period. While there is a general increase in payments, there is no discernible trend in the payments for each category of expenditure. The level of annual expenditure has increased towards €2 million in this period, but no discernible trend is apparent from the expenditure.

2.14. The new accounting system has not been configured to support a separate analysis of bail and non-bail expenditure. The review team consider that this analysis is relevant to making an assessment of the performance of the Scheme and should be provided by the system. The CSSO Costs Accounting Unit has analysed the 2005 and 2006 expenditure which indicated that bail expenditure was €647,314 in 2005 and €801,594 in 2006. This represented 60% of overall Scheme expenditure in 2005 and 46% in 2006 (which was an exceptional year for non-bail payments).

2.15. The introduction of the European Arrest Warrant (EAW) in 2004 had an exceptional effect on Scheme expenditure in 2006. Scheme payments made in respect of EAW and extradition cases were €142,654 in 2005, €554,806 in 2006 and €142,598 in 2007. This shows the distorting effect that a small number of these cases can have on the overall level of

payments for the Scheme. The reason for the large payments in 2006 was that a small number<sup>1</sup> of complex cases, including appeals to the Supreme Court, were settled in that year.

2.16. The large fluctuation in “other” expenses is explained by exception levels of payments in different categories in each year. The increase of €29,727 in this category between 2006 and 2005 was due to payments for consultation (2006: €13,589; 2005: €1,122), judgment (2006: €14,078; 2005: €6,106), and Commissioners’ fees (2006: €12,409; 2005: €8,849). Similarly, the increase of €37,363 in this category between 2006 and 2007 was due to increases in payments for evidence of arrest hearings (2007: €32,694; 2006: €2,904), and interpreters fees (2007: €22,889; 2006: €3,509) and decreases in payments in other categories.

2.17. The DJELR took over responsibility for the administration, on an agency basis, of all new cases arising from 1 February 2007. The administration of cases up to 31 January 2007 remains with the CSSO which also remains accountable for the Scheme through its Vote. CSSO makes quarterly payments to the DJELR for Scheme expenditure.

### **Administrative resources consumed by the Scheme**

2.18. The administrative processing of Scheme payments was undertaken by the Costs Accounting Unit and the Accounts Section in the CSSO. The work involves the initial recording of claims for payment; checking the accuracy and validity of the claim; a payment approval process and the administration of the payment. The administrative processes are considered in Chapter 3. The cost of administering the Scheme can be considered in terms of a proportion of the salaries of staff and the accompanying overheads, including the costs of accounting systems. Based on the formula for calculating fully expended staff costs provided by the Department of Finance, the annual administration costs are in the region of €90,000.

### **Conclusions**

2.19. Scheme expenditure has varied in a range of €1 million to €1.8 million per year for the period 2001 to 2007. This is approximately 2.5% of expenditure under the criminal legal aid Scheme. The transfer of the administration of the Scheme to the DJELR on an agency basis, from February 2007 is a positive step from a Value for Money perspective.

2.20. The normal pattern is that bail related expenditure is in the range of 60% to 70% of overall Scheme expenditure but there are no other discernible trends in the level of payments as the Scheme is demand led. In particular, non-bail payments may fluctuate widely from one year to another.

2.21. The administrative overhead for operating the Scheme is estimated at €90,000 per year. The improvement in financial management systems in July 2004 has improved the reliability of underlying information relevant to the performance of the Scheme but does not provide for a separate analysis of bail and non-bail payments.

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<sup>1</sup> In 2006, there were payments in respect of four cases in excess of €50,000 each. No cases incurred payments in excess of €50,000 in 2005.

### 3. Efficiency Issues

3.1. The efficiency of the Scheme is considered in this Chapter by reference to a consideration of the specific items that are eligible for reimbursement under the Scheme, overall cost effectiveness (process efficiency), and a review of the systems in use (administrative efficiency).

#### Bail fees

3.2. The items payable in respect of a bail motion are set out in a scale of costs. The items in the scale list have not changed significantly over the past eight years. The rates are reviewed periodically, in particular, the professional fee is increased in line with Pay Agreements under the Social Partnership Agreements. The use of scale fees is a good way of controlling the amount payable in respect of small outlays and frequently recurring items.

**Table 5: Fees and Costs payable under the Scheme**

With effect from	1 October 2002	2007	Increase over 5 years
	€	€	
Professional fee (both solicitor and counsel)	187.00	267.41	+43%
Attending a place of detention	104.73	147.70	+41%
Drafting affidavit	53.33	64.53	+21%
Consultation	104.73		
Photocopying	25.00	30.25	+21%
Travel*	12.70	15.37	+21%

\*Minimum payable. Further claims must be vouched

3.3. Samples of payments to solicitors and to counsel covering the period 2001 to 2004 were extracted and examined to form a view on the typical amounts paid. The sample was selected at random. A representative sampling technique was not used and no extrapolation of the analysis to support conclusions on the entire population has been made. However, based on the information gained by the review team while examining the underlying voucher files, the team is satisfied the information presented in this analysis is valid for the purposes of the review. The details of the samples are shown below.

**Table 6: Sample of Payments to Solicitors and to Counsel**

Year	PAYMENTS TO SOLICITORS			
	2001	2002	2003	2004
Number in the sample	19	95	51	8
	€	€	€	€
Value of Sample	5,110	28,717	16,434	2,928
Average payment	268.95	302.28	322.24	366.02
Highest	369.95	511.96	479.55	423.73
Lowest	165.07	170.57	63.53	188.87
Year	PAYMENTS TO COUNSEL			
	2001	2002	2003	2004
Number in the sample	19	91	47	9
	€	€	€	€
Value of Sample	3,407	17,181	9,300	2,064
Average	179.34	188.81	197.87	229.31
Highest	222.20	267.72	274.79	400.43

Lowest	152.37	153.90	149.60	149.60
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3.4. The analysis shows that payments to counsel are predominantly made up of the scale fee with very few additional expenses, while the overall payments to solicitors include a significant element of expenses beyond their scale fees. A uniform professional fee is paid to both counsel and solicitor. There are more expenses incurred by solicitors. In order to confirm this point the sample was extended to 95 transactions for solicitors and counsel for each year for a detailed consideration of the items claimed. The results of this exercise, is reflected in Table 7.

**Table 7: Analysis of composition of payments to solicitors and counsel**

	2001		2002		2003	
	Number in sample	% of total	Number in sample	% of total	Number in sample	% of total
<b>SOLICITORS</b>	95	100%	95	100%	95	100%
Visiting place of detention	42	44%	31	33%	32	34%
Affidavit	33	35%	61	64%	75	79%
Commissioner for Oaths fee	64	67%	72	76%	82	86%
Settling* fee	66	70%	72	76%	79	83%
Solicitor's fee	95	100%	95	100%	93	98%
Photocopying	71	75%	88	93%	83	87%
Travelling	40	42%	53	56%	57	60%
<b>COUNSEL</b>	95	100%	95	100%	95	100%
Notice on motion	0		1	1%	6	6%
Affidavit	18	19%	14	15%	9	10%
Visiting place of detention	0		0	0	1	1%
Professional fee	95	100%	95	100%	95	100%

\* The full subhead title is settling, filing and serving notice of motion.

3.5. The table shows that in over two thirds of the samples for each of 2001 to 2003, claims were made for photocopying, settling and commissioner for oaths fees. There is also an upward trend in claiming for travel expenses. In contrast, claims by counsel are mainly for a professional fee with a much lower incidence of ancillary expenses. As each separate invoice is checked on an item by item basis, the analysis gives a reasonable indication of the administrative burden involved in the verification of invoices prior to payment.

3.6. Payments made in 2007 were reviewed to update the above analysis. The review showed that the typical amount payable to a solicitor in respect of the routine work associated with a bail case under the AG Scheme were:

**Table 8: Typical payments to solicitors in 2007**

Activity	€
AG Attending place of detention	147.70
AG Brief fee	267.41
AG Commissioner of Oath Fees	14.52
AG Drafting notice of motion	38.41
AG Drafting of affidavit	64.53
AG Postage	30.25
AG Travel	15.37
Total	€578.19



### *Single all inclusive fee*

3.7. A single all inclusive fee to both counsel and solicitors to cover all costs might be simpler and more efficient to administer as it would be more straightforward for solicitors to prepare their claims and would involve less checking to validate the claim and process the payment. An argument against a single all inclusive fee system is that there are many different work scenarios that would need to be catered for as the tasks involved can be performed by different service providers. Without a comprehensive fee listing, there could be a danger that a single all inclusive fee system would reward those providing a less comprehensive service and could end up being more expensive without a corresponding improvement in the service paid for. For the present, the requirement for solicitors and counsel to itemise the work done is considered to be a preferred option.

### *Comparison with the Criminal Legal Aid Scheme*

3.8. The Criminal Justice (Legal Aid) Act 1962, (the Principal Act) which is the primary legislation covering the operation of the Criminal Legal Aid Scheme, provides that free legal aid may be granted, in certain circumstances, for the defence of persons with insufficient means in criminal proceedings.

3.9. An accused person is entitled to be informed by the court in which he/she is appearing of his/her possible right to legal aid. The grant of legal aid entitles the applicant to the services of a solicitor and in certain circumstances junior and senior counsel, in the preparation and conduct of his/her defence or appeal. In addition, once legal aid has been granted the case cannot proceed unless the accused is legally represented.

3.10. An applicant for legal aid must establish to the satisfaction of the court that his/her means are insufficient to enable him/her to pay for legal representation. This is a discretionary matter for each court and is not governed by any financial eligibility guidelines. An applicant for free legal aid may be required by the court to complete a statement of means. It is an offence for an applicant to knowingly make a false statement or conceal a material fact for the purpose of obtaining legal aid.

3.11. The fees payable to a solicitor and counsel are set from time to time by way of regulations under the Principal Act. Fees in respect of District Court hearings and bail applications before the Circuit Criminal Court and the Special Criminal Court were set by the Criminal Justice (Legal Aid) (Amendment) Regulations.

3.12. The Team made a comparison of the level of fees covered by the Criminal Legal Aid Scheme and the Attorney General's Scheme, in order to form a view on the relative economy of the Scheme. The scale fees for the Attorney General's Scheme are set out in Table 5 above. The details of the fees payable under criminal legal aid are set out in Table 9 below:

**Table 9: Fees payable under Criminal Legal Aid – 2001 to 2007**

At 1 January	2002	2003	2004	2005	2006	2007	2008*
	€	€	€	€	€	€	€
Contested Bail Application to Circuit Court or Special Criminal Court	94.80	98.59	101.55	105.65	108.84	114.91	117.21
Essential prison visit	100.70	104.73	107.87	112.23	115.62	122.07	124.51

*\*The rates increased with effect from September 2008 to €123.14 for a contested bail application and to €130.81 for an essential prison visit.*

3.13. The fees payable in respect of contested bail cases in the criminal legal system are set at a lower level than the fees provided for bail applications under the Attorney General's Scheme. For example, in 2003, on average €180 was paid as a solicitor's professional fee under the Scheme in respect of each bail application compared to €98.50 provided for under the Criminal Legal Aid Scheme. A major reason for the higher level of fees is the difference in venue as cases in the High Court in general command a higher level of fees. There is parity between the payments made under the Attorney General's Scheme and payment to DPP counsel. The amounts paid are considerably less than would be awarded on foot of an order for costs. Accordingly, in relative terms, the Scheme provides reasonable value for money but the parity between schemes needs to be kept under review and there would be room for an overall rationalisation of fee structures if it is integrated into the Criminal Legal Aid Scheme.

### **Process Efficiency Issues for Bail fees**

#### *A requirement for a formal statement of means should be introduced*

3.14. The Attorney General's Scheme provides that the applicant must satisfy the court that he or she is not in a position to retain a solicitor (or, where appropriate, counsel) unless he receives the benefit of the Scheme. To this end, an applicant must provide such information about his or her means as the court deems appropriate but there is no provisions for requiring a statement of means under the Scheme. There would be scope for streamlining the process if a requirement was introduced for the provision of one statement of means covering both criminal legal aid as well all ancillary matters, including bail, in all courts including applications to the High Court.

3.15. Confirmation should be sought at the outset of a bail application in the High Court whether or not the applicant was legally aided and furthermore whether his/her circumstances have changed since the granting of legal aid (if appropriate). At present the most likely source of information to contest eligibility for the Scheme in a bail application on the basis of means comes from the Gardaí. Until one statement of means may be introduced as outlined in 3.13 above, the introduction of a requirement for a formal statement of means to be submitted to the court prior to any application being considered, would tighten up the implementation of this aspect of the Scheme.

#### *There is scope for savings from transferring the Scheme to the Department*

3.16. The review team considers that there would be scope for potential administrative savings if the Scheme was transferred to the DJELR (the Department). The savings would be derived from the standardisation of administrative processes with other schemes and the elimination of the need for a separate administrative function for the Scheme within the CSSO. It is recommended that the provision for the payment of Applicants' bail costs be streamlined and incorporated into the Criminal Legal Aid Scheme. This has been partially achieved with the transfer of administration of payments in respect of bail after 1 February 2007 to the Department. All files in respect of payment applications before 1 February 2007 have been processed.

## Non-Bail payments

3.17. For non-bail cases each claim is dealt with on a case by case basis but reference is made to the fees paid to State counsel. Outlays/expenses are paid separately. Fees are paid to the applicant's Counsel and Solicitors on a par with State counsel where this is possible. In cases where no State counsel appears, fees are paid to solicitors or counsel on a notional basis as if State counsel had been in attendance or the matter is referred to the Attorney General's Office for a direction. The administration of non-bail files was also transferred to the Department with effect from 1 February 2007 but the Cost Accounting Unit continues to deal with all pre 1 February 2007 orders of the court when claims are submitted by solicitors on foot of these orders. Cost Accounting also continues to process all Health Board non bail AG scheme claims pursuant to the terms of the agreement with the Department.

## Administrative Efficiency

3.18. The administrative efficiency was reviewed by considering the steps followed in the payment process at the CSSO.

### Bail

3.19. Solicitors/Counsel attending bail motions before the High Court are asked to complete a Bail Application form, which is subsequently certified by the duty Court Registrar. The information on the form and provision for the certification of payments by the court registrar is shown in Figure 1.

### Figure 1: Information on the Bail Application Form

#### Part A:

- Record number of case.
- Name of applicant
- Date of hearing

#### Part B: Legal Representation:

- Name of solicitor
- Address of solicitor and VAT number (If registered for VAT)
- Name of Junior Counsel
- Address of Junior Counsel and VAT number
- Name of Senior Counsel
- Address of Senior Counsel and VAT number
- Have the terms of the Attorney General's Scheme been complied with? Yes  No
- Details of who prepared the motion: Counsel  Solicitor  Neither
- Details of who prepared the grounding affidavit: Counsel  Solicitor  Neither
- Details of Consultations at place of detention prior to the date of the hearing, if any:
- Details of any other fees paid by solicitor
- Details of any other fees claimed by counsel

#### Part C: Other Information:

- Was the Attorney General's Scheme recommended by the High Court? Yes  No
- Did the recommendation include one junior counsel? Yes  No
- Did the recommendation include senior counsel? Yes

3.20. This duly certified form is submitted by the registrar of the Court to the Costs Accounting Unit of CSSO for checking and processing of payment. Payments are made directly to the respective parties according to the items certified by the registrar.

3.21. The following steps are taken in order to process a bail file in the CSSO:

- The date of receipt of the form from the Registrar of the High Court for hearings related to bail motions is recorded;
- The form is checked in order to ensure that it is completed correctly. In the event of there being an error on the form it is returned to the Registrar;
- If a new solicitor or barrister (counsel) is involved, their details are added to the Office database;
- An Office Registry Number is assigned to the file and noted on the registrars form;
- An individual file is opened on the file registry system and details recorded;
- The solicitor/ barrister (counsel) details are entered onto the costs accounting database for payment;
- The following information is recorded on this database:- 1) The High Court Record Number; 2) Date of application; 3) Solicitor/barrister (counsel)/interpreter's fee; 4) Grounding affidavit; 5) Motion; 6) Commissioners Fee; 7) Attendance at place of detention; 8) Photocopying; 9) Travel expenses.

### *Non-Bail*

3.22. The following steps are generally taken in regard to the processing of payments in non-bail cases:-

- Claims are submitted directly by the applicant's solicitor or by the officer dealing with the file within the Chief Prosecution Solicitor's Office (CPSO).
- In order for the Costs Accounting Unit to process a file, at a minimum, the following information is required –
  - a) Copy of the court order granting the recommendation under the Scheme;
  - b) A brief note of the work carried out by the solicitor and counsel;
  - c) Any additional outlay incurred by the applicant's solicitor.
- Once the Costs Accounting Unit is notified of a claim, the file is requested from the officer within the CSSO or the CPSO (where appropriate).
- Such files must contain a detailed case report form, a printout of the sanctioned fees or confirmation that all State counsel's fees have been paid. This is needed because the applicant's counsel will be paid the same fee as counsel for the State.
- The file is then carefully perused to ensure all documentation and orders are correct and State counsel fees have been paid. A claim is then prepared by way of a Memorandum of Costs.

3.23. Generally speaking an applicant's legal advisers will seek payment in respect of the following matters:-

- *Ex Parte* application.
- Drafting grounding pleadings.
- Issuing and serving of pleadings.
- Attending at all preliminary/ancillary court hearings.
- Perusal of replying documentation.
- Perusal of submissions filed.
- Attending the hearing.
- Miscellaneous outlay to include postages copying and petty outlay.
- Outlay to include attending a client at place of detention and professional services of experts.

3.24. Once the memorandum of costs was completed and approval obtained from the Head of the Costs Accounting Unit, a financial schedule is prepared, for submission to the Department of Finance. Since July 2004, the CSSO has assumed direct responsibility for the payment of the memorandum of costs. A payable order follows in due course. Professional Services Withholding Tax is deducted from payments.

3.25. The review considers that the system for processing these payments is cumbersome, leading to potential delays in the processing of files due to the number of data items to be recorded and verified. There are also some factors outside the control of the Costs Accounting Unit that may contribute to the delay in payments. These factors include -

- Delays in receipt of files into the Costs Accounting Unit.
- File not in order.
- State counsel fees not yet processed.
- The case may be under appeal resulting in the file being held by the assigned officer.
- Terms of the order may be incomplete, resulting in further court applications and the taking of advices from the Office of the Attorney General.

## **Historical delays in payments**

### *Bail cases*

3.26. The review team established that while there was general satisfaction with the payment system in relation to current bail motions, dissatisfaction was expressed in regard to the delays in payments in respect of older files, some dating back to 1993. The CSSO was presented with a number of difficulties in resolving outstanding payments in relation to older files. The main issues were:

- For some claims the records were incomplete, missing or may have been destroyed;
- In some cases the court orders were not on the files with claims;
- There was an inability to track files in the Chief State Solicitor's Office according to High Court record numbers.

3.27. In 2006, a global list of all outstanding older claims including disputed claims for the period 1993 to 2001 was made and comprised of 647 claims of which 28 referred to the year 2001 and the remainder pre-dated 2001. By December 2006, prior to the handover to DJELR, the list was reduced to a possible 58 outstanding claims to be resolved of which 38 have furnished insufficient supporting documentation, a further ten were being disputed and an offer of settlement was made in respect of the remaining ten claims. The latest position is that all these old bail files have been processed.

### *Non-bail*

3.28. Historically, there is a good deal of dissatisfaction amongst the legal profession with the payment system for non-bail cases under the Scheme. Non-payment can arise because solicitors may claim fees that exceed the amount paid to State Counsel or fall outside the ambit of the Scheme leading to disputes and complaints from practitioners. The fact that the amounts paid differ from those claimed is a reflection of the operation of internal accounting checks on each claim application. Disputes may also arise with counsel about delay in payment because although counsel has submitted fees to their solicitor, the solicitor has not yet submitted detail of the claim for payment to the Chief State Solicitor. Issues may also arise because court orders may not be clear or may not contain a recommendation for the Scheme.

3.29. The Costs Accounting Unit had a small number of non-bail payments that were held up for a considerable time because of issues over the appropriate fee to pay in situations where counsel did not appear for the State e.g. in a consent extradition or because no fee had been fixed for a particular service. At the end of December 2006 immediately prior to handing over to the DJELR, the backlog had been substantially cleared as there were no remaining cases to process for non-bail claims received for 2001 to 2003. There remained for processing in the Costs Accounting Unit 3 claims received in 2004, 5 claims received in 2005 and 33 claims received in 2006. The position at the end of June 2008 was that the Cost Accounting Unit had 25 open files in respect of pre 1 February 2007 orders of the court, of which three files were dated prior to 2006<sup>2</sup>.

## **Conclusions**

### *Cost effectiveness*

3.30. Scheme payments for bail applications made to solicitors and counsel cover scale fees and expenses which are set out in a scale of fees. The use of scale fees is appropriate for small items and for frequently recurring services. The number of items on invoices increases the administrative resources to process the invoices for payment.

3.31. Payments in respect of bail cases under the Scheme are higher than payments under the Criminal Legal Aid Scheme because the hearings involving the Scheme take place in the High Court which commands a higher fee and because of the allowances for expenses which are built into the Scheme. For non-bail cases, payments are on a par with those made to State

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<sup>2</sup> One file refers to a 2001 case for which evidence has been requested that the AG Scheme was applied for at the outset. A second file is from 2005 which is under processing. The third file is pending receipt of additional information which is requested from the solicitor.

counsel and are cost effective when compared to the potential payout on foot of an order for costs.

*Process efficiency*

3.32. There is scope for streamlining the process for establishing means if a requirement was introduced for the provision of one statement of means covering both criminal legal aid as well all ancillary matters, including bail, in all courts including applications to the High Court. Until a single statement of means may be introduced, the introduction of a requirement for a formal statement of means to be submitted to the court prior to any application being considered, would tighten up the implementation of this aspect of the Scheme.

*Administrative efficiency*

3.33. The system for processing bail payments is cumbersome, leading to potential delays in the processing of files due to the number of data items to be recorded and verified.

3.34. Delays which had arisen in the period up to 2004 in the system for the administration of payments have been largely addressed although there remain situations where the establishment of an appropriate fee and the lack of provision of the necessary supporting documentation can lead to payment delays.

## 4. Effectiveness of the Scheme

4.1. This Chapter considers the effectiveness of the Attorney General's Scheme. For the purposes of the review, effectiveness can be assessed in terms of the extent to which the objectives of the Scheme are achieved.

4.2. While the ultimate approval for payment is at the discretion of the Attorney General, the vast majority of recommendations from the Court are acted on and payments are made. This is a direct indication of the effectiveness of the Scheme.

4.3. Whilst it is the practice of the Attorney General always to pay fees on foot of a Court recommendation, he is not obliged to do so. One could argue that this could lead to the suggestion that a degree of uncertainty or lack of transparency exists. The implication is that the limits of the Scheme are uncertain. The degree of discretion could be seen to invite applications that might seek to expand the Scheme beyond the current remit. There have been specific exceptional cases, like adoption cases, where the Scheme was formally extended for a limited period in the public interest. This has not affected the underlying key objective of the Scheme.

4.4. Another effectiveness issue is to ensure that the requirements of the Scheme are adhered to. There are some cases, mainly in the non-bail areas, where disputes can arise. These can cover procedural issues, for example over the timing of the recommendation and the nature of the costs to be covered. The Attorney General is the final arbiter whether payments can be made and these procedural issues are typically dealt with through correspondence between the Costs Accounting Unit of CSSO (DJELR from February 2007), on direction from the Attorney General, and the applicant's solicitors. Issues arising from the terms of court orders can also be resolved through referral back to the Court.

4.5. The Scheme was put in place to protect the liberty of the individual in situations where criminal legal aid was not available and its financial cost must be considered in that context. The Scheme has been adjusted to keep pace with developments in jurisprudence and legal practice over nearly 40 years and there have been appropriate revisions to the Scheme since it was introduced. The main outcome of the Scheme, from a policy point of view, is that applicants have been given access to professional legal services in matters where their liberty is at stake and in circumstances where they were not otherwise in a position to obtain such services.

4.6. The review finds that it is desirable that the areas covered by the Scheme should be incorporated into the formal system of legal aid. Any system of legal aid should be transparent and clearly defined. There is a balance to be struck between the clarity and rigidity required to comply with a statutory scheme and the need for discretion to maintain an element of flexibility to cater for exceptional situations that can arise from time to time.

4.7. The review considers that it is important that the Attorney General should retain discretion to extend the Scheme to ensure that a party who ought to be given legal assistance<sup>3</sup>

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<sup>3</sup> for example because of requirements in the European Convention of Human Rights where some discretion is necessary under the Scheme to ensure that legal representation is given where this otherwise would result in the State breaching its obligations under the Convention.



is not disqualified due to some administrative anomaly. However, where there is a clear obligation to grant legal aid there should be no discretion. In practice, the use of this discretion has not compromised the objectives of the Scheme.

4.8. The adequacy of payments under the Scheme to cover the underlying costs is also a contributing factor to the effectiveness of the Scheme. The costs paid under the Scheme are linked to payments governed by other systems and therefore they are adjusted over time except for bail. There are specific fees paid in bail cases which have to be adjusted by agreement. For bail cases, a professional fee is applied which is in line with fees applying for the High Court and is adjusted in line with Pay Agreements under the Social Partnership Agreements. The scale of fees is reviewed occasionally by the Attorney General and is subject to the approval of the Department of Finance. Consultations on the scale of fees are made with stakeholder, principally the Bar Council and the Law Society. For non-bail cases, the fees are dealt with and paid on a par with State counsel and depend on the nature and complexity of the case.

### **Options for improving the effectiveness of the Scheme**

4.9. The historical and current status of the Scheme was set out in Chapter 1 of this report. The Scheme was set up on an ad-hoc basis to fill a lacuna within the system of legal aid in Ireland in 1967. While the Scheme has been revised on a number of occasions it still operates on the original basis in which it was set up. At the time the Scheme was set up, the system of criminal legal aid had been in operation from 1965<sup>4</sup>.

4.10. The expenditure review examined the merit of broadening the scope of the Criminal Legal Aid Scheme to include the criminal provisions of the non-statutory Attorney General's Scheme. The ad-hoc arrangement of the Attorney General's Scheme has been addressed on three occasions in the Pringle Report, the Tormey Report and the Criminal Legal Aid Review Committee Final Report. All three Reports recommended that responsibility for the Attorney General's Scheme be removed from the Office.

#### *Pringle Report (1977)*

4.11. The Pringle Report deals briefly with the setting up of the Attorney General's Scheme specifically making reference to *habeas corpus* applications. The Report recommended "A statutory board, to be called the Legal Aid Board, should be established to administer the Legal Aid and Advice Scheme." It is clear that the Report intended that *habeas corpus* applications come within the remit of civil legal aid.

#### *Tormey Report (1981)*

4.12. The Report of the Tormey Committee, dated 9 April, 1981, recommended that the Criminal Legal Aid Scheme should be expanded to include matters dealt with under the Scheme. The Report makes specific reference to bail motions, State-side proceedings (now judicial review proceedings) and Extradition Proceedings in paragraphs 16 and 17 respectively:

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<sup>4</sup> *Criminal Justice (Legal Aid) Regulations 1965.*

*Paragraph 16*

*“The non-statutory arrangement under which legal aid is provided in certain cases by the Attorney General's Office should be brought within the scope of the Criminal Legal Aid Scheme”*

*Paragraph 17*

*“Extradition Proceedings should be brought within the scope of the Criminal Legal Aid Scheme subject to the conditions specified in Paragraph 10.1.3.”*

**Criminal Legal Aid Review Committee Final Report (2002)**

4.13. This Report, published in February 2002 again recommends that elements of the Attorney General's Scheme should be placed on a statutory footing and brought within the scope of the Criminal Legal Aid Scheme. This is probably the most comprehensive Report to deal with this issue taking submissions from a number of key stakeholders.

4.14. The Office stated in its submission that

*“... The (Attorney General's) Scheme has no legislative basis. In the Attorney General's Opinion it is inappropriate that such an ad-hoc system of legal aid should exist. The Attorney General would ask that your Review Committee recommend that this scheme in so far that it relates to matters connected with criminal cases be incorporated into the Criminal Legal Aid Regulations....”*

4.15. The Law Society stated as follows

*“The present system is unnecessarily complicated and uncertain and should be incorporated into any new Legal Aid System. In this we echo recommendations 16, 17, (18 and 19) of the Tormey report.”*

4.16. The Bar Council stated:

*“... In respect of matters such as Bail Motions, habeas corpus applications and Judicial Review applications, the Criminal Legal Aid Scheme does not provide legal representation to persons who cannot afford to pay for it. In such cases representation is provided to impecunious persons by means of what is known as the Attorney General's Scheme.*

*The present practice is that once the presiding Judge for the application of the Attorney General's Scheme makes a recommendation, the Registrar of the High Court draws up an Order. This order is recovered by the Solicitor for the Applicant and then furnished to the Chief State Solicitor's Office with a note of fees.*

*The Bar Council proposes that the provisions of the Criminal Legal Aid Scheme be extended to cover such Bail applications. It is the view of the Counsel that it would make for greater efficiency if the processing of fee payment claims currently made under the Attorney General's Scheme were part of the normal claims processing system for Criminal Legal Aid cases ....”*

4.17. Having considered the foregoing submissions the Criminal Legal Aid Review Committee (CLARC) set out its detailed analysis as to the merit of broadening the scope of

the Criminal Legal Aid Scheme to include the 'criminal' provisions of the Attorney General's Scheme. The Committee considered *inter alia* the following:

- Bails make up the vast bulk of applications under the Scheme. Two systems of legal aid can often apply to the one criminal case.
- There are no legal or constitutional reasons why such a recommendation should not be followed.
- There may very well be cost saving benefits by amalgamating the operations of the DJELR and the Costs Accounting Unit within the CSSO assigned to the administration of the Scheme into one Unit.
- The previous recommendations of the Tormey Report.

4.18. The CLARC concluded that the Scheme should be placed on a statutory footing and brought within the scope of the Criminal Legal Aid Scheme. Despite the clear recommendations of the aforementioned Reports the status of the Scheme has not altered since its introduction.

4.19. The DJELR took over the administration of the Scheme on a non-statutory and on an agency basis since 1 February, 2007. The provision of criminal legal aid is one of the tasks carried out by the Department and its Statement of Strategy includes the following high level goal "*to facilitate access to justice through the operation of professional, efficient and cost effective criminal aid and advice schemes...*" The Attorney General continues to be of the view that there should be a statutory scheme, but accepts that is a policy matter for the Department.

### **Management Reporting (Performance Indicators)**

4.20. Transaction information for the Scheme is available from the Lotus Notes based system and at subhead level from the CSSO accounting system. For the period up to July 2004, no routine financial reports on the processing of payments were made to senior management until September 2002 when a system of reporting to the Chief State Solicitor commenced as a result of backlog queries regarding payments. For the remainder of the period under review reports were given as required. Since the introduction of improved financial management systems in July 2004, routine financial expenditure reports on general law expenditure, which includes the Scheme, are provided to the CSSO/ AGO Management Advisory Committee. While no specific reports on the Scheme are produced, specific information is provided on an ad-hoc basis, when required.

### **Conclusions**

4.21. The key objective of the Scheme is to provide legal aid to persons, (falling outside the criminal legal aid system), whose liberty may be at risk however, the provision of such legal aid does not fit within the mission and current strategy of the Office and is more appropriate to those of the DJELR which took over the administration of the Scheme on a non-statutory and agency basis on 1 February, 2007. CSSO continue to process claims in non bail cases where recommendations were made by the court prior to 1 February 2007.

4.22. The combining of the administration of the Attorney General's Scheme payments with the larger administration of criminal legal aid would deliver administrative processing efficiencies.

4.23. It is generally accepted by previous reviews of the Scheme that it would be preferable for it to be placed on a statutory basis and transferred under the aegis of the Criminal Legal Aid Scheme. There is a balance to be struck between the clarity and rigidity required to comply with a statutory scheme and the need for discretion to maintain an element of flexibility to cater for exceptional situations that can arise from time to time.

4.24. No specific routine financial reports on the Scheme are produced although ad-hoc information is occasionally provided to the CSSO/AGO Management Advisory Committee.

## 5. Conclusions and Recommendations

5.1. This chapter brings together the conclusions reached in Chapters 2 to 4 and presents general recommendations that flow from the conclusions. The chapter is formatted in a Conclusions and Recommendations table.

**Table 10: Conclusions and Recommendations**

	Conclusions	Recommendations	Action by
<i>Scheme expenditure review</i>			
1	<p>Scheme expenditure has varied in a range of €1 million to €1.8 million per year for the period 2001 to 2007. This is approximately 2.5% of expenditure under the criminal legal aid Scheme. The transfer of the administration of the Scheme to the DJELR on an agency basis, from February 2007 is a positive step from a Value for Money perspective.</p> <p>The normal pattern is that bail related expenditure is in the range of 60% to 70% of overall Scheme expenditure but there are no other discernible trends in the level of payments as the Scheme is demand led. In particular, non-bail payments may fluctuate widely from one year to another.</p> <p>The administrative overhead for operating the Scheme is estimated at €90,000 per year. The improvement in financial management systems in July 2004 has improved the reliability of underlying information relevant to the performance of the Scheme but does not provide for a separate analysis of bail and non-bail payments.</p>	<p>The accounting systems should be reconfigured to facilitate a separate analysis of bail and non-bail payments.</p>	<p>CSSO / DJELR Accounting Units</p>
<i>Efficiency</i>			
2	<p><i>Cost effectiveness</i></p> <p>Scheme payments for bail applications made to solicitors and counsel cover scale fees and expenses which are set out in a scale of fees. The number of items on invoices increases the administrative resources to process the invoices for payment.</p> <p>Payments in respect of bail cases under the Scheme are higher than payments under the Criminal Legal Aid Scheme because the hearings involving the Scheme take place in the High Court which commands a higher fee and because of the allowances for expenses which are built into the Scheme. For non-bail cases, payments are on a par with those made to State counsel and are cost effective when compared to the potential payout on foot of an order for costs.</p> <p><i>Process efficiency</i></p> <p>There is scope for streamlining the process for establishing means if a requirement was introduced for the provision of one statement of means covering both criminal legal aid as well all ancillary matters,</p>	<p>The fee structures for all related legal aid schemes should be rationalised so that the administrative effort to verify invoices submitted for payment can be simplified.</p> <p>The system should be reconfigured to facilitate the tracking of cases by record number.</p> <p>A requirement for a formal statement of means to be submitted to the court prior to any application being considered</p>	<p>Department of Finance/ DJELR/ CSSO/ AGO</p> <p>DJELR/ Courts Service</p>

	<b>Conclusions</b>	<b>Recommendations</b>	<b>Action by</b>
	<p>including bail, in all courts including applications to the High Court. Until a single statement of means may be introduced, the introduction of a requirement for a formal statement of means to be submitted to the court prior to any application being considered, would tighten up the implementation of this aspect of the Scheme.</p> <p><i>Administrative efficiency</i></p> <p>The system for processing bail payments is cumbersome, leading to potential delays in the processing of files due to the number of data items to be recorded and verified.</p> <p>Delays which had arisen in the period up to 2004 in the system for the administration of payments have been largely addressed although there remain situations where the establishment of an appropriate fee and the lack of provision of the necessary supporting documentation can lead to payment delays.</p>	<p>should be introduced. A proposal for the provision of one statement of means covering both criminal legal aid and ancillary matters should be made.</p> <p>The recording system should be integrated into DJELR accounting systems.</p>	DJELR
<i>Effectiveness, management reporting</i>			
3	The key objective of the Scheme is to provide legal aid to persons, (falling outside the criminal legal aid system), whose liberty may be at risk however, the provision of such legal aid does not fit within the mission and current strategy of the Office and is more appropriate to those of the DJELR who took over the administration of the Scheme on a non-statutory and agency basis on 1 February, 2007.	The Scheme should be formally transferred to the DJELR	Department of Finance/ DJELR/ CSSO/ AGO
4	It is generally accepted by previous reviews of the Scheme that it would be preferable for it to be placed on a statutory basis and transferred under the aegis of the Criminal Legal Aid Scheme. The combining of the administration of the Attorney General's Scheme payments with the larger administration of criminal legal aid would deliver administrative processing efficiencies.	The Scheme should be placed on a statutory basis under the aegis of the Criminal Legal Aid Scheme.	CSSO/ AGO memorandum to Government.
5	No specific routine financial reports on the Scheme are produced although ad-hoc information is occasionally provided to the CSSO/AGO Management Advisory Committee.	Routine management reports of the volume and value of transactions processed for the Scheme should be produced on a quarterly basis for the joint CSSO/AGO Management Advisory Committee. These reports should also show the number and value of unsettled cases at the end of the period and an aged analysis of outstanding balances.	CSSO Accounting Unit

## **Appendices**

## Appendix 1: Description of the Attorney General's Scheme

The Attorney General's Scheme provides payment for legal representation in certain types of legal cases not covered by civil legal aid or the criminal legal aid Scheme. The kinds of cases covered include certain types of judicial review, bail applications, extradition and habeas corpus applications. It is an *ex gratia* scheme set up with funds made available by the Oireachtas. The Chief State Solicitor administered the Scheme on behalf of the Attorney General until 1 February, 2007 when the DJELR took over the administration of the Scheme on a non-statutory and an agency basis. Special rules apply which are contained in the Scheme itself as follows.

### The Attorney General's Scheme

The provisions of the Attorney General's Scheme in the Supreme Court and the High Court are as follows:

1. The Scheme applies to the following forms of litigation (which are not covered by Civil or Criminal Legal Aid): (i) *Habeas corpus* applications. (ii) Bail Motions. (iii) Such Judicial Reviews as consist of or include Certiorari, Mandamus or Prohibition and are concerned with criminal matters or matters where the liberty of the applicant is at issue. (iv) Applications under section 50 of the Extradition Act 1965, extradition applications and European Arrest Warrant applications.
2. The purpose of the Scheme is to provide legal representation for persons who need it but cannot afford it. It is not an alternative to costs. Accordingly, a person wishing to obtain from the court a recommendation to the Attorney General that the Scheme be applied must make his or her application (personally or through his or her lawyer) at the commencement of the proceedings and must obtain the recommendation at the commencement of the proceedings.
3. The applicant must satisfy the court that he or she is not in a position to retain a solicitor (or, where appropriate, counsel) unless he or she receives the benefit of the Scheme. To this end the applicant must provide such information about his or her means as the court deems appropriate.
4. The court must be satisfied that the case warrants the assignment of counsel and/or solicitor.
5. If the court considers that the complexity or importance of the case requires it, the recommendation for counsel may also include one senior counsel.
6. The costs payable to the solicitor, and the fees payable to counsel, under the Scheme are at most those which would be payable in a case governed by the Criminal Justice (Legal Aid) Regulations current for the time being, applied *mutatis mutandis*.
7. Where there is more than one applicant, but only one matter is at issue before the court, the solicitor and counsel assigned shall represent all the applicants.
8. The Scheme is an administrative, non-statutory arrangement whereby payments are made out of the Vote of the Office of the Chief State Solicitor in respect of certain legal costs in the types of litigation referred to in paragraph 1 of the Scheme in which, for the most part, the State is a party (although the State need not be a party to proceedings which are eligible



for the Attorney General's Scheme). The Attorney General is not bound by the recommendation of the Court.

9. The Scheme only applies to proceedings of the type referred to in paragraph 1 of the Scheme conducted in the High Court and the Supreme Court. Where the proceedings are of a type which fall outside the scope of the Scheme, as in for example family law cases, the Scheme cannot be applied to those proceedings because public funds may only be applied for the purpose for which they have been provided by the Oireachtas. It is not within the discretion of the Attorney General to apply public funds to other purposes.

10. The term "the commencement of these proceedings" in paragraph 2 of the Scheme refers to the commencement of proceedings in a particular court. In other words, an applicant would not be prejudiced from seeking the benefit of the Attorney General's Scheme to be applied to him or her in respect of Supreme Court proceedings by reason of the fact that he or she had not made such an application in relation to the High Court proceedings. However in these circumstances, the Scheme does not have effect retrospectively to entitle him or her to costs under the Attorney General's Scheme in respect of the High Court proceedings.

11. These are the main conditions relating to the Attorney General's Scheme. The Attorney General and the staff of the Office of the Attorney General are unable to give legal advice to members of the public. Members of the public should obtain their own legal advice as to their entitlement (if any) under the Attorney General's Scheme.

## **Appendix 2: Documents Referred to in the Review**

1. Delivering Better Government (DBG).
2. The Public Service Management Act 1997.
3. The Comptroller and Auditor General (Amendment) Act 1993.
4. Criminal Justice Legal Aid Act 1962.
5. Legal Aid Act 1995.
6. Extradition Act 1965.
7. Office of the Attorney General Statement of Strategy 2003-2005.
8. Extradition (European Union Conventions) Act 2001.
9. European Arrest Warrant Act 2003.
10. Attorney General's Scheme 1967.
11. Revisions of Attorney General's Scheme 1991, 1992, 1998, 2000 and 2005.
12. Bail Application Form completed by Solicitors/Counsel and certified by the duty Court Registrar.
13. Address of Solicitor and VAT number. (If registered for VAT PPI number to be supplied). Form in use makes reference to RSI No.
14. Schedule of Scale Fees is applied in relation to bails.
15. Judicial Review Schedule of fees paid to State counsel.
16. Pringle Report, 1977.
17. Tormey Report, 1981.
18. Final Report of the Criminal Legal Aid Review Committee, 2002.