

The Impact of Fixed Payments: the effect on case management, case trajectories, and ‘quality’ in criminal defence work¹

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1. INTRODUCTION

This paper considers the delicate question of whether changes to the structure and level of legal aid payments significantly affects the trajectories of criminal cases, including how defence lawyers handle cases and the sensitive question of how they advise their clients' in their pleading decisions. In recent years, Scotland⁴, like other common law countries, has made major changes to the remuneration structures for criminal defence work. This paper reports on recent research examining the impact of one of these changes: the move to 'fixed payments'. In so doing, this paper also seeks to contribute to international knowledge about the relationship between legal aid payment regimes and criminal case trajectories, including the handling of cases by lawyers and plea decision-making. Furthermore, if any changes are observed as a consequence of the restructuring of legal aid remuneration, do these have any important consequences for clients, or, are any observed changes simply absorbed by lawyers, or neutralised by other developments?

During the 1980s and 1990s, the overall cost of criminal legal aid in both the jurisdictions of England and Wales, and of Scotland, rose both in real terms and above the rate of increase in public spending: a phenomenon which has produced intense concern among successive governments in both countries.⁵ The cause of these rises has been hotly debated both within governments and among academic researchers (Gray, Fenn, and Rickman 1996; Stephen 1998; Cape and Moorhead 2005; Bridges 2001; Bevan 1996). Gray *et al.*'s economic analysis suggested that the introduction in England and Wales of standard fees in the magistrates' court in 1993 led to: a reduction in the amount of non-core work; increased work which was paid outside standard fee; and claim splitting (Gray, Fenn, and Rickman 1999). Although the assumptions upon which Gray *et al.*'s research is based have been strongly criticised by a range of commentators (Cape and Moorhead 2005; Samuel 1996; Sommerlad 1996; Wall 1996; Bridges 2001), to date there has been relatively little published direct empirical examination of the effects of standard fees for summary work.⁶ Given the favour with which the basic concept of block fees, (upon which both fixed and standard fees are based), is viewed by governments⁷, the need for direct empirical examination of the impact of block fee arrangements in the provision of criminal defence services seems all the more acute.

⁴ Scotland has a separate system of criminal law and criminal justice from that of England and Wales, with appeals being heard by the Court of Criminal Appeal in Edinburgh (there is no appeal in criminal cases to the House of Lords). The legal profession of Scotland is separate from that of England and Wales, as is the independent prosecution service - Crown Office and Procurator Fiscal Service (COPFS).

⁵ Analysis of these trends in England and Wales and Scotland can be found in a comparative studies by Goriely, Tata, and Paterson (1997); Stephen (1998); Tata (1999).

⁶ Cape and Moorhead (2005) recently analysed criminal cost drivers from which subsequent research can proceed. Quirk and Pleasence (2001) carried out a thorough investigation of Crown Court cases as the basis for which contracting systems could develop in the Crown Court. Bridges (2001), in an unpublished paper, provides a rebuttal of the 'case-splitting' hypothesis advanced by Gray *et al.* (1996).

⁷ See for example, in England and Wales, Department of Constitutional Affairs (2005) which was the base document for the recent review by Lord Carter of Legal Aid Procurement (February 2006).

2. THE INTRODUCTION OF FIXED PAYMENTS

Under the new system of fixed payments⁸ in Scottish summary courts solicitors receive a basic payment of £300 (plus VAT) per case in the District Court and £500 (plus VAT) per case in the Sheriff Court.⁹ These sums cover all work from an initial not guilty plea at the pleading diet¹⁰ up until trial. After the first 30 minutes of the trial, further payments are available, as well as, inter alia, for bail appeals and deferred sentences. Solicitors can no longer claim additional payments for costs associated with preparing the case, although there are a few exceptions (e.g. medical reports), which can be claimed in addition to the basic fixed fee. Payments are made for blocks of work: £500 in the Sheriff Court for any work done up to and including the first 30 minutes of trial (including cases heard in the District Court but coming before stipendiary magistrates). After the first 30 minutes of trial the first day of a trial attracts an additional £100 and the second day £200. In the District Court all work up to the first 30 minutes of trial attracts £300 after which the payments are an additional £50 per day. Partly in response to challenges regarding the ability of fixed payments to ensure a fair trial¹¹, this simple system of fixed payments was amended in June 2002 to allow for unusually complex and difficult cases (known as “exceptional cases”) to receive payment under the system of itemised billing known as ‘time and line’. The determination of what constitutes an ‘exceptional case’ is made by the Scottish Legal Aid Board (SLAB), which reported in 2004 that it had granted only 28 applications out of a mere 158 applications for time and line payments on the basis of an “exceptional case” (SLAB 2004). While fixed payments share certain similarities with standard fees in England and Wales, the fixed payment regime is much simpler. In contrast to standard fees in England and Wales, where an initial not guilty plea has been tendered and summary legal aid has been granted, under fixed payments there is no system of ‘higher’ and ‘lower limits’ to payment; and there is very little ‘additional work’ which can be claimed. Furthermore, under fixed payments there is no hourly calculation for particular tasks such as attendance at court; preparation; advocacy etc. (LSC CDS ‘Focus’ newsletters; Ling and Pugh 2003). Another distinction is that under the Scottish system when a plea of guilty is tendered at the Pleading Diet, Summary Legal Aid is not available. Only the much lower payments made under Advice & Assistance (A&A) and Advice By Way of Representation (ABWOR) may be accessed.

The introduction of fixed payments was seen by its proponents as a way to “give a fair level of remuneration to the legal profession while at the same time ensuring that the taxpayer in Scotland receives value for money from the criminal legal aid system” (SLAB 1998). At the time of announcement and introduction it was argued by representatives of the legal profession that fixed fees would lead to diminished and fluctuating incomes for solicitors providing criminal defence services and, in the long

⁸ Also widely known as fixed fees.

⁹ The Sheriff Courts (presided over by sheriffs who are professional lawyers by background) and hear both solemn (jury-triable) and summary (non jury triable) cases. The District Courts are largely presided over by lay justices (although in Glasgow they are presided over by stipendiary magistrates and have the same sentencing powers of the summary sheriff courts) and hear summary cases only. Unlike England and Wales, the ‘accused’ person has no right to elect for jury trial.

¹⁰ The ‘pleading diet’ is the first opportunity to plead.

¹¹ *Gayne v Vannet* 2000 *SCCR* 5, 1999 *SLT* 1292; *Buchanan v McLean* 2001 *SCCR* 475.

run, to a reduction in the number of solicitors providing these services (Law Society of Scotland, 1998).

However, those in favour of fixed payments tend to argue that this is a case of ‘swings and roundabouts’. So although on a case-by-case basis the system of payment is not proportional to the work done, over the longer run gains and losses cancel each other out. The thinking is that solicitors will make the appropriate professional judgement as to the amount of work required by any particular case. In interviews for this research, SLAB officials argued that relatively difficult cases are underpaid (ie lose on the swings), and straightforward cases are overpaid (gain on the roundabouts).

Commenting on the proposals for the introduction of fixed payments into criminal legal aid in October 1998, Minister of State for Home Affairs of the Scottish Office, Henry McLeish, said that “there will be some element of swings and roundabouts, but I am satisfied that taking their caseload as a whole, solicitors will be able to provide a quality service for the payments that are on offer.”¹² Critical to the idea of swings and roundabouts is the supposition that the arrangement of fixed payments will not affect the ability of solicitors to “continue to provide a quality service”. This idea of ‘swings and roundabouts’ (overall cost and quality neutrality) resembles two key justifications behind block contracting¹³ in England and Wales; and, indeed competitive tendering¹⁴. The first supposition is that, over the long run, firms’ overall income will balance out. However this balancing-out effect can only assist specialist firms doing a high volume of summary criminal casework.¹⁵ Secondly, explicitly at least, the impact of swings and roundabouts is supposed to be quality neutral: solicitors are said to be able to maintain “a quality service”, by continuing to give much greater attention to difficult cases and less time to straightforward cases. Whether or not a more insidious intention of the principle of swings and roundabouts is to diminish the adversarial character of defence work is harder to determine. However, it may be important to note that the level of fee for Scottish summary cases was chosen at a level well below the average cost per case under time and line and has not since been increased.¹⁶ The remainder of this paper describes and discusses some of the findings of recently completed research into the impact of fixed payments.

i. The Fixed Payments Research

¹² Scottish Office News Release.

¹³ For example, Department of Constitutional Affairs (2005) at p23: “A block contract has the advantage of paying for a specified service to be delivered, rather than hours worked. This creates an incentive for suppliers to work more efficiently to increase their profits.”

¹⁴ See for example, Department of Constitutional Affairs (2005). See also the prescient discussions by Bridges (1996) and Sommerlad (1996).

¹⁵ See the projections made in Stephen (2001).

¹⁶ It was intended to reduce total legal aid expenditure on summary cases. The originally proposed fixed payments implied a reduction in summary legal aid expenditure of 25%. After consultation the fixed payments were revised to a level which implied a reduction in expenditure of around 21%. See discussion in Stephen (2001).

We were asked by the Scottish Executive Department of Justice to explore the impact of the introduction of fixed payments into summary legal aid.¹⁷

(a) Research Methods

The research used a combination of quantitative and qualitative analysis to explore any impacts of the introduction of fixed payments, including those on: solicitor firm incomes; SLAB expenditure; the handling of cases by solicitors; and, the stage of conclusion of cases.

As an initial stage of the research, we conducted a small number of face-to-face semi-structured interviews (13)¹⁸ with senior personnel (known as ‘stakeholder’¹⁹ interviews). Partly informed by the face-to-face semi-structured stakeholder interviews, a postal questionnaire survey was issued to non-stakeholder defence solicitors. SLAB provided the research team with the register of summary criminal legal aid defence practitioners. From this list a random sample of 300 was drawn and 92 completed questionnaires were received.²⁰ The completion of the postal questionnaires led to a smaller but more in-depth telephone survey and telephone interviews of non-stakeholder defence solicitors. 62 telephone interviews with defence solicitors, who were active in summary criminal legal aid, were conducted.²¹ The telephone survey consisted of both closed questions and more open questions.²² Follow-up face-to-face interviews with ‘non-stakeholder’ defence solicitor were also conducted after the telephone survey. In addition to the face-to-face stakeholder interviews with senior members of Crown Office and Procurator Fiscal Service (COPFS) 17 depute fiscals (‘non-stakeholders’), from a range of different areas of the country, were interviewed.

Statistical analyses of two large disaggregated data sets were also conducted. We were given access to SLAB disaggregated data files. The statistical analysis of disaggregated data allowed for more controlled analysis to be conducted than is possible by using aggregated data (as is used in annual reports). The analysis of disaggregated SLAB data

¹⁷ The study ran from December 2003 to January 2005 and was assisted by a research advisory group convened by the Justice Department of the Scottish Executive which consisted of representatives of the Justice Department, SLAB, the Law Society of Scotland, local criminal bar associations, the Crown Office and Procurator Fiscal Service, the judiciary, and two independent academic experts in the area (Professor Peter Duff, professor of criminal justice, Aberdeen University Law School; and Professor Roger Bowles, co-Director of the Centre for Criminal Justice Economics and Psychology, York University).

¹⁸ The topic guide for these semi-structured interviews; survey questionnaires; interview schedules for telephone interviews as well as more detailed description of the quantitative and qualitative methodologies used in the research are provided in Stephen and Tata (2006a).

¹⁹ Here, the term ‘stakeholder’ refers to persons who are representatives of professional organizations or agencies and/or responsible for the making of summary criminal justice policy or attempts to influence the making of summary criminal justice policy.

²⁰ The postal questionnaire contained 13 questions seeking basic information about the respondent and his/her firm.

²¹ It proved impossible to conduct a telephone interview with the remaining 30 respondents.

²² There were 36 questions exploring the effect of fixed payments on four main areas: the individual solicitor’s activities and behaviour; those of the firm; general comments on the impact of fixed payments; and, observations of the impact on other defence solicitors.

allowed detailed examination of income and expenditure, an important limitation of the SLAB data is that there is no case outcome data (e.g. stage of conclusion). However, data sets supplied by COPFS allowed the proportions of cases terminating at each of four main stages to be identified. The COPFS data provided was from 1991 to 2003. In line with previous work (Tata *et al.* 2004 and Goriely *et al.* 2001), the conclusion of cases was assigned to four broad stages: at the pleading diet (all cases terminating at or before the first plea was tendered); at the Intermediate Diet; before the trial has begun (including where a trial diet was held but before evidence was led); and at trial (i.e. after evidence was led). In this paper, we concentrate particularly on describing and discussing the impact of fixed payments on case handling and case outcome and the analysis of data supplied by COPFS.²³

(b) Findings

At the time of announcement (and subsequent introduction in 1999) opponents of fixed payments predicted that it would lead to diminishing incomes for solicitors. Due to space constraints, it is not possible to report and discuss here our findings on the impact of fixed payments on legal aid expenditure and on firm income. This is detailed in our full report which was first submitted to the Scottish Executive in January 2005 (Stephen and Tata, 2006).²⁴ However, three points should be noted since they provide helpful context to the discussion of findings about the preparation of cases and case trajectories. First, fixed payments initially hit the income of specialist firms particularly hard, but by 2000-1 income levels began to recover and by 2001/2 they were back to the levels of before the introduction of fixed payments. The second point is that both quantitative and qualitative evidence shows that most specialist firms have adapted to fixed payments by sharply increasing the caseloads undertaken.²⁵ Third, client contact²⁶ was reported to have decreased sharply as a direct result of the impact of fixed payments.²⁷ In our telephone survey of criminal defence solicitors active in legal aid work, two thirds said their own levels of client contact were unaffected. However, only one third believed this to be true

²³ In order to estimate the impact of the introduction of fixed fees on the system, an event study analysis was performed using panel data methods. In particular, we use a ‘difference in difference model’, where we control for the specificity of each court. This specification is equivalent to a two-way fixed-effects regression. This method allows the statistical analysis to distinguish between effects which occur over time (such as changes in the remuneration system) and effects which are particular only to individual courts, (which might be described as encompassing individual court cultures), and are not a direct consequence of the introduction of new national policies, such as fixed payments. More detailed explanation of the statistical analyses performed is provided in Stephen and Tata (2006a).

²⁴ At the time of writing (December 2006), our full report (Stephen and Tata 2006) remains unpublished by the Scottish Executive. Readers who wish to obtain a copy of the full 220 page report have had, we understand, to resort to requesting it under Freedom of Information legislation. However, publication of a short discussion on the financial impact on the impact on firms and legal aid expenditure was permitted to be published by the Scottish Executive - see Tata and Stephen (2006b)

²⁵ These analyses of solicitor firm income and SLAB expenditure are described and discussed in detail elsewhere – Stephen and Tata (2006a).

²⁶ Respondents were told that the term ‘client contact’ included visits to custody, written and telephone correspondence, meetings held at the office and any other forms of contact.

²⁷ Both the level and nature of fixed payments were said to have had this effect. Space constraints mean that we can only report some of the results on this question. Fuller data is in Stephen and Tata (2006a).

of *other* defence solicitors. Half of the respondents believed client contact by other defence solicitors had declined; and almost a third said their own client contact levels had declined as a consequence of the introduction of fixed payments. In our interviews with them about the impact of fixed payments, senior SLAB officials sought to draw a distinction between what is necessary to progress the case as opposed to what they regarded as relatively superfluous client-care. However, in both face-to-face and telephone interviews several defence solicitors suggested that the reduction in client contact has led to less effective defence work

I think it has made it less effective...they want to spend time telling you whereas the clock is ticking and you do not have time to do that and it then becomes a case which you make no profit out of at all. [Telephone survey, defence solicitor 981494].

If somebody who may get the jail, whose life may be ruined em deserves half an hour of my time, they're going to get 3 minutes of my time [face to face non-stakeholder interview defence solicitor 4]

Indeed, research into client-lawyer interaction underlines the centrality of client contact and client care. In their study of legally aided clients, Sommerlad and Wall found that clients judged solicitors on a variety of interpersonal as well as technical criteria. Interpersonal criteria were judged highly important (Sommerlad and Wall 1999), a point which was emphasised by client interviews in Scotland (Goriely *et al.* 2001 and Tata *et al.* 2004). These studies confirm the point that unless solicitors established good rapport with clients, they can fail to elicit enough information to perform a technically competent service (Sommerlad and Wall 1999).

(c) Preparation and Precognitions

In contrast to many other English-speaking jurisdictions, traditionally, in Scotland there has been no formal systematic provision for advance disclosure by the prosecution.²⁸ Rather, a unique feature of Scottish criminal procedure has been that of precognitions, in which the prosecution provides a list of prosecution witnesses to the defence solicitor who then normally arranges for them to be interviewed and statements taken.²⁹ In this way, the defence is made aware of the strength of the prosecution case and can advise the client accordingly. Earlier research showed that precognitions were widely regarded by defence solicitors as vital to the preparation of a case for trial and conducting a trial itself. However, that research also highlighted that, under time and line, the payment for precognitions work was open to abuse.³⁰

²⁸ Recently, in law at least if not in routine practice, there has been a shift towards disclosure, which is discussed below.

²⁹ A precognition differs from a witness statement in that a precognition cannot be put to the witness in a trial. "Whereas a witness statement is essentially an account of what the witness has said, a precognition is a precognoscer's account of the witness's evidence." (Christie and Moody 1999).

³⁰ For the taking and review of precognitions solicitors could claim £21 per hour from SLAB. The going rate for precognition agents (routinely employed by firms to take witness precognitions) was around £8 per hour. Our interviews with defence solicitors suggested that while it was recognised that this was open to

The new system of fixed payments expressly required that the taking and review of precognitions be covered by the fixed payment. It was widely reported, in our interviews, that there had been a sharp decline in the use of precognitions as a direct result of the introduction of fixed payments. We asked defence solicitors whether, as a result of the impact of fixed payments, they believed that: they, their firm and other defence solicitors made more, less, or the same use of precognitions.

(‘Insert Table 1’)

In semi-structured interviews with defence solicitors and with depute fiscals³¹, it was very widely suggested that the move to a fixed payment system has provided a strong disincentive to conduct precognitions, and preparation more generally

[W]ith a block fee clearly your perception is that if you get that fee regardless of anything that you do then it doesn't make a lot of economic sense... to be carrying out exhaustive investigations in cases. [Telephone survey 981498 defence solicitor]

No doubt whatsoever. The general level of preparation is less than it was before. [Telephone Survey 981384 non-stakeholder defence solicitor]

SLAB officials remarked that whether or not solicitors chose to take precognitions was a matter of professional judgement, but that in most cases it would be unnecessary as the strength of prosecution evidence would be immediately apparent to the defence solicitor.

Well, for many criminal cases I can see why there's no need – because there's either evidence or there's not, so they will need to take a judgment as to whether or not it's necessary [Stake-holder face-to-face interview 4, SLAB].

Although it was widely acknowledged that defence solicitors had to become more selective in their use of precognitions, what an appropriate ‘selection’ meant in practice was less straightforward than it was for SLAB officials:

If you don't know what a case involves you don't know what you have to look at, what the issues are, how complicated it is, what work you have to do and the system brought in is just a flat payment, the system is fundamentally flawed. [Telephone Survey 981498 defence solicitor].

There was a widespread view among both defence solicitors and prosecutors that there were firms which, as a matter of routine, have given up precognosing witnesses altogether This was confirmed by some in telephone and face-to-face interviews.

There is anecdotal evidence of firms that do no preparation at all in fixed fee cases...firms that simply submit the legal aid application and leave the file completely until the intermediate diet and do nothing, in which case obviously they make a fair amount of money because they're doing no admin preparatory work whatsoever. [Face-to-face interview non-stakeholder defence solicitor interview 6]

abuse by a small minority, the vast majority of solicitors spent considerable time preparing precognition agents to take accounts; reading those accounts; and weighing them up in the client's interest.

³¹ Depute procurators fiscal (or ‘depute fiscals’) are rank and file prosecutors.

Nowadays certain firms do still instruct precognition agents, a lot don't. I did for the first 4 cases on a fixed fee basis and got 4 bills from the precognition agents and then said "well, I'm not doing that anymore". So I stopped it [Face to face non-stakeholder interview defence solicitor 2]

They haven't been precognosing. And they've been keeping the £500... without any of it going on precognitions. I mean I can understand why they do it I mean they've got their own costs, In any particular case they may feel they can get by without precognitions then some of them will do that. [Stake-holder Interview 14, COPFS]

Partly as a consequence of the reported decline in preparation and in the use of precognitions in particular, it was widely reported that there was increased reliance on ad hoc summaries of evidence produced by the prosecution, which in turn is heavily reliant on police evidence. Although in Scotland the prosecution is entitled to intervene and direct police investigations, fiscals rarely take advantage of this power. Zuckerman has pointed out the consequence: "It follows that marking is entirely done on the basis of the police report and is therefore dominated by it. Whatever the fiscal sees, he sees through the policemen's eyes." (Zuckerman 1992 at pp. 330-1; see also Moody and Tombs 1982).

Whether or not the informal provision of summaries of the prosecution's case adequately fills the gap left by the decline in precognitions is highly debatable. The practice of providing summaries to the defence is neither automatic nor a requirement.

There are stories of some firms that don't precognose at all and simply rely on the fiscal's office if they can get notes of evidence. [stake-holder interview 2, defence solicitor]

In a summary case now...I probably wouldn't [precognose], I'd probably just go straight to the fiscal and find out from the fiscal what the evidence was likely to be. [face to face non-stakeholder interview defence solicitor 5].

It appears that as a direct consequence of fixed payments, precognitions have diminished, but this has not been replaced by an adequate or speedy system of disclosure. The decline in the use of precognitions, brought about by fixed payments, may also have had a postponing effect on pleading practices. Overall, this can have key consequences on the timing of guilty pleas. For example:

where the client told you the position was basically a not guilty and without the evidence to say to them, 'well, hang on a second that doesn't make any sense.' Sometimes clients who are under the influence of drink or drugs and have managed to come up with a memory of it that is totally at odds with what happened but I don't have any statements so I can't confront them with them. If they plead not guilty and I get the statements, then at the intermediate diet I can sit them down and say 'see what you told me before, that's just complete rubbish. Here's what the statements are' and at that point they may very well agree to change the plea.... [Stakeholder interview 2, defence solicitor]

Furthermore, prosecution interviewees observed that the move to fixed payments added an additional incentive to the advice to plead not guilty where prosecution evidence had not been disclosed:

if your client wasn't giving you any clear instructions to plead guilty and there was an element of doubt in his story, but you were almost there, you were almost...you knew that he'd been involved, you knew that in all probability he was guilty but his clear instructions were not to plead guilty and he was looking for further advice, sometimes you felt inhibited because you didn't have the full story. You don't have any of the papers that the Crown have got and 'em. You're just hearing his side of it and it's very very easy to say ... 'well lets reserve your position we'll put in a not guilty plea at the moment. And then we'll investigate it and once it's been investigated we'll be in a position to advise you of what the evidence is against you' and that'll inform your instructions to us. But that's far too easy because under time and line and under fixed fee legal aid there's also the added bonus to the defence agent that he gets paid. Then if that is the situation it would almost be silly not to advise your clients to hold off if he's not 100 percent sure." [Stakeholder interview 14, COPFS]

Recently, there has been a shift, in law, towards disclosure. In November 2004 the Lord Advocate circulated a memorandum to his staff (General Minute No 10/04) which said that the prosecution should normally supply the defence with all witness statements in High Court cases (i.e. solemn cases only). However, a major change relating to both solemn and summary procedure has been brought about, (since the completion of the research study reported here), by two recent decisions of the Privy Council³². Duff suggests that while these cases arose from the High Court of Justiciary, they appear to have implications for summary procedure: "although in many such cases witness statements are not taken ... it might be that henceforth police reports to the fiscal which summarise the evidence against the accused, and possibly even the contents of police notebooks will have to be disclosed." (See also Raitt and Ferguson (2006)) In November 2006 the Scottish Executive asked a retired Supreme Courts of Scotland judge (Lord Coulsfield) to examine the issue of disclosure.

Despite the official shift away from the 'grace and favour' system to automatic and systematic early disclosure which Holland and Sinclair requires and Crown Office instructions, at ground level (and especially at summary level) disclosure remains very patchy and where it is provided is often provided before trial. In this way, the diminution in the use of precognitions (deemed by advocates of fixed payments often to be superfluous) and which was a consequence of the introduction of fixed payments has not led to earlier guilty pleas as advocates of the fixed payments had suggested. In fact it has led to the reverse.

We now turn to look more closely at the effects of fixed payments on client pleading decisions.

(d) Influences on Client Pleading Decisions

In common with other English-speaking jurisdictions, a persistent criticism of Scottish summary process is that guilty pleas should be made earlier in the process – thus saving

³² Sinclair v HM Advocate 2005 *SLT* 563; Holland v HM Advocate 2005 *SLT* 553

public money and reducing delay. Much of the policy debate has focused on the question of whether defence practitioners can (and should) be given incentives to encourage earlier pleas of guilty, and if so how this can be achieved most effectively.

In the study reported in this paper, clients were not interviewed. At the very outset we raised this matter with the Research Advisory Group³³ (which oversaw the conduct of the research). It decided that the research was not commissioned to seek the views and experiences of summary legal aid clients. The Group felt that it would not be possible for clients to assess what effect (if any) fixed payments had. However, this is *not* to say that knowledge about client experiences and perspectives was unimportant to this research. The research was able to draw on the existing research literature into client experiences and perspectives, and two studies which examined the client experience and client in the Scottish summary courts – research evidence which was contemporaneous with the period studied in this paper. Here we briefly outline some of the findings from these two studies which are particularly relevant to an appreciation of client experiences and how this relates to the question of plea decision-making.

Recent research from Scotland into the performance of public defence solicitors (Goriely *et al.* 2001; Tata *et al.* 2004) has described key pressures on clients and solicitors which combine to produce very high rates of not guilty pleas at the first (or ‘pleading’) diet which later changed to guilty pleas. At custody diets, solicitors work under tremendous time constraints, often exacerbated by delays in prosecution serving papers on accused. Prosecutors are often themselves in no position to negotiate because they know little about the case. Holding an accused person in custody is more likely, all else being equal, to encourage a not guilty plea than where the accused is at liberty. Not surprisingly, for most of those accused persons who are remanded into custody their first and most immediate priority is liberation. Where bail is not opposed, a not guilty plea ensures immediate release from remand. These, then, are some of the enduring system factors, which discourage guilty pleas at earliest diet and are as significant in explaining the very high initial not guilty plea rate as remuneration regimes.³⁴ Nonetheless, the switch from a ‘proportional’ (time and line) system to a virtually fixed system of payment represents a major shift in financial incentives.³⁵ The fact that it was implemented with the fee set at

³³ A Research Advisory Group was established by the Scottish Executive Justice Department to oversee and advise the research. The group was chaired by a senior official in the Justice Department and consisted of representatives of: the Justice Department, the academic research team, SLAB, COPFS, representatives of the Law Society, representatives of some of Scotland’s (defence) bar associations, the judiciary; and, two independent academic experts who are highly experienced in the conduct of the kind of research which was to be undertaken. From the outset and throughout the study, members of this Research Advisory Group commented on the structure and process of the research, including on earlier drafts of this report; as well as on specific tools of the research (such as interview and survey schedules).

³⁴ See also Samuel (1996); Tata *et al.* (2004).

³⁵ We investigated whether during the period 1997-2002 there had been major changes of policy or practice in summary procedure, prosecution, or patterns of cases being prosecuted through the summary courts. The only one which appears to have had a major overall impact has been the introduction of mandatory intermediate diets which we discuss later. Various other possible influences were also suggested for investigation by members of a research advisory group to see whether they may have instead caused any changes in the patterns of case trajectories. These included: the introduction of racial aggravation, human rights challenges, the increased use of fiscal fines and other forms of diversion, transfer of cases from the Sheriff to the District Courts or different case mixes. Most appeared to have a relatively negligible impact

a level which would reduce expenditure by more than 20% represents a further shift in financial incentives. We have already seen how it appears to have impacted on client contact and the investigation of prosecution evidence. Yet, has the move from time and line to a system of fixed payments at a lower average case cost impacted on the stage at which cases conclude?

It is fundamental to English-speaking jurisdictions that pleading decisions belong to clients, and that lawyer advice is made only in the client's best interests. One should not, therefore, expect that changes to lawyer remuneration regimes will produce overall changes to case trajectories. However, the empirical literature on the relationship between criminal defence lawyers and their clients around the English-speaking world has consistently highlighted the relative passivity of most clients (Blumberg 1967; Bottoms and McClean 1976; McConville *et al.* 1994; Goriely *et al.* 2001; Tata *et al.* 2004). Carlen for example described the tendency of most clients to be, in effect, "dummy players" in their own case (Carlen 1976). Ericson and Baranek described defendants as "dependants" in the criminal process (Ericson and Baranek 1982). This relationship of relative dependence is not unique to the criminal process. Similar dynamics, including where clients' expectations of outcome and decision-making are largely formed by their adviser, have been found in the relationship between civil lawyers and their (non-corporate) clients; and indeed between lay people and a variety of professional advisers (Rosenthal 1974; Sarat and Felstner 1995; Smart 1984; Mather, McEwan, and Maiman 2001).

Moreover, the relatively weak social, educational and economic resources of most clients in summary proceedings coupled with the immediate stress and anxiety which the criminal process brings means that clients tend to be in a particularly poor position to take firm command of their defence (Pleasence and Quirk 2001; see also Currie 2004). In a separate study, ethnographic research (Tata *et al.* 2007) into the construction and interpretation of pre-sentence reports examined, *inter alia*, observations of interviews with clients by social workers and communications between clients and their defence lawyers.³⁶ This research tracked the development of individual cases from the initial pre-sentence report interview through to sentencing. Clients who had pled guilty frequently regarded themselves as not guilty, though they were willing to accept the advice of their solicitor and steering by pre-sentence report writers. A key issue for professionals is to 'close' the guilty plea by persuading the client to accept their legal guilt, while carving out a space for mitigation. The research highlights that defence lawyers and pre-sentence report writers have to navigate a tricky course between mitigation and the appearance of exculpation (which risks the reopening of the guilty plea).

Thus these two studies (focused on the summary courts in Scotland and are contemporaneous with the study reported in this paper) shed considerable light on what

and none would appear to have had a major and systematic impact. For further explanation of the investigation of these alternative hypotheses see Stephen and Tata (2006a). Nonetheless, we do not discount the possibility that any changes in overall case trajectory patterns may in fact have been significantly affected by factors which bear no relationship to fixed payments.

³⁶ That research (ESRC award number RB000239939) has aimed to understand the process of communication between report writers and sentencers in the Sheriff Courts of Scotland.

clients know; want; comprehend and interpret in the process of guilty plea production. Both studies show that many represented clients in the Scottish summary courts tend to have difficulty accurately explaining the charges against them (or indeed those amended charges to which they chose to plead guilty). Furthermore, clients tended to conflate legal culpability with moral culpability: they may plead guilty for a variety of reasons but often do not believe they are truly guilty in the broader meaning of the word. However, most clients were willing to place their trust in their defence solicitor and take his/her advice. This contrasts with the oft repeated belief that most defendants/accused persons 'play the system' knowledgeably and skilfully and have their finger on the litigation button should they feel their lawyer has not done everything possible. In fact, most summary clients in these studies were compliant, confused and passive. Moreover, although many expressed frustration that their side of story was not told and they did not regard themselves as genuinely guilty, they accepted that their defence lawyer knew best.

Pre-sentence report writers and defence lawyers explained a variety of ways of ensuring compliance and 'closing' the guilty plea (Tata *et al.* 2007). Even among more experienced clients who professed initial confidence, when pressed to provide clear explanations, most admitted that they had a fairly vague idea of the procedure in their case. In contrast to the supposition that client-satisfaction is almost entirely outcome-orientated, in their interviews and surveys of clients, Goriely *et al.* found that most clients accepted that they were not in a position to judge the solicitor's command of law, or overall advice. They did, however, feel able to judge their defence lawyer on *client process* issues (such as listening; being kept informed; being treated with dignity; feeling 'stood up for'; feeling that the lawyer cared about them; remembering the case; etc).

These recent findings from Scotland provide further evidence that a simple market-style consumer-sovereignty model of client satisfaction and criminal legal services is flawed³⁷. As we have seen, most summary accused persons readily admit that they cannot make valid evaluations of their lawyers beyond process factors.³⁸ Pleading decisions, therefore, may ultimately be taken by clients, but they are heavily influenced and guided by the advice they receive; and shaped by expectations and agenda setting which are mediated by their advisors.

(e) Analysis of Case Trajectories

Using Crown Office data for the period 1991/2 – 2002/3, we first tested to see whether there had been any other major trends in the proportions of cases prosecuted in the District Courts or for the Sheriff Courts.³⁹ We also conducted statistical analyses

³⁷ And indeed, to a large extent, found also in relation to individual clients in civil cases. See for example Moorhead *et al.* (2003).

³⁸ Sherr, Moorhead and Paterson (1994), for example, succinctly put it: "[T]he client's views on quality are invaluable but inherently limited."

³⁹ In Scotland the accused cannot chose the court jurisdiction at which a case may be heard. We tested to see whether there had been any statistically significant change in the proportions of cases set for prosecution in the Sheriff and District Courts. On the whole there were no significant changes with only three exceptions: two of which long precede the introduction of fixed payments and the third of which

(informed by interviews and surveys), which sought to measure whether there appeared to have been any major impacts on case trajectories, other than any possible impact of fixed fees. It appears that easily the most important change (other than fixed payments) in the period 1991-2002/3 to affect the patterns of case trajectories has been the introduction of mandatory intermediate diets in 1996.⁴⁰

An Intermediate Diet is a court hearing after the initial pleading diet but before a possible trial diet to review whether the parties are ready to go to trial. This change was intended to reduce the number of trials cancelled during, on or shortly before the date of trial because the accused had changed his or her plea from not guilty to guilty, or, because of the non-appearance of key witnesses (Scottish Office 1993).⁴¹ Intermediate diets are intended to allow the judge to check that the accused is adhering to a not guilty plea and that all witnesses have been cited and are available to appear. Given the apparent impact of mandatory intermediate diets, we include it in the analysis here.

Has the introduction of fixed payments had an impact on the ways in which cases proceed through court? We focus primarily on the stage at which cases were concluded⁴². We have treated cases as being ‘concluded’ only when the last charge was resolved. We assigned the conclusion of cases to four broad stages: at the first or pleading diet (all cases concluded at or before the first plea was tendered); at the Intermediate Diet (all cases concluded after the first plea but before the trial diet); before trial has begun (including where a trial diet was held, but which concluded before evidence was led; at trial (i.e. after evidence has been led).

Table 2 shows the statistically estimated average proportion of cases concluding at each stage in the 49 Sheriff Summary courts over the period covered. It shows that following the introduction of fixed fees, the largest apparent effect has been the increase in the proportion of cases concluding at the Intermediate Diet stage (up 3.5 percentage points *in addition to* the 8 percentage points when these were made mandatory). The introduction of fixed payments in 1999 appears to have led to a 1.5 percentage point increase in the share of cases concluding on the day of trial, but before evidence is led. The proportion of cases concluding at a trial (i.e. after evidence has been led) fell by nearly 2 percentage points⁴³. All of these changes are statistically significant at the (conventional) 95%

affected both District and Sheriff courts in the same direction implying that it did not simply represent a transfer of cases from one level of court to the other.

⁴⁰ Intermediate diets were made mandatory (rather than optional) by the Criminal Procedure (Scotland) Act 1995. See Duff and McCallum (2000); Leverick and Duff (2001).

⁴¹ See also Duff and McCallum (2000).

⁴² In this context, the term ‘conclusion’ refers to the stage at which there was an acquittal or conviction (including through a guilty plea to amended charges). The COPFS data used does not identify the basis on which the case was concluded i.e. whether by change of plea to guilty as libelled or to a reduced set of charges or the prosecution withdrawing the case. In this context, the stage of ‘conclusion’ does not include sentencing diets and sentencing disposals.

⁴³ It should be noted that the figures given in Table 2 are not simple arithmetic averages but are estimates derived from statistical procedures designed to take account of differences across courts that are unrelated to the policy changes e.g. differences in prosecutorial and judicial style, court size etc which may be summed up in the term ‘court culture’. For a detailed discussion of the statistical method see Stephen and Tata (2006a).

confidence level. It should be noted that in some cases the *proportionate* change is very large e.g. the increase in the proportion of cases concluding at the Intermediate Diet after they were made mandatory is three-fold.

(‘Insert Table 2’)

We sought to isolate statistically the impact of fixed payments from that of mandatory Intermediate Diets and measured any impact of fixed payments *in addition to* the effects of mandatory Intermediate Diets for the years after the introduction of fixed payments.⁴⁴ These regression analyses suggest that the introduction of fixed payments has led to a statistically significant reduction in the proportion of cases concluding at the Pleading Diet and after the commencement of trial and, in particular, a statistically significant and large increase in the proportion of cases concluding at the Intermediate Diets of some 29% of their level after Intermediate Diets were made mandatory. In other words, there appears to have been a ‘squeezing effect’ towards the Intermediate Diet.

Indeed, guilty pleas at the intermediate diet were widely recognised by stakeholder practitioners as the optimal economic management of fixed payments.

The most economic use of fixed fees is simply to plead everybody not guilty, apply for legal aid, get legal aid granted, then plead them all guilty in the intermediate diet. [Interview 6 Stake-holder Defence solicitor]

You are more keen to have a case resolved that will resolve at an intermediate diet as opposed to going to trial on it because there is no financial benefit as such in going to trial even if there was a legal benefit in going to trial and therefore if a resolution is to be reached it’s better to achieve a resolution at an intermediate diet instead of halfway through a trial or an hour or half an hour into a trial or the morning of the trial. [Telephone Interview 981585, defence solicitor].

Our telephone surveys of and follow-up face-to-face interviews with prosecution and defence practitioners strongly confirmed the finding that fixed fees have led to a significant increase in cases concluding at the Intermediate Diet. Respondents were asked to describe whether their own pleading advice had changed as a result of the introduction of fixed payments. We also asked them whether they thought the pleading advice of other criminal defence solicitors had changed as a result of the introduction of fixed payments. Table 3 shows the results. Respondents did not think the introduction of fixed payments had altered their own pleading practice, but were considerably more likely to perceive a

⁴⁴ This is done using standard multiple linear regression techniques. It should be emphasised that the impact of fixed fees is measured *in addition to* the effect of mandatory Intermediate Diets for the years after the introduction of fixed fees. We were also able to test whether these effects were particular to larger, rather than smaller courts – there were no statistically significant differences between the overall impact on case trajectories of fixed payments between larger and smaller courts. We also tested for differences in case trajectories between different legal regions (sheriffdoms) and also between different individual courts. There were found to be some significant differences in case trajectories between sheriffdoms and between individual courts but statistically these did not affect the overall impact of fixed payments. These results (and the method) are discussed in much greater detail by Stephen and Tata (2006a).

change in the pleading practices of others.⁴⁵ Over three times as many respondents believed others had changed their pleading practices as had changed themselves.⁴⁶

(‘Insert Table 3’)

Those who believed practices had changed were asked to explain why. By far the most common explanation was that the fixed payments system provided an incentive to plead not guilty initially but to change the plea to guilty at the Intermediate Diet

I think people are more likely to try to resolve things prior to trial. In one view it is in a solicitor's interests that a fixed payment be resolved prior to trial. There is no incentive for someone to take the matter to trial. [Telephone Survey 981366, defence solicitor]

I think far more solicitors are ready to negotiate a plea rather than go to trial, I'm quite sure of it. And I think that's straight commerce and...it's to the disadvantage of the client [face to face non-stakeholder interview defence solicitor 3]

(f) Sentence Discounting?

Does the apparent legal aid incentive effect of encouraging a plea of guilty at the Intermediate Diet rather than later at trial (or indeed being found guilty after trial) tend to benefit clients in terms of sentencing outcomes?

Traditionally, the Scottish Court of Criminal Appeal has been wary of the idea of imposing more lenient sentences on those pleading guilty *as a matter of presumptive policy*.⁴⁷ Rather, the provision of a sentence ‘discount’ and the extent of it, has been said to very much depend on the stage and circumstances of such a plea in any individual case. Indeed, research reported and discussed by Goriely *et al.* (2001) and by Tata *et al.* (2004) found no evidence of *systematic* sentencing differences between cases which pled guilty early and those which were found guilty after a trial. Nonetheless, one of the key reasons why clients chose to plead guilty was the pervasive belief that they would likely to benefit from a significantly discounted sentence.⁴⁸

⁴⁵ That any practitioners were prepared to say ‘yes’ in relation to their own pleading advice is in itself a result which we did not expect.

⁴⁶ It is, perhaps, unsurprising that in response to closed survey questions about the impact on one's own pleading advice, most defence solicitors said that there had been no impact. Both in discussing their observation of other defence solicitors and in response to more open questions about their own practice, defence solicitors tended to be more likely to suggest that there had been some impact.

⁴⁷ See, for example, *Strawhorn v McLeod* 1987 *SCCR* 413.

⁴⁸ Although this may doubtless have been the case in various individual instances, it did not appear to make a difference across the board in otherwise similar cases.

The statistical data reported in this paper just precedes any effects which might have occurred as the result of new guidance issued by the Court of Criminal Appeal in *Du Plooy*.⁴⁹ On its face, the main intention of *Du Plooy* appears to have been to encourage greater transparency (i.e. reason-giving in open court) as to whether the sentencing judge is applying a discount⁵⁰ because of the fact of an early guilty plea.⁵¹ It does not require that there should be a policy of *automatic* discounting for an early guilty plea: whether or not a discount of up to around one third should be given (and the extent of it) remains a matter very much under the discretion of the sentencing judge. Interestingly, the research study reported in this paper also found that although it was very frequently mentioned, there was wide variation among interviewees as to the implications of *Du Plooy* in practice.⁵² For these reasons, and in absence of more direct empirical examination, it would be wrong to assume that this (apparently modest) alteration in the stance of the Court of Criminal Appeal has had any major, systematic impact on the practice of guilty plea sentence discounting. In any event, the impact of fixed payments appears to have been both to hasten *and* to postpone guilty pleas – a subject to which we now turn.

(g) *The Push and Pull Effects of Fixed Payments*

Has the introduction of fixed payments led to an increase in the rate of guilty pleas at the earliest opportunity? Although the rate of pleading guilty at the intermediate diet appears to have increased substantially, Table 2 also suggests other shifts. The proportion of cases concluding at the pleading diet *declined* over the period 1999/2000 - 2002/3 from 59.71% to 56.88%.⁵³ Regression analyses were carried out on the proportion of cases concluding at each of the four stages over time. These controlled analyses sought to identify whether, and by what magnitude, these proportions changed as a consequence of the introduction of fixed payments and of the introduction of mandatory intermediate diets.

Comparisons of the magnitudes of these changes suggest, *inter alia*, that 78% of the net increase in conclusions at the intermediate diet after fixed payments appears to be attributable to the decrease in cases concluded at the pleading diet. In other words, it appears that although fixed payments appear to have pulled the conclusion of cases back

⁴⁹ *Du Plooy (Devonne) v HM Advocate (no 1) 2003 SCCR 443*. See also *RB v HM Advocate 2004 SCCR 443*; *Smith v HM Advocate SCCR 2004 521*; *McColm v HM Advocate Court of Criminal Appeal 27 January 2005*; and *Allison v P F Stranraer Court of Criminal Appeal 17 March 2005*.

⁵⁰ The term 'discount' was avoided in favour of 'allowance'.

⁵¹ Section 196 of the Criminal Procedure (Scotland) Act 1995 was amended on October 4 2004 by the Criminal Procedure (Scotland) Act 2004 section 20(3) to insert subsection 1(A). Thus, in passing sentence, the court has to state whether it has chosen to apply a discount for a guilty plea and if so how such a sentence would have differed in the absence of such a plea; and if not why not. Again the emphasis was on the need for 'transparency' through reason-giving at the point of sentencing each individual case, but it does not alter the essentially permissive approach as to whether or not a discount is to be applied. Neither do these developments in transparency tell the client what the sentence would be if s/he were to plead not guilty at an early or late stage as opposed to deciding to maintain a plea of not guilty and run the risk of being found guilty by the court. Such imponderables have to be given through the lawyer's advice.

⁵² It was also felt that the concept of sentence discounting was seriously undermined by the practice of 'sheriff/judge-shopping'.

⁵³ Although the proportions of cases concluding at the pleading diet began to fall with the introduction of fixed payments, the reduction did not reach a statistically significant level until 2000/01. There is not space here to present the graphs of trends over time (see Stephen and Tata 2006a).

from the day of trial and after trial slightly, the much greater overall net effect appears to have been to push conclusions forward from the pleading diet to the intermediate diet. To put it another way, *the introduction of fixed payments appears overall to have had a net postponing effect* on the conclusion of cases.

In telephone and face-to-face interviews we explored apparent changes in pleading patterns and their reasons. Two explanations emerged. The first, is a familiar one in the Scottish system and long predates the introduction of fixed payments: that summary legal aid cannot be obtained until the accused pleads not guilty. However, by making the intermediate diet such an even more comparatively attractive point at which to advise a plea of guilty, fixed payments may have had the effect of making the pleading diet even less appealing.

The other oddity of the system was that [...] you've got to get, you've got to plead not guilty initially to get into the fixed payment. It means that the intermediate diet, as well as focusing back from the trial you are also looking forward from the pleading diet, and so that's really a flaw in the system that encourages you to get at least as far as the intermediate diet, rather than encouraging you to actually take a frank look at the case at the outset. [Stakeholder Interview 5 SLAB Official]

The whole legal aid system is geared up to the not guilty plea. And if they were to pay us properly for work that we do at the beginning of a case without pleading not guilty because sometimes we will go and investigate or take statements or try and take statements in cases before we plead not guilty but we don't get paid for that. [Telephone Interview 981575, defence solicitor]

3. CONCLUSIONS

The research reported here suggests that introduction of fixed payments into summary legal aid appears to have had a fairly profound effect on both case handling and patterns of case trajectories. We saw earlier that there was no explicit suggestion that the notion of swings and roundabouts should alter the character of defence work. In fact, it appears to have had a fairly profound impact.

Contrary to the desire of successive governments to encourage accused persons to plead guilty earlier, one impact of the system of fixed payments has been to add further to disincentives to plead guilty at the first opportunity (the pleading diet). Commentators have pointed out that, in itself, the legal aid system discourages guilty pleas at the pleading diet.⁵⁴ Readers will recall that in Scotland summary criminal legal aid is only available to those who have pled not guilty at the pleading diet.⁵⁵ Persons who are arrested and then plead guilty from custody may be represented under the duty solicitor scheme, while those brought to court by a citation who plead guilty may be represented

⁵⁴ See for example: Elaine Samuel, who comments "...legal aid scheme generates incentives to plead not guilty and to adhere to that plea until such time as access to legal representation is obtained through summary legal aid." in Samuel (1996); See also Stephen (2001); Goriely, Tata, and Paterson (1997).

⁵⁵ This had been envisaged by the Scottish Office as a money saving change. For further discussion of the abolition of 'the fourteen day rule' in which summary criminal legal aid had previously been available to all those who pled guilty at the pleading diet, or, fourteen days thereafter, see Warner (1996).

under the ABWOR scheme. Representation under both the duty solicitor scheme and under ABWOR is relatively unattractive, (financially, administratively, and in terms of preparation), to *both* solicitors *and* clients compared to summary legal aid.⁵⁶ By cutting the link between solicitor time input and remuneration, the system of fixed payments appears to have added further to the disincentives to both client and solicitor to decide to plead at the earliest opportunity.

Instead, the effect of the introduction of fixed payments appears to have led to a significant increase in the rate of guilty pleading at the Intermediate Diet with a slight reduction in contested trials. It does not, however, appear to have led to a reduction in the overall incidence of ‘cracked trials’ (pleading guilty on the day of trial). Furthermore, the system of fixed payments seems to have led to a reduction in client contact and a decline in the overall levels of preparation and case investigation. Many of the interviewees suggested that, as a result of these impacts, the overall effectiveness of defence work had diminished: almost none suggested it had improved. Most practitioners interviewed suggested that there was a *risk* of inadequate work (especially without an increase in fee rates), and many felt that fixed payments encouraged other defence solicitors to cut too many corners. Some fiscals and defence solicitors said that they believed that there must have been an increase in wrongful convictions as a result of the impacts of fixed payments. Almost none said that they were unaware of the most financially ‘efficient’ way of organising time under fixed payments:

The most efficient way of dealing with cases is not the proper way, and the difficulty is that you skip on preparation. What I see happening in practice is: people will be seen from custody; signed up; they’re not seen again until the Intermediate Diet; the solicitor will get an idea of the case from the Fiscal on the day of the Intermediate Diet. Precious poor representation. That is how it is being maximized. [original emphasis retained]. [Face-to-face non-stakeholder defence solicitor interview 3].

You’re getting a considerably lower amount per case than you were before. Therefore everybody had to cut their coat according to the cloth. So therefore repeat visits to precognose witnesses, lots of letters to the client telling them what’s happening in their case disappeared. The quality of service being provided went down [face to face non-stakeholder interview defence solicitor 6]

Whether, as a result of these apparent impacts, there has been an increase in the incidence of wrongful convictions cannot be directly confirmed or denied by this research. Nonetheless, it offers some insight into the impact of fixed payments on defence work. None of the interviewees felt that fixed payments had improved the effectiveness of defence work. In response to closed telephone survey questions, most of the depute fiscals thought the introduction of fixed payments had led to some decline in the effectiveness of defence work. A quarter of defence solicitors felt it had made little difference; but two thirds felt it had led to a decline in the overall effectiveness of defence work; and a few appeared to suggest quite explicitly that their own work was less

⁵⁶ This is not to suggest of course there are not a range of other countervailing non-legal aid system incentives (real and perceived) which strongly encourage pleading guilty at the pleading diet (see also Goriely *et al.* 2001; Tata *et al.* 2004). Neither do we seek to imply here that accused persons *ought* to plead guilty earlier (or later) than they do.

effective than it had been under time-and-line. In response to more open interview questions and when discussing their observations of *other* defence solicitors, there was felt to be a greater *risk* of wrongful convictions, as a consequence of the impact of fixed payments. For example,

The likelihood is that because corners are being cut, because the defence do not have the funding available to carry out full and thorough investigation, there may be a greater number of cases in which points are missed which result in advice being given to plead guilty where perhaps the better advice might have been to proceed to trial or that perhaps witnesses are not brought to trial and ... there is likely to be a number of people convicted who would not otherwise have been convicted [face to face non-stakeholder interview defence solicitor 6]

Because defence agents are not as prepared...yes, I think it probably has gone down actually, I think it probably has. [face-to-face interview non-stakeholder depute fiscal]

While this research suggests that remuneration arrangements do appear to have impacted significantly on case handling and case trajectories (including pleading patterns), it should *not* be concluded that remuneration structures are the only important influence. Rather, as recent analysis of cost drivers suggests (Cape and Moorhead 2005), it is one influence among several. Indeed, the research reported here also shows that while financial arrangements have been one factor, personal reputation among one's peers, and active judicial case management may be at least as powerful – as seen for example in the introduction of mandatory intermediate diets. The arrangement of legal aid remuneration appears to be one important factor which does lead to a significant change in the patterns of case outcomes, but it is far from being the only factor which influences lawyer behaviour in summary justice.

Furthermore, this paper does *not* claim that dedicated and professional people, such as defence solicitors, abandon basic values for simple financial gain. Neither is it argued that commercial factors play no part at all. Rather it suggests (in line with Goriely *et al.* 2001 and Tata *et al.* 2004) that modifications in behaviour “will be greatest in areas of ‘ethical indeterminacy’: where there is a choice between two courses of action, both of which have advantages and disadvantages”, and where professionals are genuinely unsure about which is better. “In making difficult and evenly balanced judgements, greater weight is placed on advantages that flow from one course of action that is one's own interests. Less weight is placed on those that flow from actions that run contrary to one's interests” (Goriely *et al.* 2001). The concept of ‘ethical indeterminacy’ may provide a useful framework to explore the interplay between financial and non-financial incentives.⁵⁷

This research also gives rise to a question about the political ineffectiveness of the criminal defence profession's opposition to changes proposed by government, such as block fees and block contracting.⁵⁸ Why has the profession been so unsuccessful in its

⁵⁷ The concept of ethical indeterminacy is developed further in Tata (2007).

⁵⁸ In Scotland, examples include: the introduction of public defence solicitors and the rolling out of further public defence offices; the freezing of pay rates; the introduction of fixed payments in summary cases and more recent changes to payment in solemn cases. In England and Wales examples include: public defence

opposition to what it calls ‘sausage-machine-style’ proposed reforms? For leaders of the criminal defence profession, a perennial dilemma must be the danger of being seen to have ‘cried wolf’ before. When a change such as fixed payments or block contracting is proposed by government it is denounced as likely to lead to a risk of lower quality defence work. After its impact, (and many find they can adjust to make a good living out of it), government is emboldened to call the profession’s bluff once again.

By flatly denying that financial arrangements influence the overall quality of defence work, the profession places itself in a bind which government can easily exploit. Policy officials know that the profession will not ever concede publicly that there may have been a decline in the effectiveness of defence work. To do so would be to admit publicly that there has been a net reduction in the effectiveness of service to clients and that financial arrangements play some part in how clients are advised and cases are prepared. For the profession, the public line instead has to be that their members have shouldered the costs themselves, thereby maintaining the same level of quality of service to clients. Yet, by making this point, the profession scores an own goal: the architects of such policies are thereby able to claim that their predictions of ‘efficiency gains’ have, in effect, been accepted by the profession.

The profession’s public stance dictates that it is reduced to warn only of ‘future dangers’. The profession’s public opposition to new managerialist, ever-higher-volume-lower-input, reforms is therefore emasculated by its refusal to concede publicly that quality might have declined as a consequence of similar reforms. By adhering rigidly to the claim that lawyers only work in the best interests of their clients and that the effectiveness of service is utterly undiminished by financial arrangements, the profession denies itself any useful rhetorical means of opposing the desire of government for ‘earlier’ (and more) guilty pleas nor of the erosion of adversarial practice.⁵⁹

service, franchising, contracting, competitive tendering and block contracting, etc.

⁵⁹ See also Cape (2004).

REFERENCES

- Bevan, Gwyn. 1996. *Has there been Supplier Induced Demand for Legal Aid? Civil Justice Quarterly*. Vol. 15. Pp. 98-114.
- Blumberg, Abraham S. 1967. *Criminal Justice*. Quadrangle Books.
- Bottoms, Anthony and John McClean. 1976. *Defendants in the Criminal Process*. Routledge.
- Bridges, Lee. 1996. *The Reform of Criminal Legal Aid* in Young, Richard and David Wall. 1996. eds. *Access to Justice*. Blackstone.
- Bridges, Lee. 2001. *The Myth of Case Splitting*. Unpublished Paper.
- Cape, Ed. 2004. *Rise (and fall?) of a criminal defence profession*. *Criminal Law Review*: Pp. 72-87.
- Cape, Ed and Richard Moorhead. 2005. *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work*. Legal Services Research Centre, LSC.
- Carlen, Pat. 1976. *Magistrates' Justice*. Robertson, Martin.
- Christie, David J. and Susan R. Moody. 1999. *The Work of Precognition Agents in Criminal Cases*. Central Research Unit. Scottish Executive.
- Currie, Ab. 2004. *The nature and extent of unmet need in criminal legal aid in Canada*. *International Journal of the Legal Profession* 11(3). Pp. 191-212.
- Department of Constitutional Affairs. 2005, p. 23.
- Duff, Peter and Frazer McCallum. 2000. *Intermediate Diets, First Diets and Agreement of Evidence in Criminal Cases: An Evaluation*. Scottish Executive.
- Duff, Peter. 2005. *Sinclair and Holland: A Revolution in Disclosure*. SLT. (19). Pg. 105-111.
- Ericson, Richard and Patricia Baranek. 1982. *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process*. Toronto University Press.
- Goriely, Tamara., Paul McCrone, Peter Duff, Cyrus Tata, Alistair Henry, Martin Knapp, Becki Lancaster, and Avrom Sherr. 2001. *The Public Defence Solicitors' Office: An Independent Evaluation*. Scottish Executive: Pg. 68-69.

- Gray, Alistair, Paul Fenn, and Neil Rickman. 1996. *Controlling Lawyers' costs through standard fees: an economic analysis* in R. Young and D. Wall. eds. *Access to Justice*. Blackstone.
- A. Gray, P. Fenn, and Neil Rickman. 1999. *An Empirical Analysis of Standard Fees in Magistrates' Court Criminal Cases*. LCD Research Series.
- Law Society of Scotland. 1998. Press Release, October 28.
Legal Services Research Centre, LSC. CDS. *Focus*. Newsletters.
- Leverick, Fiona and Peter Duff. 2001. *Adjournments of Summary Criminal Cases in the Sheriff Courts*. Scottish Executive.
- Ling, Vicky and Simon Pugh. 2003. *Understanding Legal Aid: a practical guide to public funding*. Law Society of England & Wales.
- McConville, Mike, Jacqueline Hodgson, Lee Bridges, and Anita Pavlovic. 1994. *Standing Accused*. Clarendon Press.
- Mather, Lynn, Craig H. McEwan, and Richard J. Maiman. 2001. *Divorce Lawyers at Work: varieties of professionalism in practice*. Oxford University Press.
- Moody, Susan R. and Jacqueline Tombs. 1982. *Prosecution in the Public Interest*. Edinburgh University Press.
- Moorhead, Richard, Alan Paterson, and Avrom Sherr. 1994. *Judging on Results? Outcome measures: quality, strategy and the search for objectivity*. International Journal of the Legal Profession. Vol. 1(2). Pp. 191-210.
- Pleasence, Pascoe and Hannah Quirk. 2001. *The Criminal Case Profiling Study*. Legal Services Research Centre, LSC.
- Raitt, Fiona E. and Pamela R. Ferguson. 2006. *Reconfiguring Scots Criminal Procedure - Seismic Shifts*. Edinburgh Law Review. Vol. 10. Pg. 102-112.
- Rosenthal, Douglas E. 1974. *Lawyers and Clients – Who's in Charge?* Russell Sage Foundation.
- Samuel, Elaine. 1996. *Criminal Legal Aid Expenditure* in Young and Wall. 1996. eds. *Access to Justice*. Blackstone.
- Sarat, Austin and William L. Felstner. 1995. *Divorce Lawyers and their Clients*. Oxford University Press.
- Scottish Office, 1993. *Review of Criminal Evidence and Procedure*.

SLAB. 2004. *Proposals for the Review of Summary Criminal Legal Assistance*.

SLAB. 1998. Online Press Release, October:

http://www.slab.org.uk/contents/resources/pressreleases/13_10_98.htm

Smart, Carol. 1984. *The Ties that Bind*. Routledge and Keagan Paul.

Sommerlad, Hilary. 1996. *Criminal Legal Aid reforms and the Restructuring of Professionalism* in Young, Richard and David Wall. 1996. eds. *Access to Justice*. Blackstone.

Sommerlad, Hilary and David Wall. 1999. *Legally Aided Clients and their Solicitors: Qualitative Perspectives on Quality and Legal Aid*. Law Society Research Study No. 34. London.

Stephen, Frank H. 1998. *Legal Aid Expenditure in Scotland: Growth, Causes and Alternatives*, The Law Society of Scotland, Edinburgh.

Stephen, Frank H. 2001. *Reform of Legal Aid in Scotland*. Hume Papers on Public Policy. Vol. 8, No. 3. Pp. 23 – 41.

Stephen, Frank H and Cyrus Tata .2006. *Impact of the Introduction of Fixed Payments into Summary Legal Aid: Report of an Independent Study*. Scottish Executive, Department of Justice, 220pp

Tata, Cyrus, Tamara Goriely, Peter Duff, Alistair Henry, Paul McCrone, and Martin Knapp. 2004. *Does Mode of Delivery Make a Difference to Criminal Case Outcomes and Client Satisfaction? The Public Defence Solicitor Experiment*. Criminal Law Review. February. 2004.

Tata, Cyrus. 2007. *Supplier induced demand or demand induced supply? Ethical indeterminacy and essentialist conceptions of 'need' in criminal defence work* forthcoming.

Tata, Cyrus, Fergus McNeill, Neil Hutton, Simon Halliday, and Nicola Burns. 2007: *The interpretation and use of pre-sentence reports* forthcoming.

Tata, Cyrus and Frank Stephen. 2006a ‘ “Swings and Roundabouts”’: *Do changes to the structure of legal aid remuneration make a real difference to criminal case management and case outcomes*’ *Criminal Law Review*. Pp722-741 .

Tata, Cyrus and Frank Stephen. 2006b: ‘*Fixed Payments: a real impact?*’ *Journal of the Law Society of Scotland*. December. Pp10-14

Wall, David 1996. *Legal Aid, Social Policy and the Architecture of Criminal Justice: the supplier induced legal aid thesis and legal aid policy*. Journal of Law & Society. Vol. 23. Pp. 549-69.

Zuckerman, Adrian. 1992. *Miscarriages of Justice – Root Treatment*. CLR. Pp. 323-345 at 330-1.

TABLES

Table 1: Impact of fixed fees on the level of use of precognitions

	% More	% Less	% The Same	% Don't Know
Own ⁶⁰	1.8 (1)	61.4 (36)	35.1 (20)	1.8 (1)
Firm's	6.9 (4)	55.2 (33)	36.2 (22)	1.7 (1)
Others	3.3 (2)	62.3 (37)	9.8 (6)	24.6 (15)

⁶⁰ Two respondents declined to answer in relation to their own practice.

Table 2: Cases concluding under time and line and under fixed payments at four stages

	% Pleading Diet	% Intermediate Diet	% Day of Trial	% Trial
Under Time & Line (1990/1-1995/6)	63.35	4.15	21.15	11.36
Under Time & Line plus mand. IDs⁶¹	59.71	12.57	17.13	10.58
Under fixed payments plus mand. IDs (1999/2000-2002/3)	56.88	16.22	18.22	8.67

⁶¹ The analysis takes account of the statistical impact of mandatory Intermediate Diets from their introduction until 2002/3.

Table 3. Thinking about the overall workload, has the introduction of fixed payments had an impact on pleading advice to clients?

	Yes	No	Don't know
Pleading advice - own ⁶²	10.2% (6)	86.4% (51)	3.4% (2)
Pleading advice - others	35.5% (22)	30.6% (19)	33.9% (21)

⁶² Two respondents declined to respond in relation to their *own* practice.