

## Legal Studies Research Programme

# Impact of the Introduction of Fixed Payments in Summary Criminal Legal Aid

Frank H Stephen, University of Manchester, and Cyrus Tata, University of Strathclyde

Fixed payments for summary criminal legal aid were introduced in April 1999. This document summarises the findings of exploratory research into the impact of fixed payments, and in particular, the impacts on: legal aid expenditure, firm income, case management practices of defence solicitors, and on case trajectories.

## Main Findings

- Because the fixed payment was set well below the average payment made immediately prior to the introduction of fixed payments, average case costs were lower under the system of fixed payments. However, the ratio of legally aided cases to complaints initiated appears to have risen significantly following the introduction of fixed payments. The total paid to solicitors in fees for summary legal aid had risen in 2001/02 almost to the pre-fixed payment level. In the case of summary cases in the Sheriff Court the total paid was higher than it had been before the introduction of fixed payments.
- The number of Advice and Assistance intimations also rose following the introduction of fixed payments. There appears to have been an increased tendency to claim for all work done under Advice and Assistance.
- On average firms specialising in summary legal aid suffered a reduction in income in the 2 years immediately following the introduction of fixed payments. However by 2001/02 on average such firms had higher incomes from combined activities of summary criminal legal aid and advice and assistance work. The number of cases taken on by these specialists rose.
- It was widely observed that fixed payments had led to an overall change in case management by many defence solicitors. In general, it was observed that more cases were being dealt with by defence solicitors and that this meant there was less time per case than before the introduction of fixed payments. Overall, levels of client contact were reported to have declined. It was widely reported that the use of precognitions by the defence had declined sharply.
- Following the introduction of Fixed Payments, there appears to have been a decrease in the proportion of cases concluding at the Pleading Diet (the first stage at which the accused can plead guilty). The largest effect has been the increase in the proportion of cases concluding at the Intermediate Diet. Three quarters of the net increase in cases concluding at the Intermediate Diet is a result of the net reduction in the proportion concluding at the Pleading Diet.

## Background

Fixed payments for summary criminal legal aid were prescribed in the Criminal Legal Aid Fixed Payments (Scotland) Regulations as amended by the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2002. The new system of Fixed Payments was implemented on 1st April 1999.

The new system of fixed payments replaced the 'proportional' or 'time and line' system under which solicitors were required to submit accounts to the Scottish Legal Aid Board for work carried out in summary criminal cases. A key justification of the new system was the notion of 'swings and roundabouts' – the assumption that complex or unusual cases, which require greater time and attention from defence solicitors, would be offset by the majority of cases which were regarded as relatively simple and needing less work from solicitors. Proponents of fixed payments further argued that the new system would provide a fair level of remuneration to defence solicitors while ensuring value for money from the criminal legal aid system.

## The Study

The research sought to explore the impact of the move to fixed payments on legal aid expenditure and income, case management practices of solicitors, and case trajectories. A range of quantitative and qualitative techniques were used including: in depth interviews with key stakeholders, postal and telephone surveys of solicitors supplying defence services under Summary Criminal Legal Aid, and depute procurators fiscal. The research also conducted in-depth statistical analysis of disaggregated data both from the Scottish Legal Aid Board and the Crown Office and Procurator Fiscal Service, which aimed to quantify impacts and test hypotheses suggested by both participants and theory. The study ran from November 2003 to January 2005. The statistical analysis of case trajectories covered the period up to 2003.

## Legal Aid Expenditure and Income

### *Cost per case*

The study examined legal aid firm income and public expenditure data from 1997/98 to 2001/02, allowing analysis of 2 years prior to the introduction of fixed payments, and three years following introduction. The fixed payment for legally-aided summary cases was set well below the average payment made in the years immediately prior to their introduction. Therefore, the average payment of

summary legal aid in such cases has fallen with the introduction of fixed payments. Had there been no change in the number of legally-aided summary cases this would inevitably have led to a reduction in legal aid expenditure. However, after the introduction of fixed payments the number of legally-aided cases rose. Total expenditure on summary criminal legal aid rose broadly in line with the number of legally aided cases. The ratio of legally-aided cases to complaints initiated by the prosecution increased significantly in the three years following the introduction of Fixed Payments. By 2001/02 the fees paid on average to solicitors firms for legally-aided summary cases were higher than they had been in 1997/98.

While the exploratory nature of the study did not allow for conclusive findings on the cause of the rise in the ratio, it did explore several hypotheses. The rise in the ratio does not appear to have been mainly due to: changes in the number of cases prosecuted; nor is it explained by any overall shift in cases from the District Court to the Sheriff Court; nor is it principally explained by the introduction of new offences; nor by an increase in non court prosecution methods, such as diversion. Instead, the advent of fixed payments in Scotland may have led some solicitors to begin to adjust their billing behaviour in relation to work which might previously have been regarded as ancillary to the main case, or, where under the previous time and line system, solicitors might simply have absorbed the costs of this ancillary work in the 'main' case. Under a system of fixed payments there is a much greater incentive to ensure that an application is made, where appropriate, for Advice and Assistance.

The statistical analysis also indicated that the number of advice and assistance intimations had risen, and there were suggestions by some of those interviewed that following the introduction of fixed payments there was a tendency to claim for all work done under advice and assistance.

The study did not produce a statistical model of what expenditure on summary criminal legal aid would have been had fixed payments not been introduced. This is an area for future research.

### *Impact on firms*

Statistical analysis of fee payments to solicitors firms suggested that on average, these were not significantly different following the introduction of fixed payments for generalist and non specialist firms. Specialist firms on the other hand experienced a reduction in income from summary criminal legal aid in the 2 years immediately following the introduction of fixed payments, however by 2001/02 this income had returned to its pre fixed payment level. The number of legally aided cases undertaken by this group had also risen. However, by 2001/02 on average specialist firms

had higher incomes from combined activities of summary criminal legal aid and advice and assistance work.

## Case management

It was widely observed by interviewees that fixed payments had led to an overall change in case management, especially among specialist firms. In general, it was observed that more cases were being dealt with by solicitors under fixed payments and that this meant less time per case than under time-and-line.

Through the use of closed survey and open interview questions, the research explored the experiences and observations of the impact of fixed payments on the management of criminal legal aid cases. Key issues explored were: the level of client contact, the use of precognitions, and levels of preparation.

Defence solicitors were asked whether the level of their contact with clients had been affected as a result of fixed payments. In response to closed survey questions, the majority of solicitors reported that their client contact remained unchanged, while a substantial minority said that fixed payments had led to a reduction in their own levels of contact with clients. However, the majority of these solicitors also observed that levels of contact by *other* solicitors had declined as a result of the introduction of fixed payments. Moreover, responses to open interview questions underlined that client contact levels tended to decline as a direct consequence of the introduction of fixed payments.

Views were mixed as to the impact of this observed decline in client contact – some interviewees thought that this may have impacts on the level of client care, and concerns were also expressed that this may have made it more difficult for solicitors to advise clients to plead guilty at an early stage in cases.

The system of fixed payments was very widely reported to have led to a sharp drop in the use of precognitions. While many defence solicitors reported in face-to-face and phone interviews that they were now more selective about when precognitions were necessary, a few others appeared to suggest that, as a direct consequence of the impact of fixed payments, they did not now precognose witnesses. As a result of the sharp decline in the use of precognitions, there tended to be much greater reliance by the defence on prosecution summaries of evidence. While some

interviewees felt that this led to greater efficiency, some defence solicitors and procurators fiscal expressed concerns about the need to scrutinise the prosecution evidence, and the impact on levels of preparation by defence solicitors, with some interviewees suggesting that levels of preparation may have fallen following the introduction of fixed payments.

## Case Trajectories

The research explored the impact of fixed payments on case trajectories through statistical analysis of Crown Office data, and also through surveys and interviews. The key focus was the stage at which cases conclude.

The research examined the stage of conclusion of cases in Sheriff Summary courts using disaggregated Crown Office data up to 2003. Following the introduction of Fixed Payments, there appears to have been a decrease of almost 4.75% in the proportion of cases concluding at the Pleading Diet (the earliest stage). The largest effect has been an increase of 29% in the proportion of cases concluding at the Intermediate Diet stage. The introduction of fixed payments has produced also an increase of almost 6.4% in the proportion of cases concluding shortly before the commencement of a trial but before evidence is led (so called ‘cracked trials’) and a decrease of 18% in the proportion of cases concluding after a trial has begun.

In response to closed survey questions, while only a few respondents said that they had changed their pleading practices as a consequence of fixed payments, a majority observed that *other* defence agents had. It was widely observed by interviewees that pleading guilty at Intermediate Diets or shortly before trial may represent the optimal economic management of fixed fees and the fee structure.

The research found a range of views as to whether fixed payments had impacted on the overall effectiveness of summary criminal defence work. Most of the depute fiscals surveyed thought it had led to some decline in preparation by defence solicitors. Some defence solicitors felt it had made little difference; but most 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 effective than it had been under time-and-line. Almost no practitioners or officials suggested that fixed payments had led to an increase in the effectiveness of defence work.

If you wish further copies of this Research Findings or have any enquiries about social research, please contact us at:

Scottish Executive Social Research  
4th Floor West Rear  
St Andrew's House  
Regent Road  
EDINBURGH  
EH1 3DG  
Tel: 0131 244-2256  
Fax: 0131 244-5393  
Email: [socialresearch@scotland.gsi.gov.uk](mailto:socialresearch@scotland.gsi.gov.uk)  
Website: [www.scotland.gov.uk/socialresearch](http://www.scotland.gov.uk/socialresearch)

The report "Impact of the Introduction of Fixed Payments in Summary Criminal Legal Aid", which is summarised in this research findings is a web only document and will shortly be made available on the publications pages of the Scottish Executive website at <http://www.scotland.gov.uk/Publications>

This document (and other Research Findings and Reports) and information about social research in the Scottish Executive may be viewed on the Internet at: <http://www.scotland.gov.uk/socialresearch>

The site carries up-to-date information about social and policy research commissioned and published on behalf of the Scottish Executive. Subjects covered include transport, housing, social inclusion, rural affairs, children and young people, education, social work, community care, local government, civil justice, crime and criminal justice, regeneration, planning and women's issues. The site also allows access to information about the Scottish Household Survey.



ISBN 0-7559-6240-0

