

Demand Induced Supply?

Identifying Cost Drivers in Criminal Defence Work

A Report to the Legal Services Commission



Professor Ed Cape* and Professor Richard Moorhead[†]

* University of the West of England, Bristol

[†] Cardiff University

Published by the Legal Services Research Centre, Legal Services Commission, London
July 2005

Chapter 1 Introduction and context

1. Introduction

We were asked by the Legal Services Research Centre (LSRC) to conduct a literature survey in order to identify changes in the criminal justice system over the past ten years that have had implications for the cost of criminal legal aid.¹ Expenditure on criminal legal aid has increased significantly over the past decade, reaching nearly £1.2 billion by 2003/04. Such an increase would demand close scrutiny in any circumstances, but is particularly important given the government's decision to cap overall legal aid expenditure. As a result, since the Access to Justice Act 1999, increases in expenditure on criminal legal aid have posed a serious risk to the civil legal aid budget. We were not asked to attempt to identify all factors that may have influenced criminal legal aid costs, but to look at the system as a whole and to highlight the main cost drivers, attempting to quantify the impact of such factors where possible.

There have been two important limitations on the work that we have been able to do in identifying relevant costs drivers. The first is the timescale, since we were required to conduct the research and submit the report in a period of three months. The second is the limited literature and data on cost drivers in legal work generally, and legal aid work in particular, especially criminal legal aid work.

In an article published in the mid 1990s Bevan speculated that increases in legal aid costs were fuelled by supplier-induced demand.² However, there has been a long standing concern, accentuated recently, that legal aid costs are driven, in part at least, by changes in the civil and criminal justice systems beyond the influence of legal aid lawyers and the Legal Service Commission.³ In criminal defence studies, work has largely been confined to very generalised speculation on the potential for criminal justice reforms to create knock-on costs which are reflected in criminal defence costs.⁴ The Department for Constitutional Affairs (DCA) consultation on reintroducing means-testing was an interesting attempt to model the impact of means-testing on criminal legal aid costs, as was the Lord Chancellor's Department (LCD) consultation

¹ In conducting the research for this report we have been greatly assisted by Clair Wilkins, Research Assistant at Cardiff University, and Neil McKay, Raj Mundra and Neville Bentley at the Legal Services Commission. We have also benefited from conversations with and assistance from Professor Lee Bridges, and a number of criminal defence solicitors. Any errors remain ours.

² Bevan G., (1996) 'Has There Been Supplier-induced Demand for Legal Aid?' *Civil Justice Quarterly* Vol 5, 98.

³ See, Matrix Research and Consultancy, *The independent review of the Community Legal Service*, 2004; Constitutional Affairs Committee, *Civil legal aid: adequacy of provision*, Fourth report of session 2003-2004; Legal Services Commission *Annual Report 2002/3*.

⁴ See, for example, Wall D.S., (1996) 'Legal Aid, Social Policy and the Architecture of Criminal Justice: The supplier-induced inflation thesis and legal aid policy', *Journal of Law and Society*, vol 23, no. 4, 549-569.

*Delivering Value for Money in the CDS.*⁵ Whilst work in the civil field has been more empirically detailed and has demonstrated the difficulty of modelling costs,⁶ only a limited amount of work in the criminal field has looked in any detail at costs issues.⁷ A significant layer of difficulty is added in the criminal justice field by the level and frequency of reform, which means that the ability to isolate particular causes of costs increases is limited.

2. Methodology

In preparing this report we have searched and analysed the available literature on costs in legal aid work which, as noted above, is relatively limited. We have also used official statistical sources such as the *Criminal Statistics* series published by the Home Office, and the *Judicial Statistics* series published by the Department for Constitutional Affairs (DCA) and its predecessor, the Lord Chancellor's Department (LCD). We have experienced some difficulties in assembling and analysing the data. Crown Court bills have, until recently, been managed by the DCA, and so data on legal aid costs have traditionally been found in two different sources: magistrates and police station data was available from the Legal Aid Board/Legal Services Commission Annual Reports and higher (or Crown Court) data from the Judicial Statistics. The categories under which the magistrates and police station work were billed were reorganised in April 2001 as a result of criminal contracting. This affected the way statistics were collected and published. These two sets of discontinuity make year-on-year comparisons of legal aid data somewhat difficult.

One source of data we have been able to use is the criminal claims database which supports criminal contracting (SPOCC). This was brought into effect in April 2001, and we have analysed cases from July 2001 to June 2004. We have deliberately excluded the first few months of contracting because the cases coming through in the earliest months would typically be cheaper and quicker cases. As can be seen from our analysis below, this atypicality appears to continue to some extent for several months into our analysis. We qualify our analysis by referring to the contacting scheme 'bedding down' during this period.

In terms of presentation, we tend to use graphs to present fluctuations in spending and these graphs report cumulative increases or decreases in spending, not year-on-year changes. This enables us to see long term

⁵ See LCD, *Delivering value for money in the Criminal Defence Service*, June 2003; DCA, *Draft Criminal Defence Service Bill: Consultation Paper and Explanatory Notes*, 2004; and Constitutional Affairs Committee *Draft Criminal Defence Service Bill*, Fifth report of session 2003-2004. See also Frontier Economics, *A market analysis of legally aided services provided by solicitors*, December 2003.

⁶ Goriely conducted work for the Legal Action Group and Genn conducted work as part of the Woolf review of civil justice. Fenn *et al* have also conducted work on the Woolf Reforms which suggests how changes to civil procedure impacted significantly on civil costs.

⁷ Pleasence P. and Quirk H., (2001) *The Criminal Case Profiling Study: Final Report*, London: LSRC; Bridges L., *et al* (2000) *Quality in Criminal Defence Services and Work Patterns and Costs under Criminal Contracts*, London: LSC.

trends in spending without these being unduly affected by year-on-year changes in spending. Hence if there is a 5% increase in spending one year and another 5% increase the next, the graphs we use will show the increase in year one being 5%, and in year two the increase will be shown as having reached around 10%.

3. General trends in criminal legal aid expenditure⁸

It can be seen from Table 1 that there has been a consistent increase in the amount of public money spent on criminal legal aid. To understand the extent of changes in legal aid expenditure and to place them in a broader context, Figure 1 illustrates the trends in legal aid expenditure and compares them to three mainstream economic indicators: inflation, GDP and public spending.

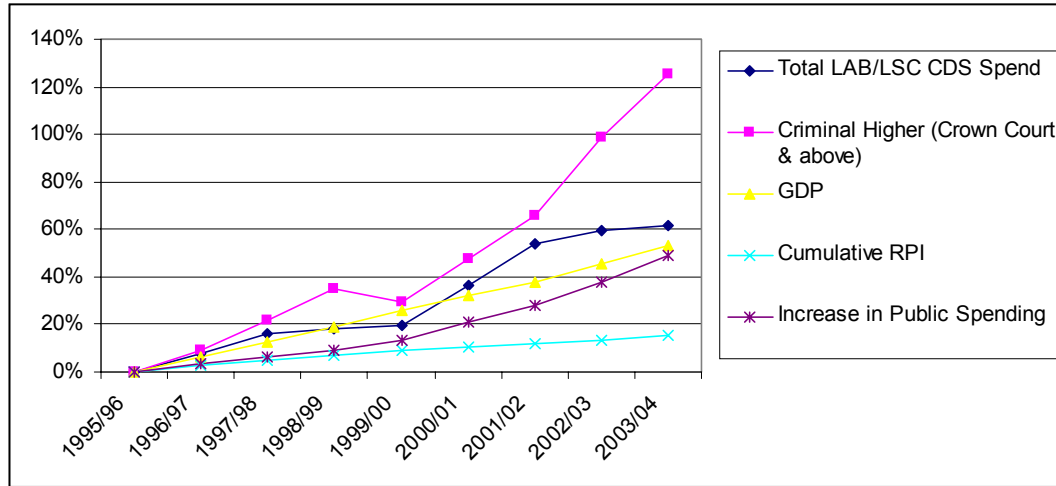
Table 1: Legal Aid Expenditure in Criminal Work (£m net)⁹

<i>£m net</i>	1993/94	1994/95	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02	2002/03	2003/04
Criminal Magistrates'	192	202	212	226	242	241	233	233	299	305	305
Criminal Legal Help	21	24	23	26	28	28	28	30	18	12	13
Court Duty Solicitor Scheme	11	12	13	14	15	16	26	55	33	30	29
Police Stations Scheme	67	68	82	90	100	105	108	133	153	170	177
File Review	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	3	3
Public Defender Service	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	3	3	4
First Assist PS Phone Service	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	2	3	3
Total LAB/LSC CDS Spend	290	306	330	356	384	390	394	450	508	526	533
Criminal Higher (Crown Court & above)			286	313	349	386	370	422	474	569	645

⁸ Note that throughout the report, whilst we have made comparisons with RPI and GDP, we have not adjusted expenditure figures to take account of inflation.

⁹ Source: Legal Services Commission, private communication.

Figure 1: General Trends in Criminal Legal Aid Expenditure Compared to Main Economic Indicators¹⁰



The first matter of note is that it is spending on higher criminal cases (Crown Court and above) that constitute the largest cumulative increase over the period. The second is that increases in higher criminal and other criminal work (the CDS spend) both exceed cumulative increases in inflation and general levels of public spending. It is also worth noting that increases in the costs of CDS work (magistrates court, police station and free standing advice and assistance) broadly keep pace with GDP, suggesting that until 2000/01 increases in CDS work did not generally outstrip GDP, and by 2003/04 a decrease in the rate of increase of CDS expenditure brought the position back towards cumulative increases in GDP and public spending.

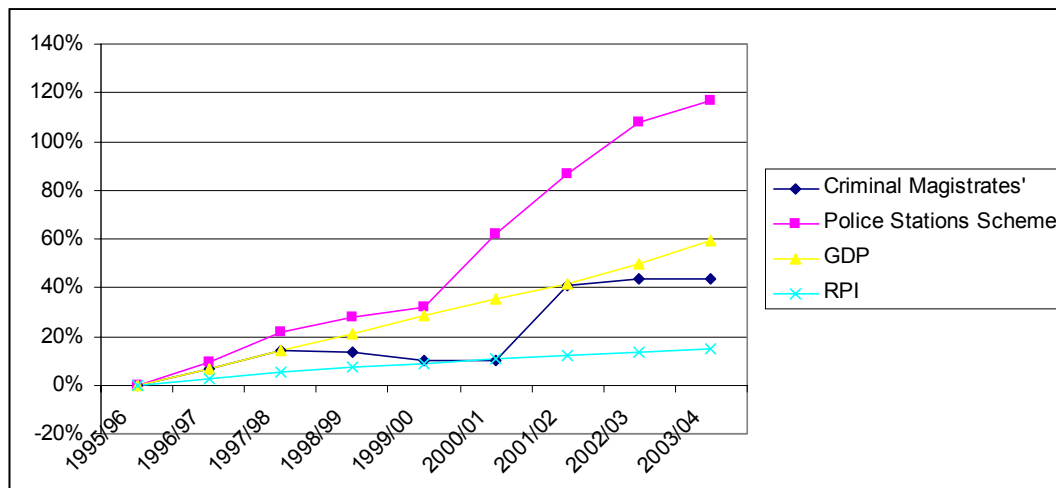
The clear message of this analysis is that it is the increases in higher criminal cases (largely Crown Court cases) which are of principal concern. Crown Court costs have consistently grown ahead of the mainstream economic indicators and higher work is also taking an increasing proportion of the budget (increasing from 46% in 1995/96 to 55% in 2003/04) on the above data.

¹⁰ Source data: Legal Services Commission; Legal Services Commission *Annual Report* 2003/04, London: TSO, London; Law Society Evidence to the Constitutional Affairs Committee; GDP deflator. Source: HM Treasury Website, 1st February 2005 (Data last updated 24/12/04, ONS): http://www.hm-treasury.gov.uk/economic_data_and_tools/gdp_deflators/data_gdp_fig.cfm; Public Spending Figures: Emmerson C., Frayne C. and Love S. (2004) *A Survey of Public Spending in the UK*, December 2003, Updated September 2004, London: Institute for Fiscal Studies; RPI data National Statistics Website dataset, <http://www.statistics.gov.uk/STATBASE/tsdownload.asp?vlnk=7172>.

Position within CDS cases

Figure 2 shows the cumulative increase, within the CDS budget, in magistrates and police station cases. It does not include court duty claims or free standing legal help/advice and assistance, which are much smaller parts of the budget.

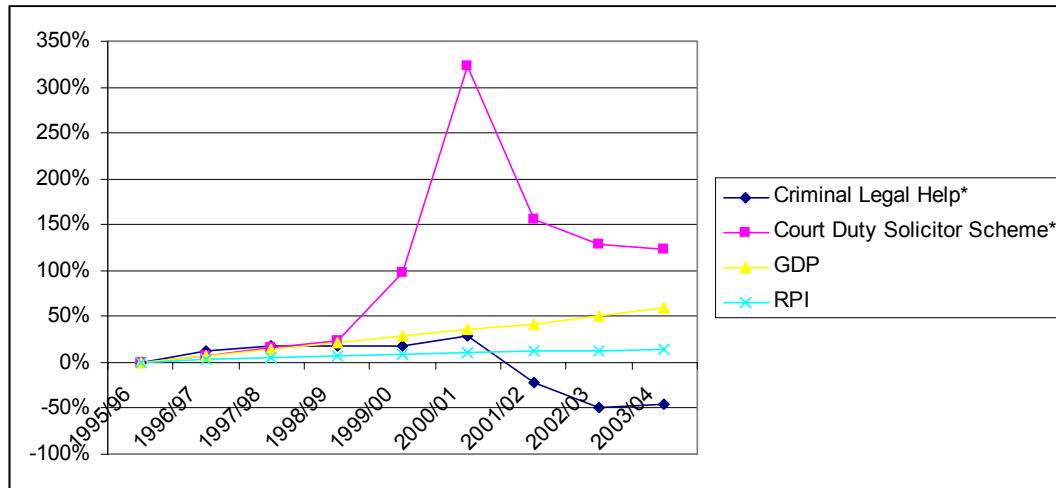
Figure 2: Cumulative Increases within the CDS budget (Investigations and Proceedings Claims)



This data shows that increases in magistrates proceedings work has more or less tracked increases in GDP, but still exceeds cumulative increases in RPI. The steady decline in the later 1990s was offset by an increase in court duty solicitor claims (see Figure 3). Growth in the total costs of police station work has, on the other hand, increased significantly ahead of both GDP and RPI.

For completeness, the figures for court duty and legal help/free standing advice and assistance are shown in Figure 3. The dramatic drop in criminal legal help is caused by the change in the way that this was dealt with from April 2001 under criminal contracts. Prior to this it was possible to claim legal help alongside other criminal claims for the same client and investigation/prosecution. Post-April 2001, it was only possible to claim legal help (advice and assistance) if it was free-standing (i.e. it was not ancillary to other claims).

Figure 3: Cumulative increases in the cost of Court Duty and free standing advice and assistance



The drop in legal help work is entirely predictable given the different contractual provisions from 2001/02. Save for the sharp increases in spending on court duty schemes in 1999/00 and 2001/00 (which were offset by reductions in the spends in the two subsequent years), spending on court duty work also appears to have given rise to increases similar to increases in GDP. At the same time as the increase in court duty work occurred there appears also to have been a significant reduction in ordinary magistrates court claims (see Figure 2). This is almost certainly the consequence of the ‘Narey’ reforms under which solicitors could claim as ‘duty solicitor of choice’ rather than claiming under a representation order. With the introduction of contracting in April 2001, duty solicitor of choice claims were no longer possible, with the effect of a sharp reduction of expenditure under the duty solicitor scheme and an increase in expenditure in respect of representation orders.

Non-representation order, non-police station criminal legal aid

The LSC Annual Reports set out information in respect of ‘Advice, assistance and advocacy where no Representation Order has been granted’. The total cost of this in 2003/4 was nearly £42m compared with under £33m in 2001/2, an increase of about £9m per annum. In 2003/4 it constituted about three and a half to four per cent of the total criminal legal aid budget. About half of this area of legal aid expenditure is accounted for by magistrates’ court duty solicitor session which we will deal with further in Chapter 4.

Free-standing advice and assistance was broadly the same over the period, but nearly £1.8m was spent on post-charge police station advice and assistance in 2003/4, a category that did not appear in 2001/2. Other areas of increase in expenditure were on prison law (increasing from just over £1m (5,247 cases) in 2001/2 to nearly £5m (13,728 cases) in 2003/4), ‘appeals, reviews and other courts’ (increasing from £323,000

(1,695 cases) in 2001/2 to nearly £1m (1,604 cases) in 2003/4), and civil assistance on criminal matters (i.e. public law work arising from criminal work) (£88,000) and claims for file review payments (£3.4m) neither of which appeared in the earlier statistics. It should be noted that prison law and civil assistance in criminal matters were transferred from civil legal aid to the Criminal Defence Service budget when contracting was introduced in 2001.

4. General trends in the criminal justice system

Whilst the general levels of crime were falling over the decade, it is the numbers of people who are 'processed' by the criminal justice system that is more relevant in terms of legal aid expenditure. As will be demonstrated in more detail later, the number of arrests declined over the period under examination, although they have begun to creep up again since 2001. However, there is evidence to suggest that a greater proportion of those arrested are being proceeded against, and that levels of seriousness (according to a number of measures) are increasing. Thus by the end of the decade 34% more people were being charged compared to at the beginning of the decade, and of those charged 74% more were appearing in magistrates' courts having been denied bail by the police. Similarly, 18% more cases were being disposed of in the Crown Court at the end of the decade compared to at the beginning. Sentence severity has increased over the period, with the prison population at the end of the decade being almost double that at the beginning.¹¹

5. Conclusions

Although expenditure on magistrates' court legal aid appeared to increase significantly in the year following the introduction of contracting, over the decade it has more or less tracked GDP and in the past two years there are signs that it has levelled off. Expenditure on the police station scheme has, on the other hand, grown throughout the decade with particularly rapid growth since 1999/2000. It is the growth in expenditure on Crown Court legal aid, however, that has been the most marked, with the cost increasingly outstripping all other forms of criminal legal aid for the past two years.

¹¹ Home Office Statistical Bulletin 05/05, Home Office, February 2005.

Chapter 2 General Themes from the Literature

This chapter reviews the main literature on lawyers' costs in so far as it applies to criminal defence work. It considers the principal theory antagonistic to lawyers, supplier-induced demand, which has had a significant effect on government policy over almost the last ten years, before reviewing more detailed findings relevant to our discussions in later chapters.

1. *The supplier-induced demand thesis*

The literature on lawyers' costs is theoretically rich but empirically weak. The most influential and controversial paper is Gwyn Bevan's work on supplier-induced demand, conducted as research for the then Lord Chancellor's Department.¹² As we will discuss below, what is meant by the term 'supplier-induced' is left somewhat opaque but Bevan advanced two related theses. The most fundamental was that because of principal-agent and moral hazard problems, the cost of legal aid was determined not by the consumers of legal aid, nor the funders of those services, but by the suppliers (i.e. lawyers). The second was that lawyers would seek to manage their work to secure a target income which in real terms is the same or increased year-on-year. This leads to 'supplier-induced demand' and unsustainable increases in legal aid budgets. Having made the theoretical case, Bevan sought to demonstrate the hypotheses by looking at general data on increases in legal aid costs relative to the profession's declining income in other private client work in the early 1990s. He also compared regional variations of utilisation and expenditure on legal aid, attempting to demonstrate that such regional variations were not explained by variations in need for legal aid.¹³

There are critiques of the supplier-induced demand thesis elsewhere.¹⁴ For our purposes it is worth emphasising a few critical points.

Supplier-induced demand is a rather value-laden concept. The idea that lawyers increase either the number of cases they take on or the costs incurred on those cases simply to ensure target incomes implies quasi-fraudulent behaviour by large numbers of the legal profession. Whilst Bevan occasionally nods in this

¹² Bevan G. (1996) 'Has There Been Supplier-Induced Demand for Legal Aid?' *Civil Justice Quarterly* Vol. 15, 98-114.

¹³ Bevan *op.cit.* n. 12, p. 111 and onwards.

¹⁴ Wall (1996) *op.cit.* n. 4; Gray A. (1994) 'The Reform of Legal Aid' (1994) *Oxford Review of Economic Policy* Vol. 10, 51; Samuel E. (1996) 'Criminal Legal Aid Expenditure: Supplier or System Driven? The Case of Scotland' in Young R. and Wall D., (1996) *Access to Criminal Justice* London: Blackstone.

direction,¹⁵ and the language applied in the economists notion of *moral hazard* might be casually read as implying overt wrongdoing, he is generally careful to observe that supplier-induced demand does not mean lawyers taking cases without merit or doing work which is unnecessary. Indeed he emphasises one indicator that the legally aidable section of the population has some way to go before it achieves equality in litigation rates.¹⁶ He also acknowledges that the idea of supplier-induced demand is “difficult, if not impossible, to prove”, that the concept itself is inherently contested because it seeks to measure reality against an “unattainable ideal”, and rejects some of the key analytic concepts applied to it by others (in particular the idea that supplier-induced work is unnecessary).¹⁷ Bevan’s principal concern is thus narrower: that in the 1990s the economic incentives of the legal aid scheme meant that, “the current system lacks anyone asking the fundamental questions of affordability.”¹⁸

A second observation is crucial to our discussion. Bevan largely excludes criminal defence work from his hypothesis. He does this for a number of reasons. It is clear that the increases in criminal legal aid costs during the period in question were considerably more modest than those in civil legal aid, and in fact the magistrates’ court legal aid budget actually decreased.¹⁹ Furthermore, he makes the point that criminal cases originate, not with lawyers deciding a client has a claim, but in police and prosecution decisions to bring a charge. Bevan also seems to suggest that because criminal solicitors would already have specialised in legal aid work, whereas civil lawyers would have a private and publicly funded caseload, they would have less opportunity to increase the amount of legal aid work they did.

A third observation is that it was not true then, and it is less true now, to say that the system has no controls dealing with affordability. Indeed elsewhere in the article Bevan acknowledges that controls on expenditure had reduced increases in costs significantly below that which would be predicted by his target income hypothesis.

A fourth point is that some or all of any increases in cost may be demand rather than supply-driven. As Bevan acknowledges, in criminal justice terms, prosecution decisions about who to prosecute, for what and how, are crucial determinants of what criminal legal aid work will be done. Furthermore, there may be underlying changes in the criminal justice system, such as changes to practice or procedure, which fuel increases in unit costs. Whilst the supplier-induced demand thesis has been used to discredit professional judgments about what clients need, and to justify the imposition of greater scrutiny of affordability, it is equally true, however, that the current system lacks any proper determination of what factors drive up legal

¹⁵ See in particular the car repair example of moral hazard, *op.cit.* note 12 p. 102.

¹⁶ Bevan *op.cit.* n. 12 p. 101.

¹⁷ Bevan *op.cit.* n. 12, p 105.

¹⁸ Bevan *op.cit.* n. 12, p. 104.

¹⁹ Bevan *op.cit.* n. 12, p. 108.

costs other than supplier-induced demand and what level of inputs are necessary to provide adequate criminal defence services.

The idea that *criminal* defence costs are supplier led has also been considered more directly. Gray *et al* indicate that billing behaviour after the introduction of standard fees in 1993 was “consistent with” solicitors: reducing the amount of ‘core’ work they did under standard fees where it would not lead to a higher standard fee; increasing “non-core” costs which are remunerated on the basis of time spent (ie. outside of the standard fee); and ‘claim-splitting’ where solicitors claim for work outside of the standard fee (eg. under the advice and assistance scheme) so that they can make two claims (a standard fee plus an advice and assistance claim) rather than one (a standard fee).²⁰ They were unable to say whether a fourth hypothesis, that where possible solicitors would increase core costs to ensure that they could claim a higher or non-standard fee than they would otherwise be entitled to, was supported by the evidence.

The multivariate analysis that Gray *et al* present appears to provide sophisticated proof of the supplier-induced nature of criminal defence costs. The implication was that rather than accept standard fees, solicitors were increasing costs where they had the flexibility to do so (more travel and waiting), splitting cases so they could make more claims and increasing profitability by reducing core costs. There are, however, a number of concerns with the analysis, and the data used. The evidence is a database of criminal claims between 1988 and 1994. Crucially, this provides only one year of data after the introduction of standard fees (the 1994 data). There is a significant likelihood that this data is atypical. In particular, in the transition from one system to another, it would take a significant period of time for the claims profile under the new scheme to build up to the level of claims pre-change. What is more, the atypicality in the 1994 sample would specifically lead to an under-representation of longer, more time consuming cases. As a result, one would expect the 1994 database to show a reduction in the number of attendances, a reduction in the number of hearings, and a reduction in case length. All of these are seen in the 1994 data as evidence of profit maximising behaviour by solicitors, and two of the reductions are relied on in Gray *et al*'s analysis. Similarly, one would also expect to see a reduction in time spent on core costs (as they also found and relied upon) and some reduction in disbursement costs (as was again evident in their analysis). Indeed, the only indicator that they rely on which is not consistent with the atypical sample theory is the increase in waiting time in 1994. Such an increase might support a hypothesis of supplier-induced inflation, but there was what appears to be a very similar increase the year before which presumably cannot be attributable to solicitors' response to standard fees.

It seems a reasonable working assumption, therefore, that the differences in billing patterns that were attributed to a change in behaviour on the part of solicitors may simply have been an atypicality in the 1994

²⁰ Gray A., Fenn P. and Rickman N. (1999) *An Empirical Analysis of Standard Fees in Magistrates' Court Criminal Cases* London: LCD Research Series.

sample caused as a result of the system bedding down. The 1994 sample was likely to contain a greater proportion of cheaper, quicker cases that would more generously be rewarded under the standard fee regime than a mature sample. Without understanding the bias, it would appear that lawyers were cutting corners on core work, and over-claiming on non-core work. There is no evident investigation or consideration of this potential bias in the samples. The fact that the 1994 sample is apparently smaller than the 1993 sample further supports the possibility of such a bias.²¹ For this reason, one must be sceptical of the claims made for this evidence: the evidence presented for case splitting, profit maximisation and supplier-induced cost increases are all consistent with problems with the sample.

More specific findings

The strong upward rise in legal aid costs, exceeding all other economic indicators including the profession's own earnings,²² persuaded many in legal aid policy that costs policy had to focus on taming supplier-induced demand. Our analysis does not disprove the supplier-induced inflation thesis. Nor do we discount the very plausible thesis that solicitors respond to economic incentives. It is clear, however, that the evidence in favour of the malign influence of supplier-induced demand is weaker than government policy has traditionally recognised.

We come now to consideration of the issue of cost drivers in more detail. Firstly, we consider the ways in which supplier-induced demand is alleged to have manifested itself. Secondly, we consider limitations on, or counter arguments to, the supplier-induced demand thesis.

Case splitting

We have already noted, and critiqued, Gray *et al's* evidence that case splitting has been evidenced as one reason for increases in costs. Case splitting has, nevertheless, been accepted by a range of commentators including the LSC itself,²³ and 'incentive problems' associated with fixed fees were one of the problems that the introduction of legal aid contracting was intended to address.²⁴ Bridges provides a detailed rebuttal of the case-splitting thesis.²⁵ He comments on what he describes as 'the remarkable cost stability' of criminal legal aid from the introduction of standard fees for magistrates' court work in 1993 up to shortly after the turn of the century. Any short-term increase in expenditure following the introduction of standard

²¹ Shown in the sample sizes shown in Figures 6 and 7, Gray *et al*, *op.cit.* n. 20, p. 22

²² Moorhead R. (2005) 'Legal Aid and the Decline of Private Practice: Blue Murder or Toxic Job?' *International Journal of the Legal Profession*, forthcoming.

²³ Goriely T., Tata C. and Paterson A. (1997) *Expenditure on Criminal Legal Aid: Report on a Comparative Pilot Study of Scotland, England and Wales and the Netherlands* Edinburgh: Scottish Office; LAB *Annual Report 1993/94* London: HMSO.

²⁴ LCD (1995) *Legal Aid – Targeting Need: the future of publicly funded help in solving legal problems and disputes in England and Wales*, Cm 2854, London: HMSO paras 3.29-3.32.

²⁵ Bridges L., (2001) *The Myth of Case Splitting – the Impact of Criminal Legal Aid Standard Fees*, January (unpublished).

fees was not due to case-splitting but rather the result of increases in remuneration rates introduced at the same time as standard fees. In so far as case-splitting did occur, it resulted in solicitors receiving less overall than might have been projected since it led to a higher proportion of lower standard fees and a smaller proportion of higher and non-standard fees being paid to solicitors. He concluded that the introduction of standard fees, coupled with ‘a tough negotiating stance’ after the initial remuneration increase, was successful in controlling magistrates’ court legal aid.

Competition for cases

Gray *et al* have suggested that competition for cases (and clients) may increase costs, with lawyers stimulated to do more for clients when there is perceived as being a greater difficulty in hanging on to them.²⁶

A more business like approach

Increasing emphasis on time management, and computerised recording of time, has also been attributed as being a cause of increased costs. The campaign to improve management structures and skills was led by both the Law Society and, as part of the franchising/contracting project, by the Commission itself.²⁷

2. Non-supplier focused factors

Goriely *et al* in their comparative analysis of three jurisdictions (England and Wales, Scotland and the Netherlands) were able to point to a range of factors that helped to explain markedly different levels of criminal defence costs, across the three jurisdictions.²⁸ Different levels of prosecution, different approaches to prosecution and the different allocation of cases to procedures designed to deal with more serious cases, all had very substantial impacts on the overall level of case costs. In other words, they suggest that the nature and shape of the criminal justice systems is one of the key driver of costs in the system.

Prosecutorial decisions

There are a number of ways in which prosecutorial decisions might impact on criminal defence costs.

- *Diversion from prosecution.* Different levels of diversion of prosecution away from court processes will affect legal aid expenditure. Where prosecutors are less likely to bring cases, or they use non-court based resolution mechanisms (such as prosecutorial fines), then legal aid

²⁶ Gray A., Rickman N. and Fenn P., SLSA Conference Presentation cited in Goriely *et al*.

²⁷ This dates from the Law Society *Expense of Time* document but see more recently Law Society (2004) *Lexcel: Helping Practices to Improve Profitability* London: Law Society, and the Legal Service Commission’s Specialist Contract and Specialist Quality Mark.

²⁸ Scotland’s scheme was the most expensive, and the Dutch scheme the cheapest.

expenditure is reduced.

- *Decisions about mode of trial.* Whilst political rhetoric suggests that it is defendant decisions on mode of trial which increase costs markedly, prosecutors and courts also have an important role. The PDSO experiment is monitoring the nature of Mode of Trial decisions, and will be reporting on this shortly.²⁹ Trial on indictment in either-way cases more frequently results from decisions of magistrates than from election by defendants. Prosecutors can have substantial influence on the court's decision by way of submissions during mode of trial hearings and indirectly through the charges laid and by presentation of the case. Cases committed to the Crown Court are of course likely to be substantially more expensive.
- *The nature, seriousness and aggregation of charges.* Prosecutors have a significant amount of discretion both as to the nature and seriousness of charges preferred, and in the decisions that they make as to the aggregation of multiple charges and separate crimes within one case.

Use of Counsel

There is evidence that historically, use of, and expenditure on, counsel is much higher in England and Wales than in Scotland because of different rights of audience rules in Scotland.³⁰

Increases in case length

Increases in the length of cases have been shown to impact on criminal defence costs.³¹

Increases in complexity

One hypothesis is that cases have become more complex and thus merit more work, and increased costs. Two studies have looked at this issue. Fleming and Headrick looked at Scottish cases to see if there were differences between 1992/93 and 1993/94 and found no evidence to support the increased complexity thesis, although they did find evidence of greater consideration of advance disclosure.³² Gray and Fenn's study showed that increases in costs were across the board, rather than allocated to particular heads of expenditure within bills, but such increases did appear to be related to increases in case-length.³³ Both studies look across a relatively narrow time frame.

²⁹ Bridges *et al*, forthcoming.

³⁰ Goriely *et al*, *op.cit.* n. 23, 28.

³¹ Gray A. and Fenn P. (1991) *Costs of Proceedings in Magistrates' Courts: A Research Report* referred to in Goriely *et al*, *op.cit.* n. 23.

³² Fleming A. and Headrick D., (1995) *Summary Criminal Legal Aid: Analysis of Accounts 1992/93-1993/94* Edinburgh: Scottish Office, cited in Goriely *et al*, *op.cit.* n. 23.

³³ Gray A. and Fenn P., (1991) *op.cit.* n. 31.

Changes in defence practice

Goriely *et al* report distinct changes in the culture and practice of defence solicitors as a likely cause in increases in defence costs. Defence work is strongly built around a consideration of prosecution evidence. Having initially been reluctant to engage in requests for, and consideration of, advance disclosure, the practice became increasingly common-place. They estimate that between 1986 and 1990 the number of defence solicitors requesting advance disclosure increased from half to 90%.

High Cost Cases

A key factor in criminal defence budgets is the number and cost of serious and/or complex cases, which necessarily generate high costs. Decisions to prosecute such cases, or to prosecute cases in complex ways, add substantially to criminal defence costs. Several commentators have noted the extent to which a limited number of high cost cases are responsible for a significant proportion of the criminal defence budget. Thus, in 1994/95 235 cases cost more than £100,000 and accounted for one third of the entire Crown Court legal aid budget.³⁴

Non-standard fee cases

Although much focus in terms of reform and monitoring of legal aid work has gone into lower end cases, and controls such as standard fees, large numbers of cases fall outside of standard fee brackets. Thus, in 1994/95 standard fees accounted for 63% of all Crown Court cases but only 15% of expenditure on Counsel.³⁵

Increasingly generous approaches to merits tests

It is common ground that there has been a dramatic increase in representation in magistrates courts since the late 1960s³⁶ which has been attributed to ‘Widgery drift’:³⁷ that is, the apparently increasingly generous interpretation of legal aid eligibility criteria so that cases which would in one year have been unlikely to get legal aid are several years later habitually the subject of legal aid orders. There are three main explanations for this trend. One is that the court perceives a substantial benefit to itself in the granting of legal aid because more defendants are represented before it. It thus takes every opportunity to grant legal aid where it can. The second is that rule-based criteria of this sort are naturally prone to expansion as lawyers analogise from one case where legal aid would usually be granted to another, which in turn permits further analogies to be made. The third is that offences that would once not have been seen as serious enough to merit legal aid are seen to be serious later because of changes in prosecution policy or social mores. Thus, for example,

³⁴ Goriely *et al*, *op.cit.*, n. 23, p. vi.

³⁵ Goriely *at al*, *op.cit.*, n. 23, p.57.

³⁶ Bridges, *op.cit.* n. 25; Goriely *et al*, *op.cit.*, n. 23, p. 42.

³⁷ Young R. (1996) *Will Widgery Do?* in Young and Wall, *op.cit.*, n. 14, p. 139.

Home Secretaries emphasising the need to imprison defendants also increases the likelihood that magistrates will award legal aid (because risk of imprisonment is a key factor in deciding legal aid availability).

3. Conclusions

Until relatively recently the dominant government discourse concerning increasing legal aid expenditure was that it was caused, in particular, by supplier-induced demand. There are three possibilities:

- Supplier-induced demand provides a *complete* explanation for cost increases and should be the sole policy focus;
- Supplier-induced demand is not evident and it falsely attributes legal aid expenditure increases to the legal professions when in fact the causes lie elsewhere; or,
- Supplier-induced demand is part of the explanation for expenditure increases, but policy makers should concentrate equally on the other causes

The literature suggests that the first explanation is not supported by the evidence, such as it is. However, the existing evidence does not provide clear support for either of the other two explanations.

Chapter 3 Police Station cases

1. Introduction

As was seen in Chapter 1 expenditure on police station legal aid has grown significantly over the past decade, and the cumulative increase has been greater than both RPI and GDP, especially since 2000/2001. Expenditure grew from £67m in 1993/94 to £177m in 2003/4. That rise was relatively gradual until 1999/2000, more or less tracking growth in GDP, but the growth has been much faster since then, as can be seen from Figure 2 on page 6. Apart from Crown Court legal aid, it is the only area of criminal legal aid expenditure that has significantly outstripped RPI and GDP in recent years. The increase after 1999/2000 does not appear to reflect a major increase in the number of police station claims, although the statistics on the number of claims may mask an increase because of the provisions in the General Criminal Contract requiring a single claim for all work undertaken for a client in a matter or case within a class of work (the 'rolling up' provisions). There has been a substantial increase in average cost per claim although, again, this will in part be a result of the 'rolling up' provisions.

This chapter will concentrate on police station advice and assistance since this accounts for the bulk of claims and expenditure under the police station scheme, but it is worth noting the issue of claims for police station standby. Table 2 (page 18) shows that having been relatively stable from 1996/7 to 2000/01, the number of claims plummets thereafter to a level of approximately one third of the historic level. This is likely to be a function of the method by which police station standby is claimed and recorded. Prior to contracting, each period of standby was claimed for separately. Following contracting, solicitors are required to make a consolidated claim at the end of each quarter. Although this should not affect the number of standby claims, it may be that the figures reflect the number of consolidated claims rather than the number of standby periods claimed for in those consolidated claims.

Expenditure on police station legal aid is a product of the number of claims and the average cost per claim, and it is to these two issues that we now turn.

2. The number of claims

For a variety of reasons the number of claims made in respect of police station legal aid does not equate with the number of persons who have been assisted under the police station scheme. Prior to the introduction of contracting the Legal Services Commission (and its predecessor the Legal Aid Board) counted the number of 'acts of assistance'. Following the introduction of contracting, the LSC has counted the number of claims paid. The number of claims paid does not equate to the number of acts of assistance

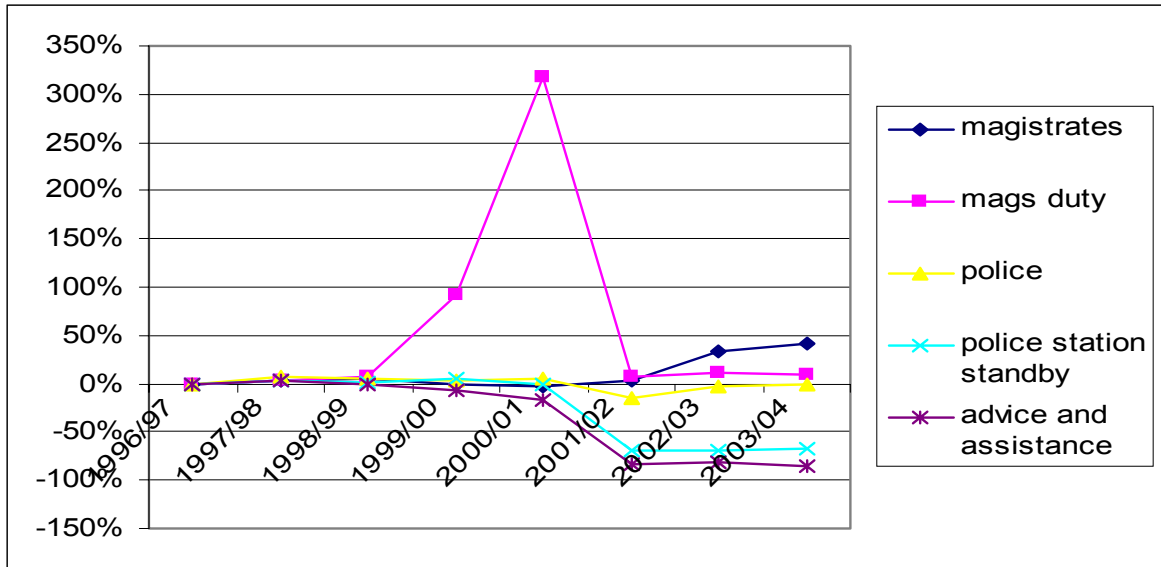
and, as noted above, under the General Criminal Contract solicitors are required to ‘roll up’ police station claims so that, for example, where a solicitor advises a client at the police station on a number of occasions (because the client, having been arrested and detained, is bailed back to the police station on one or more occasions) this will be the subject of only one claim. Prior to contracting the solicitor could have claimed each time they attended the police station. The requirement to ‘roll up’ claims will affect both the number of claims and the average cost per claim. For these reasons, comparison of the number of claims (or acts of assistance) pre- and post contracting is likely to be misleading.

Table 2 shows the fluctuations in the number of CDS claims, including police station claims, since 1996/97 and Figure 4 shows the cumulative change in the number of claims.

Table 2: Numbers of CDS claims

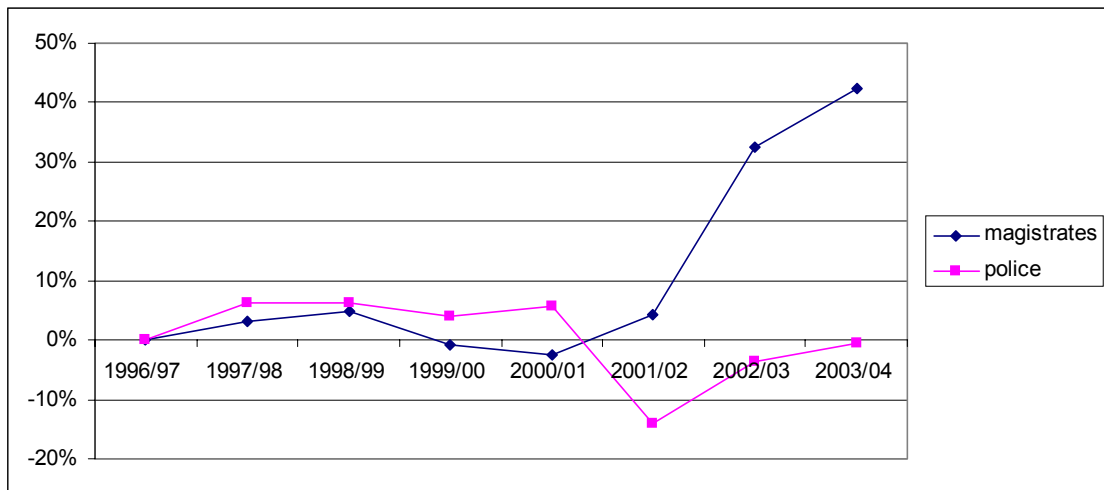
Year	Magistrates	Magistrates Court Duty	Police Station	Police Station Standby	Advice and Assistance/ Legal Help
Pre-contracting					
1996/97	479,176	80,750	720,094	104,448	396,140
1997/98	494,130	83,363	765,975	107,221	409,100
1998/99	502,763	85,957	764,870	106,053	392,552
1999/00	475,257	155,499	749,571	110,342	371,021
2000/01	467,632	337,660	760,495	104,262	329,622
Post-contracting					
2001/02	499,402	86,004	618,182	31,832	62,994
2002/03	635,310	89,379	694,105	32,769	70,909
2003/04	682,346	88,460	716,969	33,849	58,127

Figure 4: Cumulative change in number of claims³⁸



The dramatic increase in magistrates court duty work minimises the visual impact of other types of work so in Figure 5 only police station claims and magistrates' court representation order claims are included. This shows a substantial increase in magistrates court representation order claims, which is dealt with in the next chapter.

Figure 5: Cumulative change in the numbers of police station and magistrates' court acts of assistance/claims



As can be seen from Table 3, the number of police station acts of assistance/claims rose slightly between 1996/97 and 2000/01, before falling by about 140,000 in 2001/02, the year that contracting was introduced,

³⁸ Source: LAB and LSC *Annual Reports* (1996/97 – 2003/04).

and then began climbing again, reaching 716,989 in 2003/04. However, as indicated above, prior to 2001/02 the LSC counted the number of acts of assistance whereas after that year they counted the number of claims, and for the reasons stated the number of claims is likely to be less than the number of acts of assistance. It is probable, therefore, that the apparent drop in claims is largely accounted for by the way in which the statistics are collected.

SPOCC data enables a more detailed analysis of the number of claims under the police station scheme to be made in the period since 2001. Table 3 shows the number of investigation claims for the period July 2001 to June 2004, broken down by type of claim, and Figure 6 shows these figures in graphic form.

Table 3: Number of Investigation Claims July 2001 to June 2004 (SPOCC data)

	Jul-Dec 01	Jan-Jun 02	Jul-Dec 02	Jan-Jun 03	Jul-Dec 03	Jan-Jun 04	Totals
Free standing advice and assistance	11,288	11,835	11,502	11,799	9,203	8,551	64,178
Police station attendance	233,769	257,514	261,279	270,566	267,865	279,169	1,570,162
Police station telephone advice only	63,767	69,101	67,768	69,438	69,843	73,325	413,242
Police station attendance immigration	0	2	1,141	2,058	1,814	1,966	6,981
Armed Forces - Police station attendance	1,473	1,607	1,038	665	556	494	5,833
Armed Forces Personnel – Warrants	95	84	70	80	89	82	500
Warrant of further detention	443	484	451	486	503	516	2,883
Totals	310,835	340,627	343,249	355,092	349,873	364,103	2,063,779

Figure 6: Number of Investigation Claims (SPOCC)

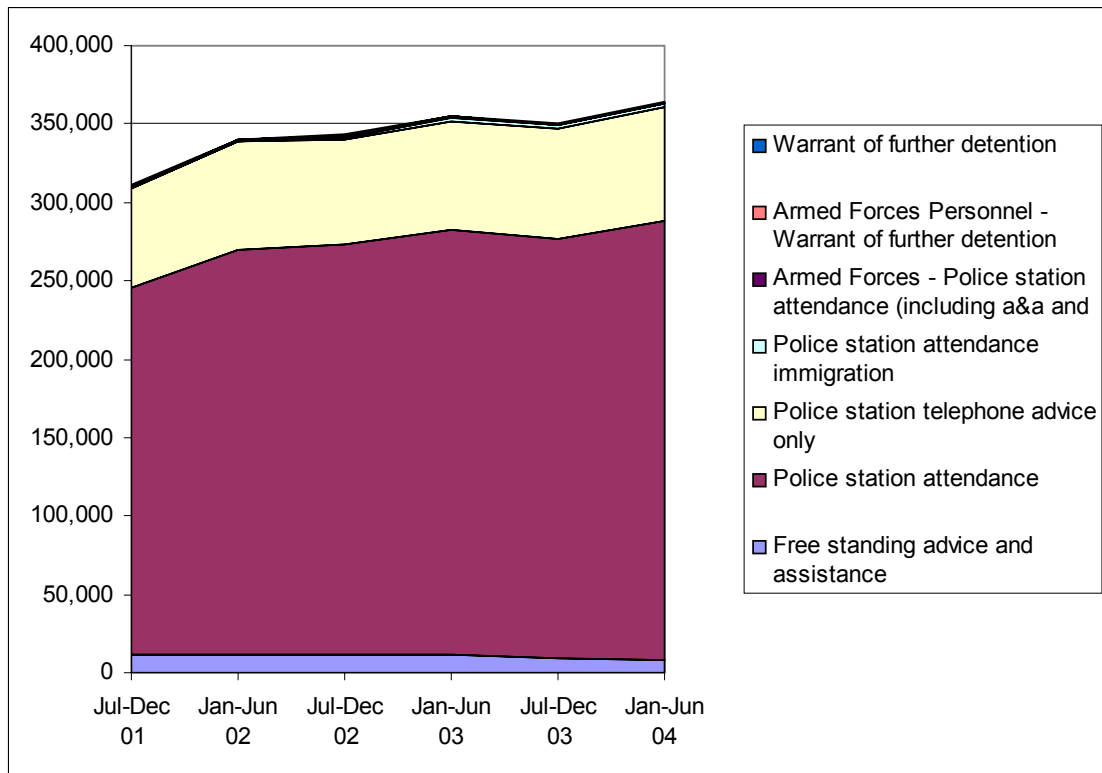


Table 3 and Figure 6 show a year-on-year increase in the total number of investigation claims, with the number of claims in the third year being nearly 10% higher than in the first year. Within the mix of claims, it is worth looking at growth of the three main areas of claim in terms of expenditure: free standing advice and assistance, police station attendance and police station telephone-only advice (Figure 7).

Figure 7: Fluctuation in Police Station Claims (since July 2001)

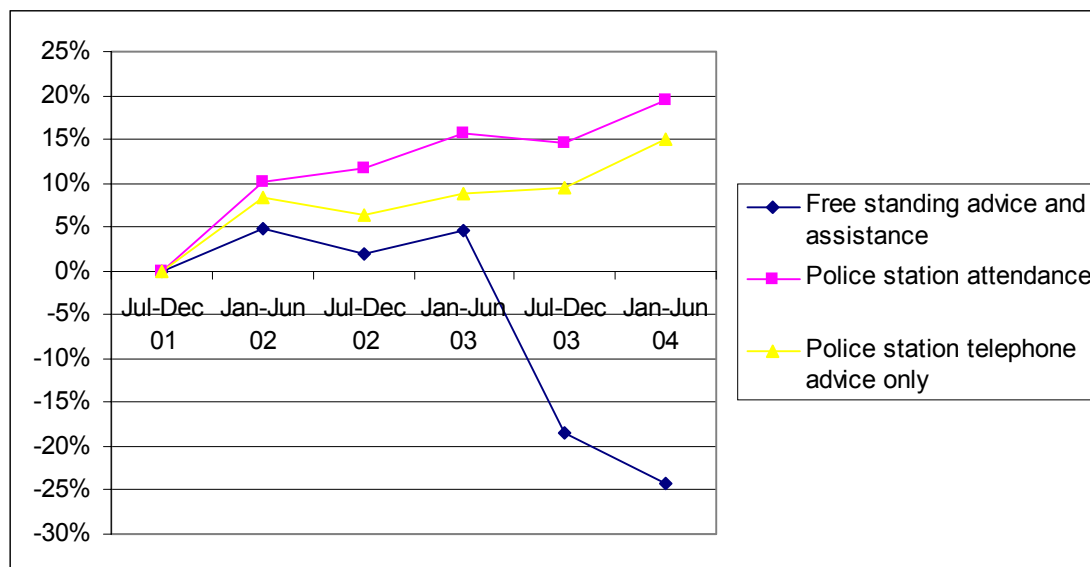


Figure 7 shows that there has been a significant decline in free standing advice and assistance; a result of the changes to the contract referred to earlier. Once contracting had bedded down, there was a parallel increase in police station telephone (7% over two and a half years) and attendance work (9% over two and a half years). Although the rules on claiming under the General Criminal Contract are likely to have reduced the number of claims compared to the number of acts of assistance pre-contract, there are a number of reasons why the number of claims, especially police station attendance, has increased since the introduction of contracting. A partial explanation for the drop in claims in the first year following the introduction of contracting is that, with the ‘rolling up’ requirement meaning that where a client was bailed to return to the police station, a claim could not be made until a final decision regarding charge was made, there would have been an initial drop in the number of claims reflecting such cases. Thus the increase in the subsequent years is likely to reflect a ‘catching-up’ process. Secondly, as explained below, the number of arrests, and thus the potential number of requests for legal advice, increased over this period.

In addition, provisions in the General Criminal Contract have, in effect, both encouraged solicitors to provide police station advice where a request is made, and to attend in person rather than advise on the telephone. The contract, for the first time, set out in detail the service obligations of both duty and own solicitors. Prior to the contract, only duty solicitor cases had been subject to service obligations, and these were less detailed and imposed fewer obligations on solicitors than those set out in the contract. Whereas prior to contracting, own solicitors were left to make a judgement about whether to attend the police

station, the contract required attendance in specified circumstances that were almost the same as those that apply to duty solicitors.³⁹

The amendments to the contract that took effect in May 2004 are designed to reduce the circumstances in which solicitors can provide advice by attending the police station, as opposed to providing it on the telephone, and to limit the circumstances in which personal attendance can be justified. If other factors, such as the number of requests for legal advice, do not change, this is likely to have the effect of reducing the number of attendance claims and increasing the number of telephone-only claims. In addition, the introduction of the CDS Direct Scheme may well have the effect of reducing the number of attendance claims. On the other hand, changes introduced during 2004 as a result of the Criminal Justice Act 2003 may have the effect of increasing the number of requests for advice. For example, the power to detain without charge those arrested in respect of arrestable offences was increased from 24 to 36 hours, and powers to fingerprint suspects and to take non-intimate samples were also increased.

Looking at the decade as a whole, there is good reason to hypothesise that, although not reflected in the claim figures, the number of suspects receiving legal advice would have increased.⁴⁰ Broadly, those eligible for police station advice under the police station scheme are those who have been arrested and detained at a police station.⁴¹ Table 4 shows, amongst other things, the number of arrests for each year during the decade.

³⁹ See in particular the General Criminal Contract Part B para 3.1 and para 8.2.

⁴⁰ It should be noted that both pre- and post-contracting the number of claims (acts of assistance) would not precisely equate with the number of suspects advised since, depending partly on the practices of solicitors, two or more co-suspects advised at the same time in respect of the same allegation(s) may have resulted in one claim.

⁴¹ 'Volunteers' as defined by PACE s29 are also eligible for advice under the scheme, but their numbers are, compared to those arrested, relatively small.

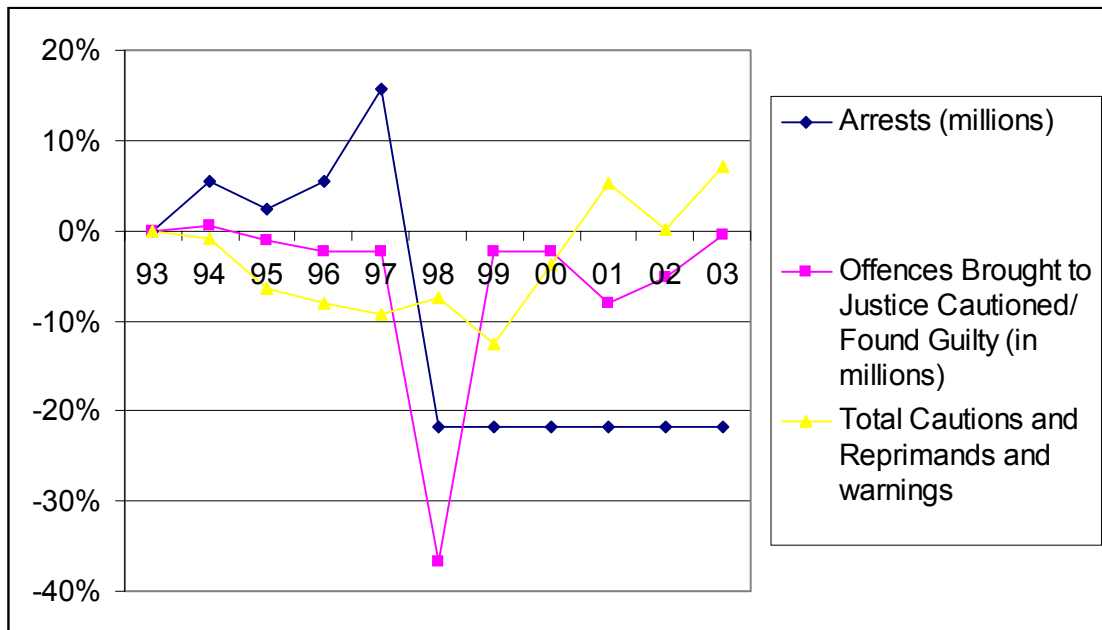
Table 4: Criminal Justice Indicators of Police Station Activity⁴²

	93	94	95	96	97	98	99	00	01	02	03
Arrests (millions)	1.66	1.75	1.7	1.75	1.92	1.3	1.3	1.3	1.3	1.3	1.3
Offences Brought to Justice Cautioned/ Found Guilty (in millions)	1.74	1.75	1.72	1.7	1.7	1.1	1.7	1.7	1.6	1.65	1.73
Cautions – All* ('000s)	311.3	308.4	291.2	286.2	282.1	287.9	266.1	239.0	229.9	225.4	241.8
Reprimands and warnings (‘000s)							6.3	60.8	98.0	86.6	91.9
Total Cautions and Reprimands and warnings	311.3	308.4	291.2	286.2	282.1	287.9	272.4	299.8	327.9	312.0	333.7

Figure 8 shows the cumulative change in these figures in percentage terms. Arrests dropped significantly, but the number of offences brought to justice cautioned/found guilty had recovered to its 1993 position by 2003 and the number of cautions/reprimands had increased.

⁴² Sources: Arrests collated year on year from *Criminal Statistics* 1993 onwards; Offences Brought to Justice Cautioned/ Found Guilty collated year on year from *Criminal Statistics* 1993 onwards; Police Cautions and Reprimands and Warnings collated from *Criminal Statistics* 2003; Police Cautions as % of offenders guilty/cautioned collated from *Criminal Statistics* 2003). Note that in 1993 and 1994 arrests figures were collated separately for the Metropolitan Police Service (MPS) and other police forces. In 1993 there were 93,000 arrests reported by the MPS and 1,567,000 in the provinces. In 1994 there were 151,000 arrests reported by the MPS and 1,602,000 in the provinces. From 1995 onwards arrest figures were reported as a combined statistic, of which there were 1.7 million in that year. 1997 is a ‘blip’ year because of a change in MPS reporting policy, which is why the figure is markedly higher that year.

Figure 8: Cumulative Changes in Criminal Justice Indicators of Police Station Activity



The number of arrests increased from 1993 to 1997, then declined sharply and have been broadly static since 1998. However, the proportion of suspects requesting legal advice appears to have been increasing since suspects were first given a statutory right to legal advice by PACE. In 1987 25% of suspects requested legal advice, rising to 32% in 1991, and to 40% by 1995, and there have been reports that by the turn of the century the figure had increased to 50%, although a minority of requests do not result in legal advice being secured.⁴³ This would indicate an increase of approximately 100,000 in the number of suspects receiving legal advice annually between 1993 and 2000.

What explanations are there for suspects being increasingly likely to request and receive legal advice? First, it should be noted that whilst 4 appears to show that the number of arrests has been static since 1998, rounding up and down of the figures obscures an increase in the number of arrests for notifiable offences of just over 52,000 between 1999 and 2003. If, on a conservative estimate, 18,000 of those arrested (35%) had legal advice, this would indicate an increase in the cost of police station legal aid in 2003, compared to 1999, of approximately £3.9m. During that period, whilst the number of arrests for certain categories of offences went down (eg. burglary, theft and handling stolen goods, fraud and forgery and drugs offences), arrests for offences such as violence against the person, sexual offences and robbery went up. According to Home Office research, those arrested in respect of the latter categories of offence are significantly more

⁴³ Phillips C. and Brown D., (1998) *Entry into the Criminal Justice System*, Home Office Research Study 185, London: Home Office, p. 59.

likely to request legal advice than those arrested for offences in the former categories.⁴⁴ There may have been similar changes throughout the decade, but in view of time constraints we have not been able to analyse the relevant statistics.

There are also indications that the proportion (and number) of those arrested who are charged with a criminal offence has increased over the decade, and that of those charged an increasing proportion (and number) are held in custody pending their first court appearance rather than being granted bail (see further page 30). This would also suggest that the request rate for legal advice is likely to have increased as the consequences of arrest have become more serious for a growing number of suspects.

There is no up-to-date information on why suspects request legal advice. Brown *et al*, reporting in 1992, showed that the main factors affecting suspects' decisions regarding legal advice are the nature and seriousness of the alleged offence, the time of arrival at the police station and suspects' previous offending history.⁴⁵ Phillips and Brown, reporting in 1998, found that significant predictors of demand for legal advice were the suspect's ethnic origin, employment status, previous convictions, condition on arrival at the police station, and whether they were answering police bail.⁴⁶ We have not been able to explore these factors from available information, but a number of other factors may be relevant to the request rate.

- *Inferences from silence* - Inferences from silence under the Criminal Justice and Public Order Act 1994 were introduced in January April 1995, with a related change in the caution that is administered to suspects. Research conducted in the year following the change did not find that there had been a measurable increase in requests for legal advice.⁴⁷ However, the fieldwork for this research was conducted only over a six month period commencing four months after introduction of the provisions. It is possible that, particularly when considered in combination with other factors, the inference from silence provisions will have led to some increase in the request rate.
- *Pressure on the police to encourage requests for advice* - For a period of time after the introduction of the right to legal advice under PACE s58 there was concern that the police used a variety of ploys to discourage suspects from requesting legal advice. However, throughout the past decade there has emerged a variety of factors that have combined to place pressure on the police to encourage suspects to request legal advice. These include the attitude of the courts to admission of

⁴⁴ Phillips and Brown, *ibid*.

⁴⁵ Brown D., Ellis T. and Larcombe K., (1992) *Changing the Code: Police Detention under the Revised Pace Codes of Practice*, Home Office Research Study 129, London: HMSO.

⁴⁶ Phillips and Brown, *op.cit.*, n. 43, p. 62.

⁴⁷ Bucke T., Street R. and Brown D., (2000) *The right of silence: the impact of the Criminal Justice and Public Order Act 1994*, Home Office Research Study 199, London: HMSO, p. 21.

interview evidence where the suspect was denied legal advice,⁴⁸ changes to Code of Practice C designed to encourage more suspects to request advice, and greater police professionalism resulting from initiatives such as the 'PEACE' police interviewing training programme.⁴⁹ The provisions regarding inferences from silence, referred to above, are also likely to have similar effect since the fact that a suspect was in receipt of legal advice at the police station makes it more likely that a court will be willing to draw adverse inferences from silence. Furthermore, as from April 2003, as a result of amendments to the 'silence' provisions of the Criminal Justice and Public Order Act 1994 by the Youth Justice and Criminal Evidence Act 1999 s58, inferences from 'silence' are not possible where a suspect was denied access to a solicitor.

- *Speeding up criminal processes* – Since coming to power in 1997 the government has pursued a policy of speeding up criminal processes. As part of this policy, a reduction in the time from charge to first appearance for those charged and granted police bail was, following recommendations in the *Narey Report*,⁵⁰ introduced nationally by Crime and Disorder Act 1998 s46 in November 1999. It is conceivable that this would have had the effect of encouraging suspects who are, or are likely to be, charged to involve a lawyer at an earlier stage since the immediacy of the consequences of their arrest and detention may be more apparent.
- *Increased police powers in respect of detained suspects* – During the last decade, police powers in respect of detained suspects have been consistently increased. The regularity and rate of such increases in police powers is such that it is not possible to track any change in the rate of legal aid claims against such development. However, it should be noted that over the period powers of the police have changed significantly in respect of a range of police investigative powers including fingerprints, photographs, searches, samples and identification procedures.
- *Bail from the police station* - The police were given a power to impose conditional bail on a suspect following charge by an amendment to the Bail Act 1976 introduced by the Criminal Justice Act 1994, and brought into effect in 1995. Previously, following charge, a suspect had to either be given unconditional bail or detained pending first court appearance. This introduced a further element of complexity, and room for negotiation with the police.
- *Greater complexity of police investigations* – Over the decade, and partly as a result of technological developments and changes in the nature of criminal activity, police investigations and evidence gathering have become more complex. Examples include evidence from CCTV,

⁴⁸ See, in particular, *R v Samuel* [1988] QB 615.

⁴⁹ (2000) *A Practical Guide to Investigative Interviewing*, Bramshill: National Crime Faculty.

⁵⁰ (1997) *Review of Delay in the Criminal Justice System: A Report*, London: Home Office.

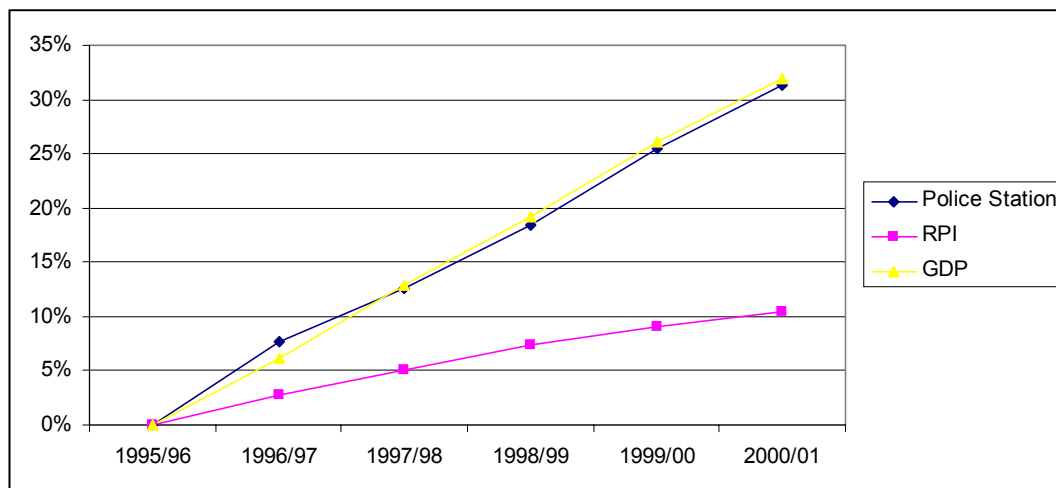
telephone records, police surveillance activities, etc. Regulation of some of these activities was placed on a statutory footing by the Police Act 1997 and the Regulation of Investigatory Powers Act 2000, legislation that has been recognised by the courts as being of great complexity. Whilst this factor is more likely to have had an impact on average cost per claim, it is also conceivable that recognition of the complexity of their position would lead more suspects to request legal advice.

- *Drug-testing on charge* - This was introduced, initially in 2002 on a pilot basis, by the Criminal Justice and Court Services Act 2000, and means that a person charged with certain offences can be required to submit to a blood test to identify Class A drugs. The suspect can be detained for up to six hours following charge for the purpose of facilitating a blood test. Although there is no evidence on this point, it is possible that drug testing may have prompted more suspects to request advice.

3. The average cost of claims

The other potentially significant element in the increase in expenditure on police station legal aid is the average cost per claim. As noted earlier, prior to contracting the statistics show the average cost per act of assistance which is not directly comparable with the post-contracting average cost per claim. The change in the average cost per act of assistance in respect of the police station scheme up to the introduction of contracting, using 1995/96 as a baseline, is shown in Figure 9.

Figure 9: Average Cost of Police Station Claims (pre-contracting)



It can be seen from Figure 9 that over the period 1995/96 to 2000/01 the average cost per act of assistance tracked, almost identically, GDP although there were no significant increases in payment rates for police

station work during this period. It is not possible, on the information that we have, to identify all of the particular factors contributing to this rise. Those factors identified earlier that are most likely to have had an impact on average cost per claim during this period are:

- inferences from ‘silence’ at the police station
- increased powers in respect of detained suspects
- the introduction of conditional bail
- greater complexity of police investigations

Two further factors that are likely to have had a significant impact on average cost per claim are improvements in the quality of police station advice and the growing seriousness and complexity of cases.

In the early 1990s there was widely expressed concern about the standard of police station advice. Defence solicitors were criticised for spending too little time securing disclosure from the police and too little time with their clients obtaining instructions and giving advice. The Royal Commission on Criminal Justice was “disturbed” by the findings of research that it had commissioned and recommended that action should be taken.⁵¹ The Law Society and the Legal Aid Board responded by introducing the police station accreditation scheme, initially for non-solicitor representatives and subsequently extended to prospective duty solicitors. As part of this process the Law Society published *Standards of Performance*⁵² which articulated for the first time the standards to be expected of lawyers advising clients at police stations, and which stressed activities that were likely to result in more time being spent, and thus higher claims. Research by Bridges and Choongh found that the accreditation scheme had a positive effect on quality generally and identified, in particular, that there had been improvements in terms of time spent on, for example, obtaining disclosure from the police and in obtaining instructions from and advising clients.⁵³ The concern with quality developed throughout the latter half of the 1990s, and the Legal Aid Board itself was a significant player in this process. Although it is not possible to cost with any precision the financial consequences of this, it would seem beyond doubt that these developments, coupled with the consequences of the ‘silence’ provisions of the Criminal Justice and Public Order Act 1994,⁵⁴ resulted in more time being spent on police station cases by defence lawyers, and thus in an increase in the average cost of claims. It is also worth

⁵¹ RCCJ, (1993) *Report*, Cm 2263, London: HMSO, at p. 37. For a review of research conducted up to the mid-1990s see Brown D., (1997) *PACE ten years on*, Home Office Research Study 155, London: Home Office.

⁵² See Shepherd E., (1994) *Police Station Skills for Legal Advisers*, London: The Law Society, London.

⁵³ Bridges L. and Choongh S., (1998) *Improving Police Station Legal Advice*, London: The Law Society and The Legal Aid Board.

⁵⁴ Research has demonstrated that following the introduction of the ‘silence’ provisions a smaller proportion of suspects remain silent in interview. Even where a suspect does remain silent, this will not necessarily shorten the interview since, possibly influenced by a number of Court of Appeal decisions, police interviewers may use the interview to ‘lay the ground’ for inferences by continuing to ask questions of the suspect.

noting that the recording and audit requirements of franchising (and subsequently contracting) may well have encouraged many solicitors to be more meticulous about recording work done.

There are a number of indicators of seriousness and complexity of police station cases, one being the numbers of those arrested who are proceeded against by way of charge or caution. Table 4 (page 24) shows that whilst the number of arrests declined over the decade, the use of diversion from prosecution in the form of caution, reprimand or warning increased. By 2000 the number of people being cautioned, reprimanded or warned had increased by over 8,000 compared with 1995, and by 2003 had increased by over 42,000 compared with 1995.

With regard to persons charged, Table 5 shows the number of persons who, having been arrested, then appear in magistrates' courts either on bail or in custody. Figure 10 shows the cumulative changes in graphic form.

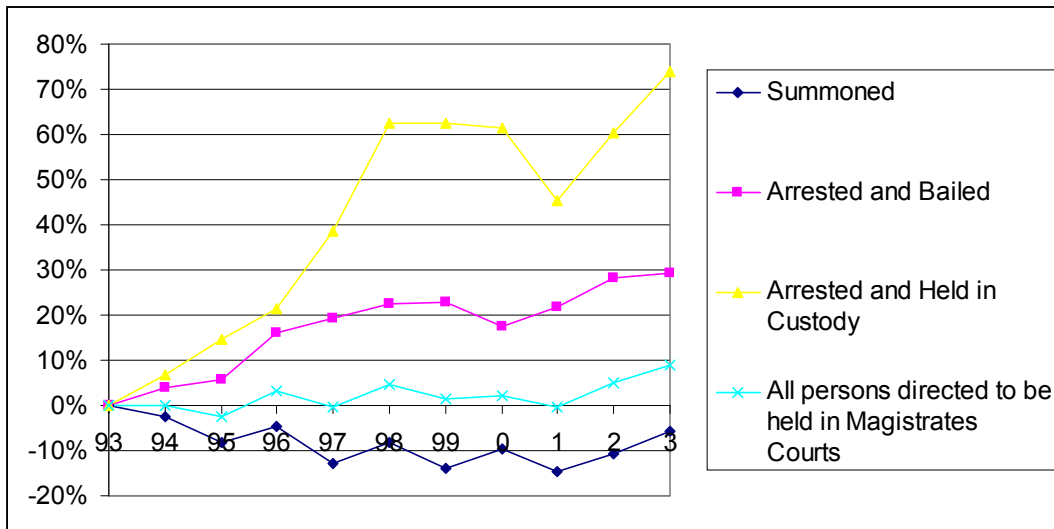
Table 5: Persons directed to appear at Magistrates' courts ('000s)⁵⁵

	93	94	95	96	97	98	99	00	01	02	03
Summoned	1,291	1,260	1,187	1,231	1,124	1,183	1,113	1,167	1,101	1,154	1,215
Arrested and Bailed	659	686	696	765	786	808	810	774	803	846	851
Arrested and Held in Custody	88	94	101	107	122	143	143	142	128	141	153
Total	2,038	2,040	1,984	2,103	2,032	2,134	2,066	2,083	2,032	2,141	2,219

The trends can be seen particularly clearly if one looks at the cumulative change in levels of each category of proceeding (Figure 10).

⁵⁵ Source: *Criminal Statistics 2003*. These figures do not equate with the figures, also taken from *Criminal Statistics 2003* for 'Defendants Proceeded Against in Magistrates' Courts although broadly the figures are going in the same direction. This seems to be a problem recognised by the producers of the statistics. See Appendix 2 of *Criminal Statistics 2003*.

Figure 10: Cumulative Changes in the Number of People Brought Before the Magistrates Court (Summoned, Charged and Bailed and RICed)



These figures show that over the period covered by Figure 9, concerning average costs per claim, increasing numbers of people who had been arrested were being charged with criminal offences, and increasing numbers of those charged were being held in custody pending their first court appearance. In 2000, 44,000 more people were charged compared with 1996, and in 2003 the increase was 132,000. Furthermore, of those charged, in 2003 46,000 more were held in custody pending court compared with 1996.

Thus during the period (up to, and after, the introduction of contracting) that average costs per claim were increasing, the seriousness of cases being dealt with at the police station as measured by these forms of outcome was also growing. This is highly likely to have had an effect not only on the numbers of suspects requesting legal advice, but on the amount of work to be carried out by solicitors, since suspects receiving legal advice were significantly more likely to face prosecution, and more likely to be denied bail by the police.

These figures, together with the legal and procedural changes, and changed expectations in terms of professional standards, over the decade support the hypothesis that the increase in average cost per claim (or act of assistance), at least in the period up to the introduction of contracting, was driven, at least in part, by increasing seriousness and complexity of police station work which, in turn, was driven by factors outside the control of both the Legal Services Commission and defence solicitors, but also by policies designed to improve quality.

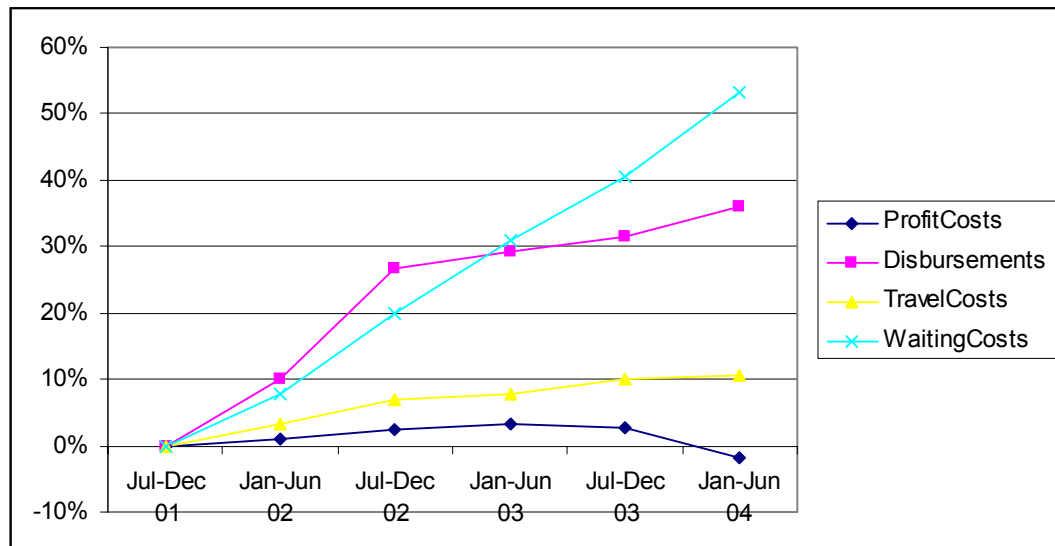
As noted earlier, it is necessary to look at the average costs per claim post-contracting separately from those relating to the period before contracting was introduced. Table 6 shows the average costs of investigation cases since the introduction of contracting in 2001, derived from SPOCC data.

Table 6: Average (mean) costs in investigation cases (SPOCC data)

	Profit Costs (£)	Disbursements (£)	Travel (£)	Waiting (£)
Jul-Dec 01	159.4	7.3	37.6	7.3
Jan-Jun 02	160.9	8.0	38.8	7.8
Jul-Dec 02	163.2	9.2	40.2	8.7
Jan-Jun 03	164.6	9.4	40.5	9.5
Jul-Dec 03	163.9	9.5	41.3	10.2
Jan-Jun 04	156.7	9.9	41.6	11.2

Between January 2002 and June 2004, average investigation claim costs rose by 3.7%. Cumulative percentage changes in the different elements of investigation claims can be seen in Figure 11.

Figure 11: Cumulative Fluctuations in Average Investigation Costs Since July 2001 (SPOCC data)



Interestingly, the average level of the most remunerative element of work, profit costs, has declined over the period, whereas there have been significant percentage increases in waiting and disbursements. Percentage increases in travel costs have been modest, and are likely to be accounted for, at least in past, by the fact that the number of attendances per claim has increased over the period (see Figure 12). Travel time,

and therefore costs, may also have increased as a result of the reduction in the number of firms providing criminal legal aid services which was one of the consequences of the introduction of contracting. The increase in the number of attendances per claim may also have had an impact on waiting costs since every extra attendance at a police station is likely to incur further waiting time. It is important to put the increases in disbursements and waiting costs in perspective. The increase in disbursements between January 2002 and June 2004 increased the average cost of investigation claims by 0.9%. Over the same period, the impact of disbursement increases was 0.8%.

The LSC Annual Reports have, in recent years, given average costs per claim by reference to the type of claim. As Table 7 shows, apart from warrants of further detention claims, the numbers of which are very small, the only claim type that has significantly increased average costs is attendance claims.⁵⁶

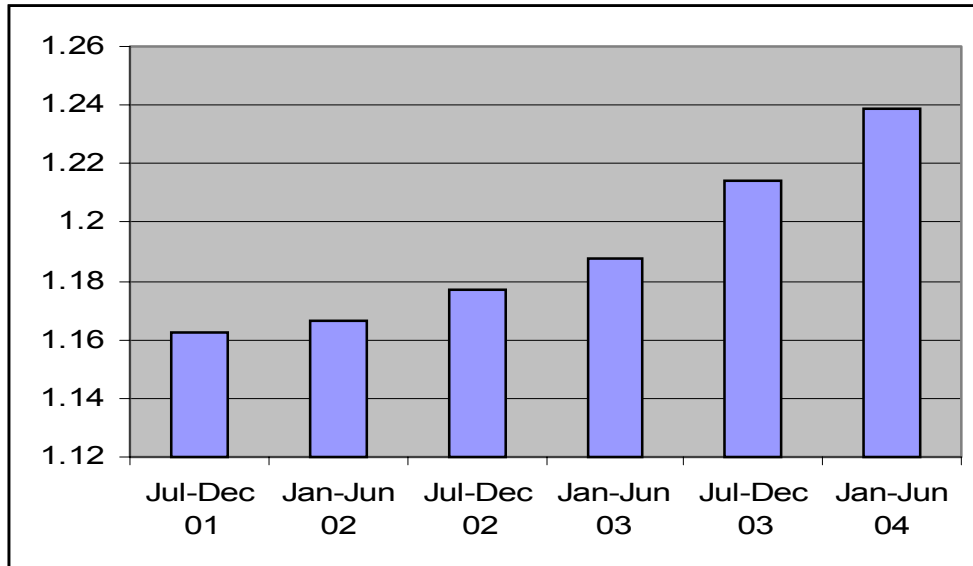
Table 7: Average costs (LSC Annual Reports)

	2001/2	2002/3	2003/4
Attendance	£246	£266	£270
Attendance on immigration issues		£223	£201
Telephone only advice	£62	£63	£59
Warrants of further detention	£404	£440	£456
Standby	£319	£315	£310
Free standing advice and assistance	£100	£105	£104

There may be a variety of explanations for the growth in average costs of attendance claims. First, as noted earlier, it may have taken time for claims relating to cases where there had been a number of ‘bail-backs’ to work through the claims system. At the same time, it may be that the police are bailing suspects to return to the police station more frequently. As can be seen from Figure 12 the number of attendances increased from just over 1.16 in late 2001 to 1.24 per claim in the first half of 2004. Although an apparently minor shift, it amounts to a 6% increase and the trend over time is consistent. In the last six months of 2001 there were 50,879 police station attendances after a first attendance, but by 2004 the figure had jumped to 86,821.

⁵⁶ A question that we have not been able to investigate is why the figures in LSC Annual Reports (Table 7) should appear to differ so markedly from the SPOCC figures (Table 6).

Figure 12: Average (mean) number of attendances at the police station per investigation claim



So since the introduction of contracting we appear to have a picture in which the average cost of attendance claims is increasing, the number of attendances is increasing, and travel and waiting times are increasing. As noted above, an increase in attendances is likely to result in an increase in travel and waiting times, as well as in the overall claim.

What factors may be at work? One of the problems in establishing any specific causes are that there are a large number of initiatives that may have an impact, many emanating from the Home Office, but which are being put in place in various places at various times, and here we can only point out factors that may be having an impact both on the length of detention and/or investigation and on the number of times a suspect is bailed back to the police station, and which may have a greater impact in the future, but which require further investigation and analysis:

- As noted above, criminal investigations appear to be becoming more complex, with more complex offences and more complex forms of evidence. Where scientific evidence is relevant, or an identification procedure is used, this is likely to result in the suspect being bailed back to the police station on one or more occasions and/or more waiting time.
- One of the consequences of the 'Narey reforms' in the late 1990s, and the provisions in the Crime and Disorder Act 1998, designed to speed up the criminal process once a person has been charged, is likely to have been a delay in charging in some cases in order that the police could prepare the case file so that it was 'court ready'. This would have increased the pressure to bail suspects back

to the police station, rather than charge them, until the file was complete for court purposes. It should be noted that the Effective Trial Management Programme now appears to be working on the basis that the time between charge and first appearance in bail cases should be extended from a minimum of 72 hours to a minimum of 96 hours, so if implemented nationally, this may have the effect of reducing such pressure.

- Although the provisions in the Criminal Justice Act 2003 requiring Crown Prosecutors rather than the police to make most charge decisions have not yet been fully implemented, over the past few years Crown Prosecutors have become increasingly involved in charge decisions. In some cases, where a Crown Prosecutor is not physically present at a police station, this may have resulted in a suspect being bailed back to the police station in order to give the CPS time to consider the case. In cases where a Crown Prosecutor is present in the police station, defence lawyers have reported that this often results in increased waiting time whilst they wait for the Crown Prosecutor to make a decision. This is likely to increase as the relevant provisions in the Criminal Justice Act 2003 are implemented nationally.
- We saw earlier that the use of formal mechanisms for diversion from prosecution (cautions, reprimands and warnings) has increased over the decade. The Criminal Justice Act 2003 introduced, commencing in July 2004, a new form of caution known as the conditional caution. A decision to conditionally caution can only be taken by a Crown Prosecutor, not a police officer, and is likely to increase the number of bail-backs, and thus travel and waiting, in cases where a conditional caution is being considered (though it may also reduce the number of cases proceeding through the courts).
- The police have, and are, being given greater powers in respect of suspects, ranging from the power to grant conditional bail following charge or following a decision to refer the case to the CPS for a charge decision, increased powers to take samples, fingerprints and photographs, to drug-testing in certain cases following charge. In addition, although probably relevant in only a relatively small minority of cases, the police have been given increased powers and responsibilities in relation to money laundering. These, and other changes, are likely to have implications for time spent by defence lawyers advising and assisting their clients.

4. Conclusions

The annual expenditure on police station legal aid had increased in actual terms by £110m by the end of the decade, an increase of 164% over expenditure at the beginning of the period. Until 1999/2000 the increase more or less tracked GDP, but the growth has been significantly greater since then. Leaving aside increases

in remuneration, which have been modest, the increase is a product of an increase in the number of persons receiving advice and assistance and an increase in the average cost per claim.

It is difficult on the evidence available to identify the number of people assisted under the police station scheme because until the introduction of contracting it was the number acts of assistance that were counted, and since then, it is the number of claims, neither of which equate to the number of people advised and assisted. However, it is likely that significantly more suspects were seeking and receiving advice at the end of the decade than at the beginning, and the post-contracting figures on the number of claims (which more closely equates to the numbers advised) show a year-on-year increase.

There are a variety of reasons why the number of people receiving advice has increased, but these are mostly related to policies and decisions beyond the control of either the LSC or criminal defence lawyers.

It is also difficult, if not impossible, to accurately compare average costs per claim pre- and post-contract because of the changed basis for claiming in respect of police station work and, therefore, in the claim statistics collected. Until the advent of contracting, average costs per claim progressively increased in line with rises in GDP. Post contracting, there is some ambiguity about the statistics, but from SPOCC data it would seem that increases in average cost per claim are largely attributable to disbursements, travel and waiting, rather than to profit costs.

It is not possible to identify precise causes for the increase in average costs. However, the evidence suggests that the increase is partly attributable to policies directed at improving quality which, in particular, are likely to have increased time spent in advising and assisting clients. It is also likely that a range of policies and processes outside of the control of the LSC, and largely emanating from, or the responsibility of, the Home Office have been a significant contributing factor.

In the summer of 2004 the LSC made changes to the General Criminal Contract that were designed to reduce expenditure on police station legal aid. Further reductions may result from the CDS Direct pilot, and the competitive tendering pilot (initially confined to London). However, police station legal aid expenditure will continue to be placed under pressure whilst policies and programmes do not take into account the potential knock-on effects for legal aid. It is also important to note that there appears to be a developing shift in the role of the investigative stage within the criminal process, with greater emphasis being placed on evidence secured from police interviews and on ‘dispensing’ justice at this early stage.⁵⁷ Whilst the latter

⁵⁷ See, for example, Jackson J., (2001) ‘Silence and proof: extending the boundaries of criminal proceedings in the United Kingdom’ *International Journal of Evidence and Proof* Vol. 5, No. 3, 145; and, Leng R., (2002) ‘Silence pre-trial, reasonable expectation and the normative distortion of fact-finding’ *International Journal of Evidence and Proof* Vol. 4, No. 4, 240.

may lead to legal aid savings at the court stage, both developments are likely to place pressure on legal aid expenditure at the police station stage.

Chapter 4 Magistrates' court cases

1. Introduction

Before the Legal Services Commission became accountable for legal aid expenditure in the Crown Court, the largest area of criminal legal aid expenditure for which it was responsible was legal aid in respect of persons appearing in magistrates' courts. There are, and have been, a number of different schemes involving legal aid expenditure in relation to magistrates' courts, but by far the largest portion of expenditure has been in respect of cases where a representation order has been granted by the court. The grant of representation orders is currently governed by s14 and Sch 3 of the Access to Justice Act 1999.

Until relatively recently there were two tests for the grant of a representation order: the merits test and the means test. The government concluded that the means test was costly and bureaucratic, and it was abolished in April 2001, leaving the merits test as the only criterion for determining whether a representation order should be granted. The merits test is currently governed by Sch 3 para 5 of the Access to Justice Act 1999 the provisions of which reflect the 'Widgery criteria' which have constituted the merits test criteria, more or less in their current form, since the mid-1960s although they were not placed on a statutory footing until 1988.

Expenditure on other forms of legal aid available in magistrates' courts, such as advocacy assistance, and legal aid for early first or administrative hearings, has always been relatively minor by comparison with expenditure in respect of representation orders. However, expenditure on court duty solicitor sessions peaked at £55 million in 2000/2001, although it has since declined.

2. Overall trends in expenditure

Table 1 (page 4) shows expenditure on magistrates' court legal aid over the past decade, with the trends illustrated in Figure 2 (page 6). Whilst expenditure has broadly tracked GDP over the period, there was a relatively gradual rise in expenditure until 1997/98, then a decline until 2000/01, after which there was a significant one year rise of £66m, before appearing to level off. Expenditure on criminal legal help, some of which relates to magistrates court proceedings, gradually increased until 2000/01, after which it dropped by a significant amount. Expenditure on the magistrates' court duty solicitor scheme also gradually rose, but this time there was a dramatic increase after 1998/99, rising to £55m in 2000/01, before dropping back to around £30m in the years thereafter.

Writing in early 2001, Bridges concluded that in the period from 1993 there had been ‘remarkable cost stability’ in terms of expenditure on magistrates’ court representation orders, a fact that he attributed to the introduction of standard fees.⁵⁸ Indeed, taking into account inflation, he calculated that in the period from 1991/92 to 1998/99, real expenditure had actually gone down even though the number of indictable cases, and the number of legal aid bills, had gone up.⁵⁹ There is little point in repeating this analysis, and we will concentrate here on the period after 2000/01. However, there are a number of observations that should be made at this stage.

The jump in magistrates’ court legal aid expenditure in 2001/02 coincided with a number of changes concerning legal aid and its administration. As noted above, the means test for representation orders was abolished in April 2001 (although it had been partially abolished in October 2000). The DCA believes that this led to a significant increase in the number of legal aid applications in magistrates’ courts, and an equivalent increase in the number of applications granted. We examine this further below, but it should be noted that other relevant changes took place at the same time.

In November 1999 a new form of legal aid, referred to as ‘duty solicitor of choice’, was introduced in order to facilitate the ‘Narey reforms’ aimed at speeding up the criminal process. This explains the increase in the cost of the court duty solicitor scheme of £10 million in 1999/2000, and a further £29 million in the following year. This was a significantly greater increase than that predicted as a result of the Narey pilot schemes. The increase in the cost of the court duty solicitor scheme in 1999/2000 was largely offset by the decrease of £8 million in the cost of magistrates’ court legal aid. As Bridges had predicted, in the first year of operation not all of the increase in the cost of the duty scheme would be reflected in the reduction in the cost of magistrates’ court legal aid because of the time-lag in presenting bills for payment.⁶⁰ In 2000/01 the cost of magistrates’ court legal aid remained at the same level as the previous year, but the cost of the duty scheme had increased to £55 million. Given that the number of persons appearing in magistrates’ court and the number of representation orders granted around this period appear, if anything, to be lower than in the preceding or subsequent periods, it would seem that there was a degree of supplier-induced inflation of legal aid expenditure resulting from solicitors choosing the most cost-efficient mix of representation order and ‘duty solicitor of choice’ claims.

However, this was short-lived because, with the introduction of contracting and the abolition of the means test in April 2001, the rationale for the ‘duty solicitor of choice’ scheme was removed, and it was abolished. This accounts for the sharp reduction in expenditure on the court duty scheme in 2001/02 and the following years, although it appears to have levelled off at about twice the pre-contract level. As Table 2

⁵⁸ Bridges, *op.cit.*, n. 25, p. 36.

⁵⁹ *Ibid.*, p. 17.

⁶⁰ *Ibid.*, p. 33.

(page 18) shows, the number of court duty solicitor claims has risen in the period after April 2001 compared to historical levels, but only marginally. We have not been able to fully analyse and explain this apparent paradox although a small proportion of the increase will be accounted for by the increase in remuneration rates introduced in 2001.

When contracting was introduced, the claiming rules for Legal Help (legal advice and assistance) were changed so that where advice and assistance was linked to a case in which a representation order was granted, the claim had to be made under the representation order and within the standard fee system. This explains the significant drop in expenditure on Criminal Legal Help in 2001/02, dropping further in subsequent years as the full effects of this change worked their way through. These changes also had an impact on magistrates' court legal aid expenditure because remuneration rates were increased about 17% in April 2001 partly to compensate solicitors for this change in claiming arrangements.⁶¹

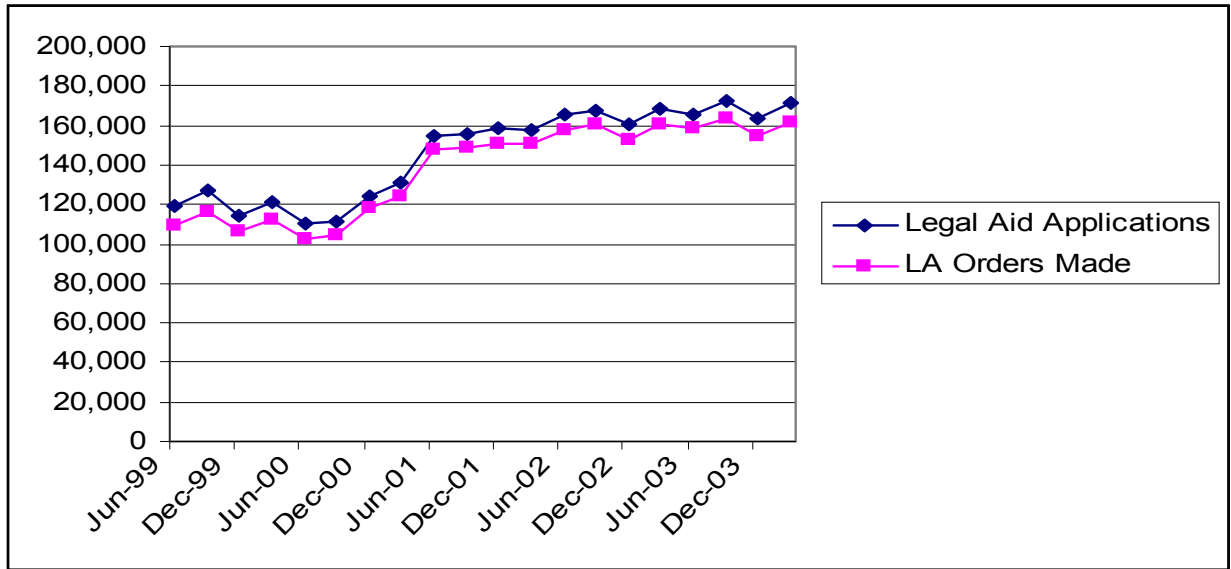
Taking into account all three forms of legal aid that were relevant to magistrates' court legal aid expenditure – representation orders, court duty solicitor and criminal legal help - the increase in expenditure between 2000/01 and 2001/02 was about £32 million, less than half the figure obtained from simply looking at the cost of representation orders, and representing an increase of about 10% in expenditure on magistrates' court legal aid. This figure more accurately reflects the true increase in magistrates' court legal aid over that period than simply looking at the increase in the cost of representation orders.

3. The number of representation orders

The Constitutional Affairs Select Committee report on the Criminal Defence Service Bill reported DCA figures on representation order applications and grants (Figure 13 and Table 8).

⁶¹ See evidence submitted to the Constitutional Affairs Committee by the LSC. House of Commons Constitutional Affairs Committee *Draft Criminal Defence Service Bill: Fifth Report of Session 2003-04, Volume II*, HC 746-II, 2004, London: Home Office, EV 65.

Figure 13: Volume of representation orders⁶²



⁶² Source: House of Commons Constitutional Affairs Committee (2004) data derived from DCA written evidence. See Draft Criminal Defence Service Bill Fifth Report of Session 2003–04, *ibid.*

Table 8: Applications made and granted

<i>Quarter</i>	<i>Legal Aid Applications</i>	<i>LA Orders Made</i>	<i>% Granted</i>	<i>% Refused Interests of Justice</i>
Jun-99	119,213	109,135	91.55	6.65
Sep-99	126,843	115,845	91.33	6.23
Dec-99	114,340	106,272	92.94	5.21
Mar-00	121,606	112,534	92.54	4.67
Jun-00	110,820	102,951	92.9	4.52
Sep-00	111,253	104,408	93.85	3.96
Dec-00	124,558	117,996	94.76	4.27
Mar-01	130,676	124,277	95.1	4.39
Jun-01	155,138	147,705	95.21	4.61
Sep-01	156,153	149,035	95.44	4.36
Dec-01	158,365	151,208	95.48	4.45
Mar-02	157,559	150,474	95.5	4.31
Jun-02	165,915	157,996	95.23	4.45
Sep-02	167,972	160,656	95.64	4.35
Dec-02	160,529	152,722	95.14	4.43
Mar-03	168,431	160,683	95.4	4.79
Jun-03	165,960	158,999	95.81	4.32
Sep-03	171,930	164,037	95.41	4.66
Dec-03	163,813	154,819	94.51	4.92
Mar-04	171,854	161,545	94	4.97

It is not clear from the DCA figures whether they relate only to legal aid for magistrates' court proceedings or whether they include legal aid applications that relate to proceedings in the Crown Court. Nevertheless, according to the DCA, they demonstrate a 40% increase in the volume of representation order grants following abolition of the means test, and an increase of 50% over pre-abolition rates in the 12 months to December 2003. There has also been an increase in the number of applications for legal aid and a moderate increase in the proportion of application granted, although this figure has been historically high. The DCA attributed a large part of this increase – between 75,000 and 150,000 grants - to the abolition of the means test.

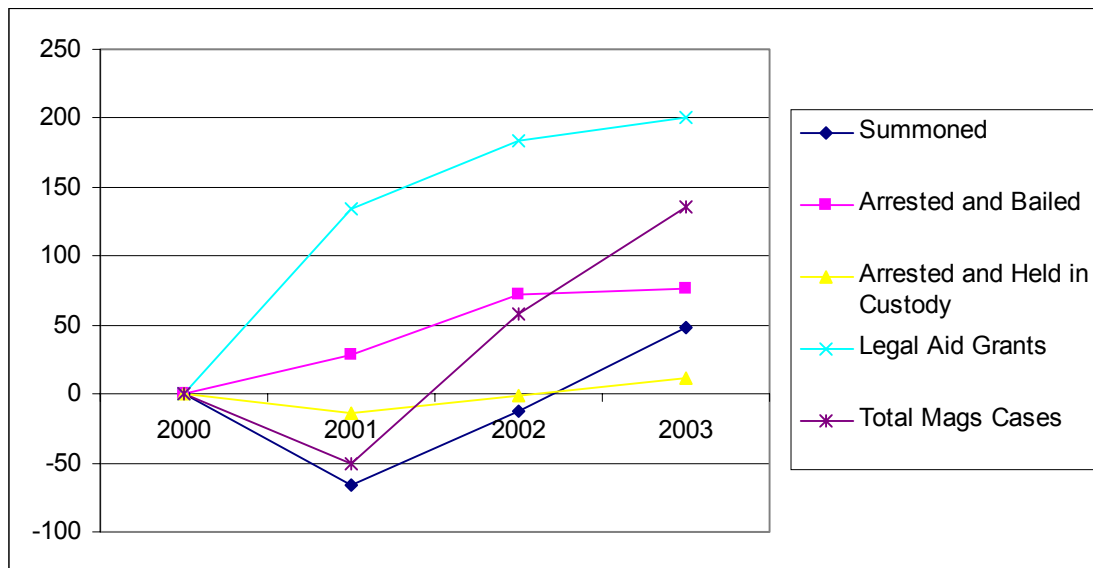
However, at the same time that the means test was abolished, the 'duty solicitor of choice' scheme was also abolished. It was predictable that the number of both applications and grants would increase as a result of abolition of this scheme. In the year following April 2001, the number of representation order grants was 148,790 higher than in the preceding year. In the same period, the number of magistrates' court duty solicitor claims dropped by more than 250,000, most of which is attributable to abolition of the 'duty solicitor of choice' scheme. It is not possible, on the data that we have seen, to determine the relative, or absolute, contribution of the two changes – abolition of the means test and abolition of the 'duty solicitor of

choice' scheme - to the increase in the number of legal aid applications and grants. However, the DCA does not appear to have factored in the latter in its calculations, and thus the estimate of the impact of abolition of the means test on the number of representation order applications and grants is likely to be an over-estimate.⁶³

Assuming that there has been some increase in the number of representation order applications and grants that are not explained by the above two factors, what may have caused this? We consider a number of possible factors, although in most cases it is not possible to quantify their contribution to any increase. One matter that we have tried to investigate is one that was raised by a number of submissions to the CAC enquiry into the draft Criminal Defence Service Bill: that the increase is, at least, partly explained by a computing change in magistrates' courts whereby a new representation order identifying number was generated each time an application to amend an existing representation order was granted. We have tried to verify this through the Justices' Clerks Society, who tell us that that practices vary, but that the overall consensus amongst those contacted was that this was not 'distorting' the grant figures.

One obvious potential factor is the number of cases being dealt with in magistrates' courts. We compared the figures on grants of representation orders with those for persons directed to appear at magistrates courts (see 5, page 30).

Figure 14: Real Fluctuation in case numbers from level in 2000 ('000s)



⁶³ Neither was it referred to by the LSC in its evidence to the CAC.

Figure 14 shows the real fluctuation in cases (in thousands) referenced back to the position in 2000.⁶⁴ The only year that the increase in legal aid applications is apparently not explained by an increase in the volume of work before magistrates courts is in 2001 when there was a substantial increase in the number of legal aid applications but only a minor increase in the number of defendants arrested and bailed to appear before the magistrates, and reductions in the numbers arrested and held in custody and those only summoned. Even in 2001 there was a net increase in the numbers charged and brought before the magistrates courts (either bailed or remanded in custody) and this might be expected to have led to a net increase in the number of legal aid applications and grants.

It would seem, therefore, that the increase in the number of representation orders is largely explained by a combination of the abolition of the means test, the abolition of the ‘duty solicitor of choice’ scheme, and an increase in court business. It is not possible to ascribe relative weights to these factors but, apart from the ‘one-off’ change in the year following April 2001, any increase in grants appears to be explained by an increase in the number of cases being dealt with in magistrates’ courts. Given the constraints on our research, it is unproductive to try to examine the reasons why court business is increasing,⁶⁵ but it is worth examining factors that may be relevant to the grant rate: that is, are there factors that explain the (modest) increase in the proportion of applications that are granted?⁶⁶

Few would question the assertion that criminal offences and criminal procedure have become inexorably more complex over the last decade. This is a continuation of a process that has been developing for at least the last thirty years. As long ago as 1980, a system of ‘paper’ committals was introduced that depended on a defendant being legally represented.⁶⁷ In this context, the Widgery Criteria have provided a flexible set of conditions for the grant of legal aid which, it has been argued, have enabled courts to grant legal aid in the interests of ‘system efficiency’.⁶⁸ It is difficult to see how complex procedural devices such as ‘plea before venue’⁶⁹ – which requires a defendant to understand that if they indicate that they would plead guilty that this will be deemed to be a plea of guilty whereas if they indicate that they would plead not guilty this will not be regarded as a plea – could be contemplated in the absence of an expectation that most defendants accused of either-way offences will be legally represented.

⁶⁴ This is done simply by deducting the number of (say) legal aid grants in 2000 from the number in (say) 2002 to give the cumulative fluctuation in real terms in 2002.

⁶⁵ Whilst, broadly, crime has been falling, a number of policies designed to ‘narrow the justice gap’ have been introduced which are likely to result in more people being put before the courts.

⁶⁶ See Table 8, p. 42 and related commentary.

⁶⁷ For a brief summary of such developments see Cape E., (2004) ‘The Rise (and Fall?) of a Criminal Defence Profession’ *Criminal Law Review* 401, at p. 406.

⁶⁸ *Ibid.*, p. 405.

⁶⁹ A procedure that was introduced in 1996. See Magistrates’ Court Act 1980 s17A.

Since 2001 there have been a number of developments which are particularly likely to have impacted on decisions to grant legal aid.

- As Table 5 (page 30) shows, since 2001 there has been a year-on-year increase in the number of defendants appearing in magistrates' courts in custody, having been denied bail by the police, with 25,000 more defendants appearing in custody in 2003 compared with 2001. Although not a formal criterion under the merits test, the fact that an accused is denied bail by the police may be some indication of case seriousness, and may be related to the likelihood of a custodial sentence which is, in effect, a formal criterion.
- Judicial attitudes to sentencing defendants who fail to surrender to bail have hardened. The Court of Appeal decision *R v White; R v McKinnon* [2002] EWCA Crime 2949 was taken to have decided that the normal sentence for failure to surrender to bail was a custodial sentence, and this was subsequently confirmed in Practice Directions. In *R (on the application of Evans) v Chester Magistrates' Court* [2004] EWHC 536 (Admin) the Divisional Court held that a representation order should have been made in respect of an alleged failure to surrender to bail "on the basis that custodial sentences were ordinarily imposed in respect of offences of failing to surrender to bail".
- The total number of offenders sentenced to immediate custody increased by 83% from 1993 to 2003, with magistrates' imposing 185% more custodial sentences at the end of the period compared to the beginning (compared to 34% more imposed in the Crown Court),⁷⁰ and this has been accompanied by a large number of changes to sentencing law and practice throughout the decade and particularly since 1997.⁷¹ There was a decrease in custodial sentencing in magistrates' courts by 2.3% in 2003, but this was the first annual decrease for at least 10 years. Thus for the first two years following abolition of the means test, the number of custodial sentences imposed in magistrates' courts increased.

4. The average cost per claim

Whilst, on the DCA figures, the number of representation orders granted went up by 40% in the year after April 2001, the number of magistrates' court legal aid claims also went up. As Table 2 (page 18) shows, in the first year after April 2001 (which, of course, was also the date on which criminal legal aid contracting was introduced), the increase was relatively modest, but there would have been a time lag between the grant of orders and the claims in respect of those grants. Comparing the following year, 2002/03, with the

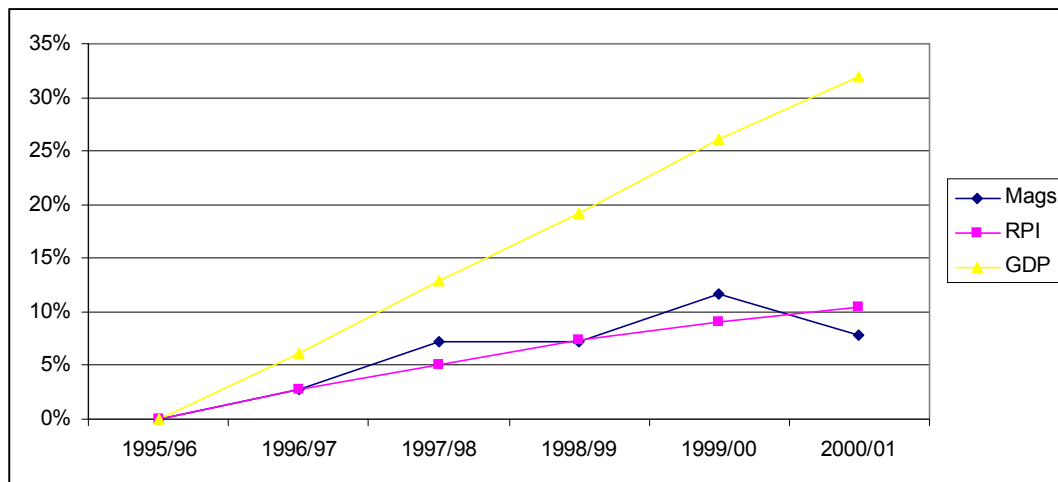
⁷⁰ *Sentencing Statistics 2003*, Home Office Statistical Bulletin 05/05, February 2005.

⁷¹ For a review, see Wasik M., (2004) 'Going Round in Circles? Reflections on Fifty Years of Change in Sentencing' *Criminal Law Review* 253.

last year before the introduction of contracting, the number of magistrates' court legal aid claims increased by nearly 168,000, about 36%. On the other hand, the number of magistrates' court duty solicitor claims fell by over 248,000 in the same period, a reduction of 74%. As explained above, this resulted from the abolition of the 'duty of solicitor of choice' scheme. Although not all of such claims would have been replaced by a representation order claim, it is likely that a significant proportion of the increase in magistrates' court legal aid claims is explained by the abolition of the 'duty solicitor of choice scheme'. In other words, changes in the number of claims reflected changes in the number of representation orders granted, and the causes are likely to be the same.

The average cost per claim for magistrates' court legal aid prior to contracting is not directly comparable with the average cost after the introduction of contracting because, amongst other things, post-contracting claims absorbed linked Legal Help, and payment rates increased, in part to reflect this. Figure 15 gives an indication of average cost per claim from 1995/96 to the introduction of contracting. This shows that the average cost per claim rose more or less in line with the RPI, and at a significantly lower rate of increase than GDP. This supports the analysis by Bridges referred to earlier.

Figure 15: Average Cost of Magistrates Claims (pre-contracting)⁷²

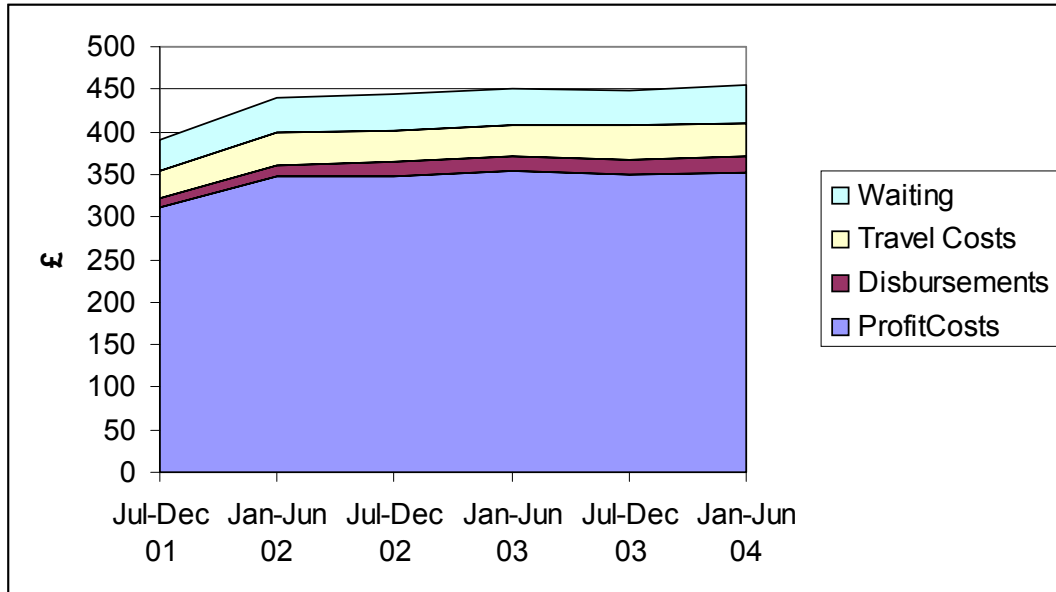


SPOCC data enables us to look at average costs in some detail for the three year period up to June 2004. We have ignored data produced in respect of the first few months following the introduction of contracting because it was particularly volatile. Although we have included data from July 2001 onwards, it is likely to show some 'bedding down' effect during the first six to twelve months following contracting.

⁷² This is the average cost of bills submitted. It does not include court duty claims.

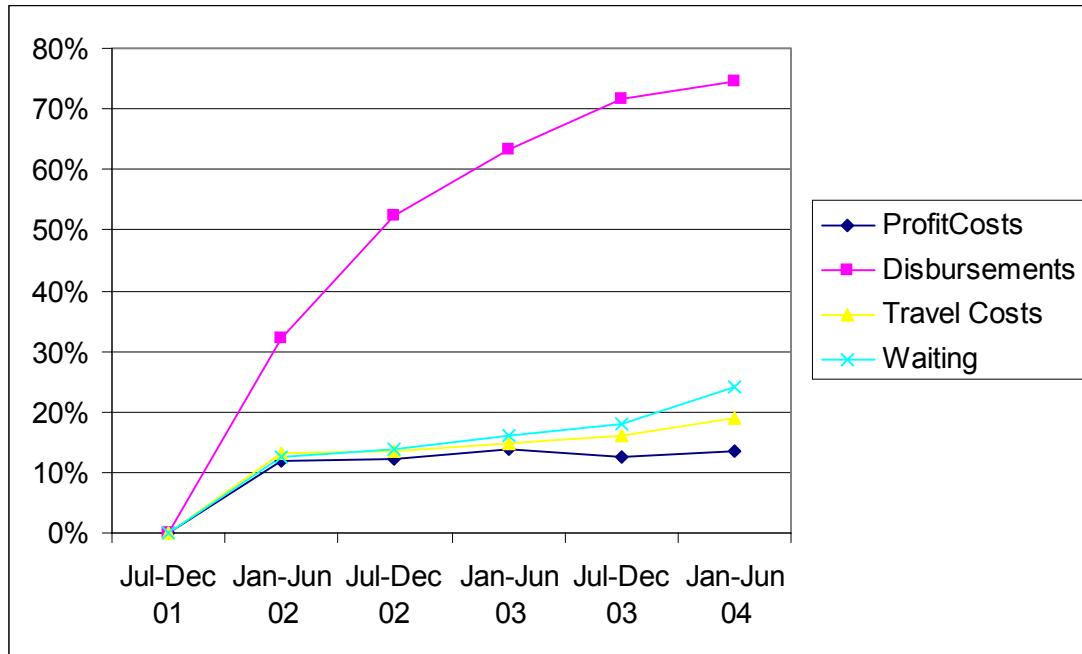
Figure 16 represents graphically the average (mean) values of constituent parts of proceedings claims from July 2001 to June 2004. The first six months shows a period of rapid increase, probably an adjustment as the caseload recorded on SPOCC matured. There is some overall increase in the total average cost but it is very modest - about 3.6% from Jan/June 2002 to Jan/June 2004.

Figure 16: Average costs in proceedings cases



There are some interesting differences within the constituent elements of proceedings costs (Figure 17).

Figure 17: Fluctuation in Proceedings Costs Since July 2001



After an initial increase in the year following contracting, profit costs levelled off. Travel and waiting costs increases have been modest once contracting had bedded down. Travel costs have increased by 6%, and waiting costs have increased by 11%, in the two and a half years since January-June 2002. On the other hand, the increase in disbursements have, at 42% over the same period, been substantial, although the trend is for the increase to slow down. This may reflect an extended tail of large disbursement costs coming through on a small number of longer cases. A supplier-induced demand thesis would predict significant increases in travel and waiting costs as these are outside of the usual controls associated with standard fees. In fact, increases in waiting added 1.1% to average proceedings costs over the two and a half year period, and travel increases added 0.5%. The increase in disbursement costs, although large in percentage terms, added just 1.1% to average costs over the same period, and this would not benefit solicitors' firms financially in any event.

Case mix

Although standard fees limit the opportunities for increasing the amount billed by firms, one way in which case costs can be increased in Magistrates Court Cases is through increasing profit costs sufficiently to shift the fee from the lower brackets to the higher brackets (i.e., from lower to higher standard fees, or from higher to non-standard fees). There are risks in so doing, particularly the risk of adverse findings in a Cost Compliance Audit, but it would be one strategy through which the profession could gain increases in funding for their cases.

Bridges studied this in detail pre-criminal contracting.⁷³ He found that, contrary to the predictions of management consultants instructed by the LCD, firms claimed proportionately more lower standard fees and fewer higher fees. The consultants predicted 70% lower standard fees, 20% higher standard fees, and 10% non-standard fees. Bridges calculates that in the period 1993-2000 93% of standard fees were lower standard fees, 11% higher standard fees and 6% non-standard fees. The picture after 2000 is seen in Table 9. There had been a consistently smaller proportion of lower standard fees post-contracting compared with the situation in the period to 2000. Once the system had settled down in 2001, there appears to be a slight upwards trend in lower standard fees as a proportion of the mainstream magistrates work and a slight decrease in the proportion of the higher fees.

Table 9: Proportion of Standard Fee Claims (SPOCC data)

	Jul-Dec 01	Jan-Jun 02	Jul-Dec 02	Jan-Jun 03	Jul-Dec 03	Jan-Jun 04
Lower Standard Fees	83%	79%	79%	79%	80%	81%
Higher Standard Fees	14%	16%	16%	16%	15%	14%
Non-standard Fees	3%	5%	5%	5%	5%	4%

Table 10 is also derived from SPOCC proceedings claims and looks more closely at the number of claims. It shows the position over three years from July 2001 (in the fourth month of legal aid contracting) and June 2004.⁷⁴

Table 10: Number of Proceedings Claims July 2001 to June 2004 (SPOCC data)

	Jul-Dec 01	Jan-Jun 02	Jul-Dec 02	Jan-Jun 03	Jul-Dec 03	Jan-Jun 04	Total
Early hearing	15,744	16,246	15,464	16,131	14,092	9,527	87,204
Free standing advice and assistance	17,002	18,743	18,556	18,795	16,239	10,282	99,617
Representation order HSF	30,096	41,880	42,562	44,321	40,225	40,536	239,620
Representation order LSF	173,168	209,339	212,370	226,261	219,219	230,189	1,270,546
Representation order NSF	5,991	12,677	12,289	14,630	14,032	12,728	72,347
Second claim deferred sentence	0	0	477	761	695	720	2,653
Total	242,001	298,885	301,718	320,899	304,502	303,982	

⁷³ Bridges (2001) *op.cit.*, n. 25.

⁷⁴ The early months of contracting were excluded because of the desirability of focusing on three years and the inherent instability in the figures on the very early days of contracting.

Once contracting bedded down in 2002, the number of claims peaked in early 2003 and then dropped back to what looks like a fairly steady state. Within the claims mix, this is also true of higher standard fee claims. Lower standard fee claims appear more volatile, although there are signs of a general pattern of a higher number of claims in the second half of each year for lower and higher standard fee claims.

Both average cost per claim, and the claim mix, can be affected by a number of factors, some within the control of contractors, others outside of their control, and yet others which may or may not be within their control. We have attempted to examine three factors that come into the last category: case length, number of hearings, and hearing times. More sophisticated analysis, for example, by reference to the seriousness of offences in respect of which legal aid orders have been granted, has not been possible on the data, and in the time frame, available.

Indications of case length and numbers of hearings

Criminal Statistics do not indicate an increase in the average number of hearings for indictable or summary offences in the magistrates court between 1999-2003.⁷⁵ The average number of times a case was listed decreased marginally (from 3.3 to 3.2 for indictable cases, 1.8 to 1.7 for summary-only non-motoring offences and 1.9 to 1.8 for summary motoring offences). The average length of adjournments increased by two days in indictable cases during that period but decreased by a day for both types of summary-only case.⁷⁶ Between 1993-1999⁷⁷ the average number of times an indictable case was listed in magistrates' courts decreased from 3.5 to 3.3. The average length of adjournment also decreased from 26 to 23 days. The average number of times a summary (non-motoring) case was listed increased over the same period from 1.6 to 1.7, but there was a large reduction in the average length of an adjournment, from 32 to 27 days. For summary motoring cases, the figures are similar – a reduction from 2.0 to 1.9 hearings, and from 33 to 28 days.

With regard to adjournments, it is worth noting a National Audit Office (NAO) survey regarding the causes of adjournments. The NAO's research "suggested that some 40% are a result of errors or omissions on the part of one or more of the participants".⁷⁸ About half of ineffective hearings in magistrates' courts were caused by problems within, or in liaison between, the courts, the police, the Crown Prosecution Service, the Prison Service, the Prisoner Escort and Custody Service, and the Probation Service. A quarter of ineffective

⁷⁵ *Criminal Statistics 2003*, Table 3.4, p. 67

⁷⁶ *Ibid.*

⁷⁷ In 1999 the basis for calculating these figures was changed so it is necessary to consider 1993-1999 and 1999-2003 separately. These figures are taken from *Criminal Statistics: England and Wales 2000*, Cm 5312, London: HMSO, p. 146.

⁷⁸ Comptroller and Auditor General and others (1999) *Report by the Comptroller and Auditor General* London: The Stationery Office.

hearings were caused by defendants on bail not turning up at court. A further quarter of ineffective hearings were caused by errors or omissions on the part of defendants or their legal representatives.

Hearing times

One of the consequences of the standard fee system of payment is that information about work that is done within the profit cost element is not routinely collected. Therefore, an analysis of profit costs in order to try to establish relevant cost drivers is not possible without looking at case files. One element of profit costs will be time spent in court hearings (although this is likely to be less than preparation time), and the *Judicial Statistics* do give some information about average hearing times in magistrates' courts, which we set out for the period from 1998 to 2003 in Table 11.

Table 11: Hearing times in magistrates' courts

Date	Not Guilty Pleas		Guilty Pleas		Cases for Sentence		Appeals	
	Total Cases	Average Hearing Time (hrs)	Total Cases	Average Hearing Time (hrs)	Total Cases	Average Hearing Time (hrs)	Total Cases	Average Hearing Time (hrs)
1998	27,167	9.4	41,872	1.1	24,759	0.6	13,463	1
1999	26,541	9.8	37,883	1.1	26,859	0.7	12,497	0.9
2000	26,637	2.6 ⁷⁹	37,022	0.9	24,992	0.6	11,854	1
2001	28,453	9.4	36,655	1.1	20,499	0.5	10,491	1
2002	30,312	9.7	40,187	1.2	24,077	0.5	9,761	1.1
2003	30,587	9.6	41,855	1.2	25,569	0.6	9,650	1.1

This shows that there has been an overall slight increase in hearing times over the past three years. Although it is possible that an increase of this order could affect the mix of claims in terms of standard fees, it is not possible on available data to determine whether this is so. It is likely that such changes would have had, at most, a marginal effect on claim mix.

5. Conclusions

That there have been major changes in both criminal law and criminal procedure over the past decade is beyond doubt. Since 1997 it has been a major part of government policy to 'undertake a root-and-branch

⁷⁹ This figure from the *Judicial Statistics* from that year is the figure published but it is clearly out of kilter with other years and is presumably an error.

remaking of the country's criminal justice system'.⁸⁰ Since magistrates' courts deal with the vast majority of all criminal cases that go to court, it is inevitable that they have been fundamentally affected by such policies.

In this context it may be regarded as surprising that in the eight years up to the advent of contracting in 2001, expenditure on magistrates' court legal aid did not go up in real terms. This has been attributed to the success of standard fees in controlling expenditure, and this period was also one of stagnation in legal aid fee levels.

Whilst expenditure on magistrates' court legal aid (largely representation order claims) did jump by £66 million in 2001/02, total expenditure on legal aid in magistrates courts (i.e., including the court duty solicitor scheme and Legal Help) increased by a more modest £32 million, amounting to an increase of about 10% on the previous year. This is a smaller increase than may have been expected as a result of, what we understand to have been, a rise of 17% in representation order remuneration rates.

The rise in magistrates' court legal aid expenditure was largely attributed by the DCA to an increase in the number of representation orders granted by magistrates' courts as a result of abolition of the means test. However, whilst it would appear that the number of grants did rise substantially in 2001/02, this rise is at least partly attributable to the abolition of the 'duty solicitor of choice' scheme. Furthermore, apart from in the year 2001, the rise in grants coincides with an increase in court business.

There are also other explanations for a rise in the number of grants, including indications of a more serious caseload in magistrates' courts, judicial decisions establishing custody as the normal penalty for failure to surrender to bail, and an increase in the use of custodial sentences by magistrates.

In the five years to 2000/01, increases in average costs per claim were broadly the same as inflation, and significantly less than GDP. Since contracting, after an initial rise, average cost per claim has levelled off.

⁸⁰ Tonry M., (2004) *Punishment and Politics: Evidence and emulation in the making of English crime control policy*, Cullompton: Willan, p. 5.

Chapter 5 Crown Court cases

1. Introduction

As Table 1 (page 4) demonstrates, it is Crown Court costs which have contributed most significantly to the increases in criminal legal aid spending over recent years. Since 1995/96 Crown Court legal aid costs have increased from £286m in 1995/6 to £645m in 2003/4, an increase of 125% and an average annual increase of 16%. Between 2001/02 and 2003/04 expenditure increased by £171 million, an increase of 36%. These increases considerably exceeded increases in GDP and inflation over the same periods. Whereas at the beginning of that period Crown Court legal aid costs constituted just over 46% of the total criminal legal aid budget, by the end of the period they took up 54% of the total budget. The cumulative increases are well illustrated by Figure 2 (page 6), which shows that the rate of increase of Crown Court legal aid costs since 2001/2002 has been little short of dramatic.

2. Nature of increases in Crown Court work indicated by costs data

Available data on Crown Court legal aid expenditure is limited. The LSC provided us with a break down of the total expenditure on Crown Court work for each month from April 2001 to the end of 2004, broken down by counsel and solicitor for four types of claim Counsel Non-Standard fees, Counsel Standard Fees, Solicitor Non-Standard Fees and Solicitor Standard Fees.⁸¹ As there are not complete results for the financial year 2004/05⁸² we show an average payment per month in each financial year, to enable comparisons across all financial years.

⁸¹ We have used the term ‘standard fee’ throughout, although in relation to counsel they are more usually described as graduated fees.

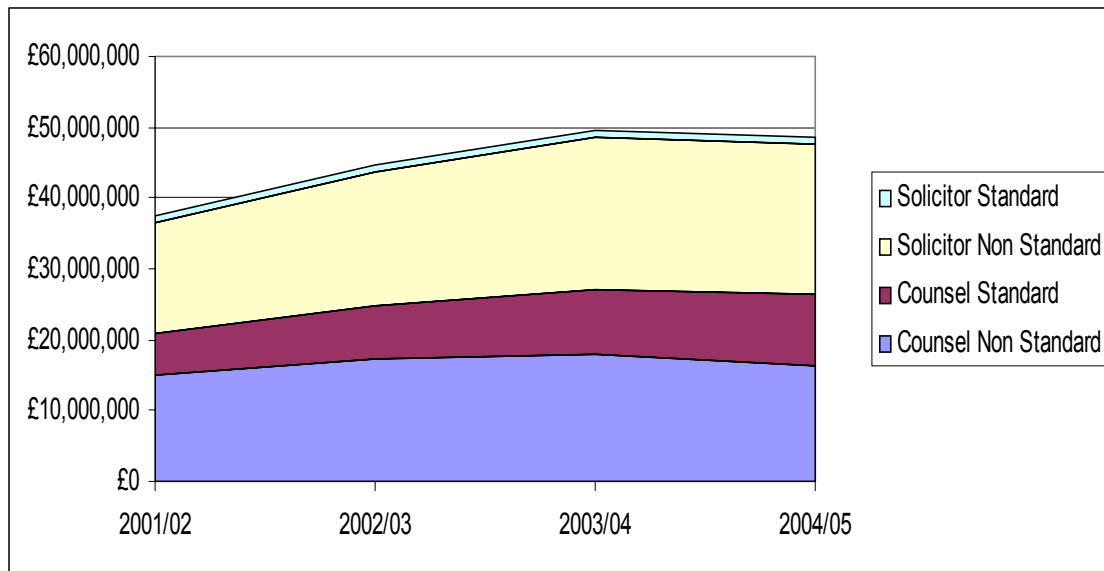
⁸² We have data on the first nine months.

Table 12: Crown Courts Costs: Average Payments per month 2001/02 to 2004/05

		2001/02	2002/03	2003/04	2004/05
Counsel Non	Value £	£14,907,388	£17,305,338	£17,808,987	£16,222,825
Standard	Volume Cases	1,272	1,156	1,094	1,185
	Volume Claims	2,553	2,408	2,189	2,176
Counsel	Value £	£5,822,422	£7,555,855	£9,296,252	£10,047,373
Standard	Volume Cases	9,067	10,866	11,613	11,701
	Volume Claims	14,285	17,813	19,497	19,727
Solicitor	Value £	£15,743,461	£18,904,529	£21,424,370	£21,311,867
Non	Volume Cases	5,662	6,406	7,015	6,968
Standard	Volume Claims	6,170	7,012	7,570	7,486
Solicitor	Value £	£1,061,995	£1,022,612	£970,848	£910,023
Standard	Volume Cases	3,137	3,033	2,949	2,859
	Volume Claims	3,187	3,078	2,983	2,892

Figure 18 shows the monthly payment figures graphically.

Figure 18: Crown Courts Costs Average Payments per month 2001/02 to 2004/05



In terms of fluctuation, the figures are as follows:

- Standard fee payments to solicitors decreased over the period by 14%, there was a decline in volume (9%) and in average cost per case (6%);⁸³
- Non-standard fee payments to solicitors increased 35%. A significant element of this was an increase in volume over the period (which increased 23%, an average of 1,300 extra cases per month), but average costs also increased by 10% over the 3.75 years (or 2.7% per annum).
- Standard fee payments to counsel increased 73%. Volume increased by 29% (2,634 more cases on average a month), and average costs per case by 34% (9.1% per annum).
- Non-standard fee payments to counsel increased by 9% over the period. Volume decreased by 7%, but average cost per case increased by 17% (4.5% per annum).

To put these increases in perspective, the increases in solicitor non-standard fees in the Crown Court amount to a £67m increase over the 3.75 years. The increase in counsel non-standard fees amounted to £16m and the increases in Counsel's standard fees, £51m. Increases in solicitor costs were largely attributable to an increase in the volume of cases attracting non-standard fees, with a cost-per-case increase roughly in accordance with inflation. It should be noted that average cost per case for solicitors is likely to have been affected by changes in the way indictable-only cases are dealt with, which were not fully brought into force until 2001.⁸⁴ As a result, claims for work done in the magistrates' court are made with the claim for work done in the Crown Court, at the end of the case in the Crown Court. Fees paid to counsel were marked by above average increases in unit costs, decreases in non-standard fee volumes and increases in standard fee volumes.

However, the significant increase in the number of counsel standard fee payments is probably accounted for in part by a change in payment rules introduced in October 2001 which was intended to bring into the standard fee regime all, or nearly all, cases other than very high cost cases which are the subject of contracting arrangements.⁸⁵ The change applied to claims in respect of legal aid orders granted after the implementation date, meaning that the change would take time to work through to claims. This change in rules is also likely to have affected average cost per case in respect of standard fee cases. Taking counsel standard and non-standard fees together, the increase in expenditure over the period was £5,540,388 per month or 27%. There was an increase of 25% in the volume of cases, but an increase in cost per case of only 1.7%, because a larger proportion of cases are being dealt with under the standard fee scheme. Thus the overall increase in average counsel's costs per case appears, on these figures, to be below inflation.

⁸³ Average costs per case are calculated on the number of cases not the number of claims.

⁸⁴ See s.51 Crime and Disorder Act 1998.

⁸⁵ Broadly, the change brought in all cases where the hearings were expected to last 25 days or less. Previously the cut-off point was a hearing length of 10 days.

The proportion of money paid to barristers compared to solicitors remained fairly stable at around the 54-56% mark during this period. There was no particular trend in the relative proportions paid to each group over this period.

There is little information available that would enable a closer analysis of average cost per case, and of what drives costs in Crown Court legal aid claims. The Fundamental Review of Legal Aid (FLAR) team has produced figures that show that the average number of hearings has increased over time, from 3.7 per case in 2001/02 to 4.3 hearings per case in 2003/04.⁸⁶ The average length of high cost case trials has also increased, by 10 days between 1998/99 and 2003/04 (an increase of 22%), although the trial length of other cases has increased by a relatively small margin of less than half a day, although this represents an increase of 13%.⁸⁷ The number of judges per case is also increasing. These factors are likely to have a number of causes including greater complexity of substantive criminal law, of procedure, and of prosecutions and investigations. Technological developments have meant that a whole range of evidence is now available that was not previously available, such as evidence from telephone records, CCTV cameras, computers, DNA, etc. all of which potentially increase the amount and complexity of evidence presented at and examined during the course of trials. They also have implications for preparation time. There have also been procedural developments, such as s40 of the Criminal Procedure and Investigations Act 1996 which provided for binding rulings concerning the admissibility of evidence or any other question of law to be made at a pre-trial hearing, which may affect the number of hearings and the number of judges per case.

A major area of interest is the extent to which increases in Crown Court costs are dominated by increases in the costs of very large cases. Very High Cost Criminal Cases (VHCCC) are the subject of a separate contracting regime. The LSC provided data on the distribution of costs of Crown Court legal aid over the last three years (Table 13).

⁸⁶ All FLAR figures here are taken from a FLAR presentation at a CDS Away Day on 15 September 2004.

⁸⁷ We understand that the DCA is currently funding a research project, *Exploring the reasons for regional differences in the length of Crown Court trials*, conducted by Lexicon Ltd. There is reason to doubt the accuracy of the DCA figures on trial length.

Table 13: Distribution of Crown Court Costs

Year	2001/2002			2002/2003			2003/2004		
Deciles	Mean	N	Sum	Mean	N	Sum	Mean	N	Sum
10%	£942,921	35	£33,002,246	£1,342,927	33	£44,316,600	£1,127,807	49	£55,262,532
20%	£446,070	100	£44,607,042	£509,181	109	£55,500,744	£468,160	129	£60,392,664
30%	£194,380	232	£45,096,123	£221,348	242	£53,566,193	£214,453	278	£59,617,808
40%	£93,575	476	£44,541,509	£102,303	528	£54,016,181	£108,052	551	£59,536,911
50%	£41,598	1,071	£44,551,612	£48,719	1,104	£53,785,929	£51,312	1,157	£59,367,414
60%	£17,255	2,575	£44,431,723	£19,995	2,691	£53,805,454	£22,674	2,623	£59,474,684
70%	£6,954	6,391	£44,444,469	£7,830	6,865	£53,752,307	£8,698	6,832	£59,423,040
80%	£3,239	13,714	£44,426,489	£3,369	15,953	£53,749,438	£3,712	16,001	£59,402,490
90%	£1,656	26,834	£44,424,720	£1,646	32,664	£53,749,131	£1,804	32,935	£59,403,857
100%	£510	98,682	£50,295,130	£438	122,835	£53,851,182	£462	129,197	£59,692,512
Totals		150,110	£439,821,063		183,024	£530,093,158		189,752	£591,573,913

Each year about 2,000, or just over 1%, of the cases were responsible for 50% of the Crown Court Costs. In 2003/04 just 49 cases accounted for nearly 10% of all Crown Court legal aid expenditure. Put another way, any growth in the costs of the top 2,000 cases is likely to affect the Crown Court legal aid budget to the same extent as any change in over 185,000 other Crown Court cases.

Figures from the FLAR team⁸⁸ show that the top 1% of cases are mostly drugs, fraud and revenue and murder cases, although nearly a quarter were in the ‘Other’ category. They are often prosecuted by prosecution agencies other than the CPS, often related to serious and organised crime, and are characterised by high volumes of evidence and multiple defendants. Not surprisingly, the largest element of cost in solicitors’ claims, at over 70%, is case preparation. Information collected in respect of barristers’ claims does not enable a similar analysis to be made of their costs.

3. Explaining Increases in Volume

It is clear that the volume of legally-aided work in the Crown Court is a major factor behind the increase in Crown Court legal aid costs. One way of examining this is to look at whether the increase determined from the claims data is explained by reference to the number of grants of legal aid for the Crown Court. There is data available on the number of applications for representation orders made in magistrates’ courts for cases that are to be dealt with in the Crown Court.

⁸⁸ See n. 86.

Table 14: Criminal legal aid: Applications granted in magistrates' courts for representation in the Crown Court, by type of proceeding, 1993-2003⁸⁹

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Trial on indictment:											
Granted	96,751	100,496	103,431	94,456	100,842	87,734	81,413	79,877	81,860	89,501	89,718
For sentence or to be dealt with:											
Granted	6,459	6,207	6,169	6,225	7,705	20,324	21,982	19,110	17,562	19,638	19,511
Appeal against magistrates' court decision:											
Conviction and sentence:											
Granted	2,445	2,294	2,160	1,750	1,414	1,382	1,360	1,264	1,239	1,347	1,357
Sentence only:											
Granted	2,457	2,808	2,725	2,481	2,333	2,528	2,489	2,557	2,407	2,512	2,484
Totals	108,112	111,805	114,485	104,912	112,294	111,907	107,244	102,808	103,068	112,998	113,070

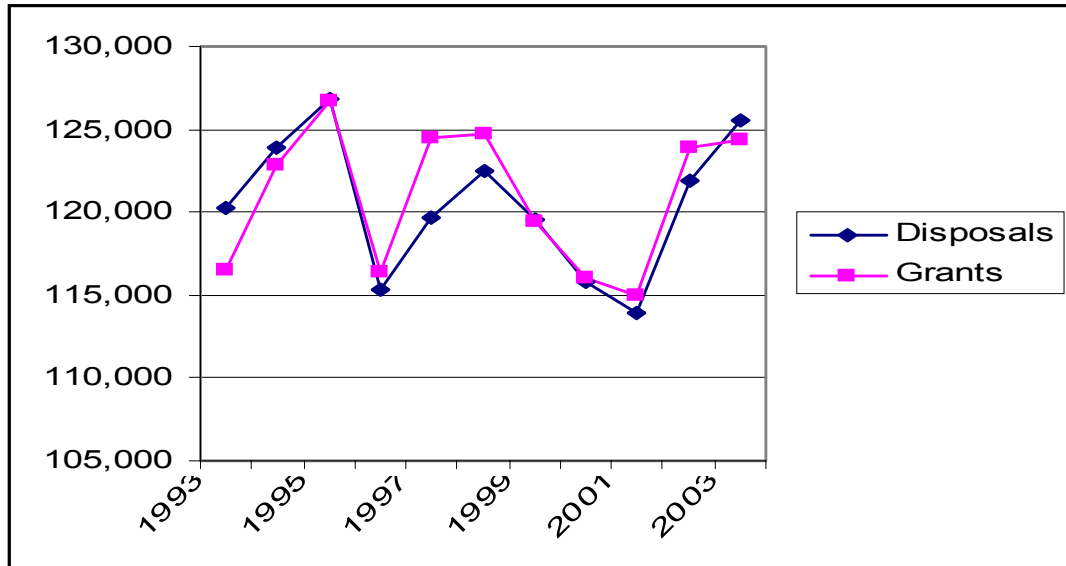
The number of legal aid grants for Crown Court cases has been volatile over the decade, but there has been a consistent increase in the period since 2000, with grants in 2003 being nearly 10% higher than in 2000. The increase in grants for cases to be dealt with by way of sentence increased in 1998, and has remained more or less at that level since then. This increase is accounted for by the introduction of the plea before venue procedure which resulted in many cases being committed to the Crown Court for sentence which would previously have been committed for trial. In the first year after introduction of plea before venue, the increase in grants for cases committed for sentence more or less cancelled out the decrease in the number of trial grants. However, since 2000 the number of grants for trial has been increasing, with over 8,000 more grants in 2003 compared to 2000. This will have had an impact on the average cost per case.

The volatility in the number of legal aid grants for the Crown court is largely explained by the volatility in the number of Crown Court disposals within a particular year, as can be seen from Figure 19. In other words, the number of grants of Crown Court legal aid tracks the number of cases disposed of in the Crown Court. This would be expected given that the merits test will normally be satisfied for a case going to the Crown Court.⁹⁰

⁸⁹ Source: *Judicial Statistics* 2003 and 1999. Applications granted include a small number of applications granted in the magistrates' courts and extended by the Crown Court. Only applications granted are shown, but the number refused are consistently minute.

⁹⁰ The merits test is the same as for magistrates' court cases.

Figure 19: Crown Court Disposals and Legal Aid Grants Compared



Thus whilst the number of cases disposed of in the Crown Court increased by 11,600 between 2001/02 and 2003/04, the number of cases claimed for by counsel increased by about 30,000, whereas the number of cases claimed for by solicitors increased by only about 13,000.⁹¹ There may be a number of reasons for the disparity in relation to counsel claims, although we have not been able to investigate this in any detail. Since the increase is in standard fee cases, it may be a function of the standard fees claiming regime and/or may be a result of case-splitting. On the other hand, other factors may be at work, such as an increase in multiple-defendant cases, which would create more legal aid claims per disposal on average. This is possible since the change in the standard fee regime brought into standard fees those cases where the expected hearing time was up to 25 days, and one factor determining hearing length is likely to be the number of defendants.

The increase in the amount of Crown Court business, that is, the number of disposals, is likely to be explained by two factors:

- a stronger propensity for either way cases to be committed to the Crown Court, either for trial or sentence; and/or,
- a greater proportion of more serious crime being prosecuted through the courts.

⁹¹ See Table 12, p. 53. These figures are estimates as the final picture for 2004/05 is not yet available.

Table 15: Committals for trial, committals for sentence, and appeals: Number of cases received and disposed of, 1993 to 2003⁹²

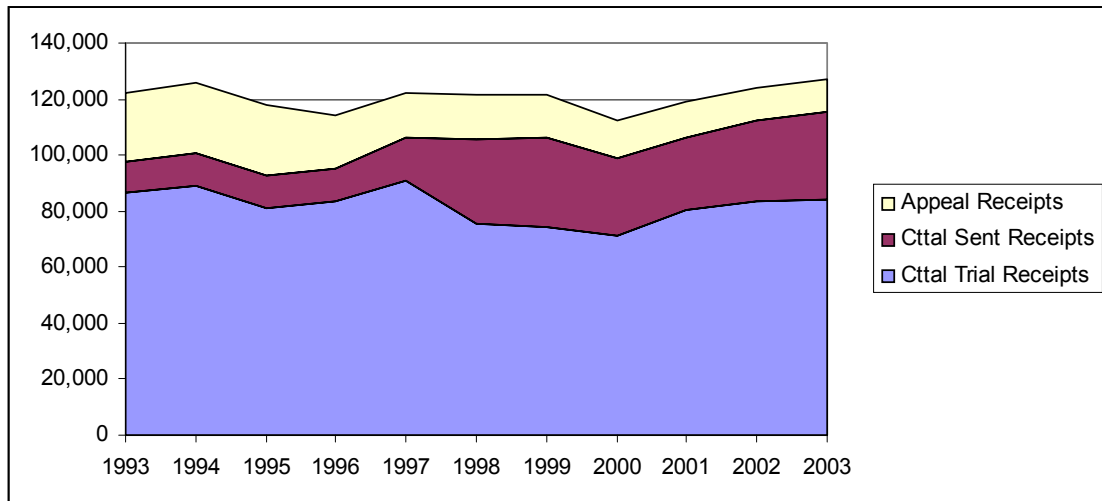
Year	Committals for Trial		Committals for Sentence		Appeals	
	Cttal Trial	Cttal Trial	Cttal Sent	Cttal Sent	Receipts	Disposals
	Receipts	Disposals	Receipts	Disposals		
1993	86,849	85,566	11,088	10,956	24,531	23,722
1994	89,301	86,980	11,485	11,226	25,262	25,644
1995	81,186	88,985	11,718	11,726	25,240	26,062
1996	83,328	83,274	12,002	11,762	18,981	20,304
1997	91,110	90,096	14,871	13,378	16,269	16,196
1998	75,815	77,794	29,774	28,224	16,278	16,473
1999	74,232	73,539	31,928	30,641	15,413	15,381
2000	71,022	72,762	27,591	28,713	13,902	14,359
2001	80,551	75,565	25,960	25,717	12,596	12,679
2002	83,449	81,766	28,837	28,235	11,910	11,940
2003	84,412	83,497	30,757	30,328	11,858	11,746

Table 15 shows that the number of cases committed for trial or sentence have increased since 2001 by nearly 13,000, which more or less equates with the increase in the number of cases claimed for by solicitors, but is significantly less than the increase in the number of cases claimed for by counsel.

Figure 20 focuses on disposals, though the trends are similar for disposals and receipts.

⁹² Source: *Judicial Statistics 2003*. Receipts include committals direct from PSDs, bench warrants executed (trial and sentence only) and cases transferred in less cases transferred out.

Figure 20: Committals for trial, committals for sentence, and appeals: Number of cases disposed of, 1993 to 2003



Committals for trial decreased by 2.4% over the ten year period (there being 2,069 fewer cases committed for trial disposed of in 2003 compared with 1993). Within this period there were three trends. The number of committals for trial:

- increased from 1993 to 1997 by 5.3% (4,530 disposals)
- dropped from 1997 to 2000 by 19.2% (17,334 disposals)
- increased from 2000 to 2003 by 14.8% (10,735 disposals)

Committals for sentence increased dramatically during the period (increasing by 277%). 19,372 more committals for sentence were disposed of in 2003 than in 1993. The main increase was in 1998 (a 210% increase of 14,846 cases), peaking in 1999 before dropping by 16% (4,924 cases) to 2001, and then increasing again in the two subsequent years by a similar amount 4,611 (an 18% increase over two years). As noted earlier, the increase in 1998 resulted from the introduction of the plea before venue procedure; subsequent increases may relate to a toughening in sentencing policy emanating from the Home Office.

The number of appeals disposed of halved between 1993 and 2003, with 11,976 fewer disposals of appeals in 2003. The decrease was greatest between 1995 and 1997.

Thus part of the explanation behind the recent increase in Crown Court costs is increases in volume of cases being handled at the Crown Court level. Although politicians have, in the past, blamed the number of

Crown Court cases on defendants improperly electing Crown Court trial, most either-way cases that go to the Crown Court do so as a result of direction by magistrates rather than election by defendants.⁹³

If the number of extra Crown Court disposals in 2003/04 compared to 2001/02 (11,500) was directly converted into legal aid claims, then at average cost per claim in 2003/04, this would have cost an extra £51 million, or 30% of the increase in Crown Court legal aid costs over the period. However, it may be that the extra cases were disproportionately serious and, therefore, more expensive. One way of investigating whether the nature of cases being prosecuted before the Crown Court has got more serious (which, since most Crown Court cases attract legal aid would affect average cost per claim rather than the number of claims), is to look at the classes of cases before the court. For the purpose of trial in the Crown Court, offences are divided into four classes of seriousness:

- *Class 1.* These are the most serious offences (including murder and treason) and are generally to be tried by a High Court judge unless released to a circuit judge.
- *Class 2.* These offences are generally also to be tried by a High Court judge unless released to a circuit judge or other judge. The offences include manslaughter and rape.
- *Class 3.* These may be listed for trial by a High Court judge, but may be tried by a circuit judge or recorder if the listing officer, acting under the directions of a judge, so decides. Class 3 offences include all offences triable only on indictment other than those specifically assigned to classes 1, 2 and 4, for example, affray, aggravated burglary, kidnapping and causing death by dangerous driving.
- *Class 4.* These offences are normally tried by a circuit judge, recorder or assistant recorder, although they may be tried by a High Court judge. They include grievous bodily harm, robbery and conspiracy, and all 'either way' offences.

⁹³ "For every two defendants who elect for trial in the Crown Court, there are five who are directed by magistrates to be tried there. Also, since the introduction of the 'plea before venue' procedure, there has been an over 300 per cent increase in the use by magistrates of their powers to commit 'either-way' defendants who have been convicted by them to the Crown Court for sentence." Bridges L. (2002) *Criminal Justice (Mode of Trial) Bill* Counter briefing note (Warwick Law School research paper, <http://www2.warwick.ac.uk/fac/soc/law/research/mot/>). In 1998, the Home Office acknowledged the steady decline in election of Crown Court trial: (1998) *Mode of Trial: A Consultation Paper* London: Home Office.

The proportions of such claims in each year since 1998 are recorded in Table 16.

Table 16: Classification of Crown Court Cases

	Proportion (%) if disposals in				Total disposed
	Class 1	Class 2	Class 3	Class 4	
1998	1.1	3.1	8.3	87.6	77,794
1999	1.2	3.1	8.6	87.1	73,539
2000	1.2	3.1	8.5	87.2	72,762
2001	1.3	3.4	9.6	85.7	75,565
2002	1.5	3.4	9.9	85.2	81,766
2003	1.5	3.6	9.6	85.3	83,497

Table 16 suggests that whilst Class 4 cases historically accounts for most cases in the Crown Court, there has been an increase in the seriousness of caseloads, albeit quite modest in nature. So, for example, there were 1,920 more Class 1-3 cases in 2003 than in 1998. Whilst not all of these cases would have been very high cost cases, it is more likely that cases in Classes 1-3 would entail higher costs, and an increase in the number of such cases is likely to have a significant impact on the costs in the criminal legal aid budget.

4. Conclusions

Crown Court legal aid costs have increased throughout the decade, and the increase between 2001/02 and 2003/04 reached 36%. This is partly accounted for by an increase in the volume of Crown Court business which increased by 11,600 cases between 2001/02 and 2003/04. This increase was more or less matched by an increase in grants of legal aid for the Crown Court. This increase is slightly exceeded by the increase in the number of cases in which claims for payment were made by solicitors, but greatly exceeded by the increase in the number of claims by barrister. We have not been able to fully explain the latter increase, which is in the order of 30,000.

The increase in volume of cases accounts for at least one third of the increase in Crown Court legal aid expenditure. However, the increase in volume may account for a greater proportion of the increase if cases dealt with by the Crown Court have increased in seriousness, a hypothesis for which there is some support from the analysis of the classes of work being dealt with demonstrated in Table 16.

The average cost per case for solicitors' standard fee cases has decreased, but the average cost per case for solicitors' non-standard fee cases has increased, but only in line with inflation. Calculation of the average

cost per case for barristers is complicated by the revision of the standard fee system for them in 2001. Taking both standard and non-standard fee cases together, the increase in average cost per case since 2001/02 is well below inflation, at 1.7%. However, the increase in the volume of cases in respect of which there is a claim is 25%.

About 1% of Crown Court cases account for about 50% of Crown Court legal aid expenditure. Because of their cost, relatively small growth in the number and/or average cost of high cost cases can have a very significant impact on overall expenditure.

A large number of factors have the potential to increase the cost of Crown Court legal aid, many of them beyond the direct influence of either defence lawyers or the LSC. Factors identified by the FLAR team and others include the way in which prosecutions are formulated in terms of the nature of the charges, the number and combination of charges, and the number and combination of defendants; changes in procedure; changes in evidential rules; and developments in crime investigation techniques and technology. Other factors that should also be considered are the resources and powers granted to prosecution agencies. The government has increased the resources available both to the police and to the Crown Prosecution Service. Very high cost cases, in particular, are also investigated and prosecuted by other agencies as well as the CPS. The budget for the Serious Fraud Office, for example, increased from £19 million in 1993/94 to £33 million in 2003/04.⁹⁴

⁹⁴ Serious Fraud Office *Annual Reports*.

Chapter 6 Conclusions and further research

1. Crown Court work

The largest increases in the criminal defence budget have occurred in Crown Court costs. These appear to be driven by substantial increases in volume of work and in average cost per case. A small number (2,000, just over 1%) of high cost cases account for a very significant proportion of the budget (50%). Equally, an increasingly large number of small cases has contributed to the growth.

Increases in volume are largely accounted for by increases in the volume of work being committed or transferred from the magistrates' courts. There is very little data from which deductions can be made about the drivers of average costs. There is some evidence of an increase in the number of serious cases (all those classified in Classes 1 to 3) between 1998 and 2003 of nearly 2,000 cases. Although a modest number, a significant proportion of these cases would be likely to attract higher fees and so be likely to contribute substantially to overall costs of the budget.

2. Police station work

Increases in police station costs are the second most significant element of increase in the LSC budget in recent years. They have been driven to some extent by increases in volume of work, but more significantly by increases in the average costs of cases.

Increases in volumes of police work are driven, in part at least, by the numbers of arrests made by the police. There are other indicators that the types of case being dealt with by the police, and the way in which that work is conducted, exert an upwards pressure on the number of suspects likely to request advice at the police station. In particular, as evidenced by the outcomes of cases in police stations, cases appear to be getting somewhat more serious: the number of arrestees being charged has increased and the number being produced in court in custody has increased absolutely and relatively to the numbers of people being dealt with by way of summons. The use of cautions also increased from 1999 onwards. These factors are coupled with research evidence of a general trend towards more suspects claiming legal advice and a greater willingness on the part of custody sergeants to recommend that suspects seek advice.

It is more difficult to rely on statistical indicators to track pressure on average costs. A number of factors may have contributed substantially to increases in average costs. Quality improvements in criminal defence work, led by the Legal Aid Board and Legal Services Commission and supported by the Law Society have been shown to have added to advice and assistance time in the police station. There are

statistical indications that police station work has tended to concentrate on more serious cases, and involves outcomes which are more detrimental to the client (more cautions, charges and remands in custody). Similarly, the availability of more, and more invasive, investigation techniques (e.g. DNA and drug testing) is likely to have contributed to more time being spent on cases by solicitors. The trend towards more detrimental outcomes would be likely to lead to significantly more work being carried out in the police station (representations needing to be made about cautions, charges and bail and greater advice needing to be given to the client), and it might be hypothesised that more serious cases would lead to solicitors needing to spend more time at the police station (if dealing with police disclosure and interviews took longer). There is also evidence of an increase in the use of bail backs by the police, which increases the number of attendances, the time spent in attendance and travel and waiting time.

3. Magistrates' court work

On current evidence, magistrates' court costs are the most stable part of the criminal defence budget. There was evidence of a substantial increase in volume at the turn of the Century of about 200,000 cases, associated with contracting. Whilst the increase has been substantially blamed on the abolition of the financial means test, there were other administrative factors (in particular, the abolition of 'duty solicitor of choice'), and there are indicators which suggest that a large element in the increase in volume was a response to underlying trends in criminal prosecution. In particular, there was an increase in the number of people who were charged (and either bailed to the magistrates' court or produced in custody) of about 150,000. There are other indications that within the broad cohort of magistrates' cases, the need for representation and seriousness of those cases increased. We hypothesise that needs for representation have been accentuated by changes to criminal procedure (such as Narey hearings and the plea before venue procedure) and there are also statistical indicators which would suggest that it was justifiably easier to get legal aid, because the likelihood of receiving a prison sentence was increased by changes in sentencing policy led by the Home Office.

4. Policy implications

Our research has demonstrated that decisions taken beyond the remit and direct influence of the LSC and of defence lawyers have had a significant effect on criminal legal expenditure, and account for a significant proportion of the increase in expenditure over the past decade. It is rarely the case that the legal aid expenditure implications of policies are considered when policies that may impact on criminal legal aid are being developed. This can be illustrated by a number of examples. Perhaps the starkest illustration is provided by the policy of abolishing the means test, which was implemented by the Access to Justice Act 1999. It should be remembered that when proposing the re-introduction of the means test, the Department for Constitutional Affairs estimated that between 75,000 and 150,000 grants of representation orders 'arose

as a result of the means test' at a net cost over between £24 million and £62 million.⁹⁵ However, the White Paper that preceded the 1999 Act, *Modernising Justice*, whilst expressing concern at the 'alarming' rise in the cost of criminal legal aid, contained no indication that any potential impact on the number of applications or grants, or on legal aid expenditure, had been considered. The only reference to the financial implications was to an estimate that legal aid contributions raised little more than the cost of assessing and collecting those contributions.⁹⁶

In February 2001 the Home Office published its White Paper *Criminal Justice: The Way Ahead*⁹⁷ which was concerned with a 'comprehensive overhaul of the CJS [criminal justice system] to lever up performance in catching, trying, convicting, punishing and rehabilitating offenders'.⁹⁸ In order to achieve this, it promised 'the biggest injection of new resources for the CJS in twenty years, an extra £1.4 billion in 2001-02 rising to £2.7 billion in 2003-04'.⁹⁹ This would pay for, amongst other things, 9,000 more police recruits, 700 new CPS staff, 7,000 extra Crown Court sitting days, 1,450 new probation staff, and an extra 2,660 extra prison places. Such policies have clear implications for criminal legal aid expenditure, but there is no indication in the paper that these were considered.

The Narrowing the Justice Gap project, launched by the Home Office in 2002, reflected the Labour 2001 manifesto commitment to 'bring 100,000 more crimes to justice'.¹⁰⁰ According to *Narrowing the Justice Gap: Framework Document*¹⁰¹ the justice gap is the difference between the number of offences recorded and the number of offences for which an offender receives either a caution, a conviction or has the offence taken into consideration by a court. The target set by the government was to increase the number of offenders brought to justice by 1.2 million per annum by 2005/6. This was subsequently revised, and the Home Office Strategic Plan 2004-08¹⁰² describes the target as being 1.25 million offenders per annum brought to justice by 2008, an increase of 150,000 over 2003 levels. The target does not necessarily require more suspects to be arrested, since the targets could be met by reducing the rate of attrition in respect of those who are arrested. However, whilst there do not appear to be targets in respect of the number of arrests, the document discloses that there is a clear expectation that the number of arrests will increase as part of the process of reaching the targets. The Framework Document made no reference to the legal aid expenditure consequences of the targets established.

⁹⁵ DCA Consultation Paper, *Criminal Defence Service Bill*, Cm 6194, at paras 75 and 82.

⁹⁶ Cm 4155, 1998, pp60 and 65.

⁹⁷ Cm 5074.

⁹⁸ *Ibid.*, p. 7.

⁹⁹ *Ibid.*, p. 10.

¹⁰⁰ (2002) *Narrowing the Justice Gap: Framework Document*, London: Home Office, p. 8.

¹⁰¹ *Ibid.*

¹⁰² (2004) *Confident Communities in a Secure Britain: The Home Office Strategic Plan 2004-08: Summary*, London: Home Office, p7. Note that neither the Narrowing the Justice Gap Framework document nor the Strategic Plan state that these targets concern annual figures, but that is the clear implication.

In July 2002 the White Paper *Justice for All*¹⁰³ was published, declaring an intention to produce a ‘root and branch’ reform of the criminal justice system. The paper promised an increase in spending on the police of about £1.5 billion over three years, an increase in police numbers of 130,000, increasing police powers, new evidential provisions regarding hearsay and previous misconduct, increasing disclosure obligations of defendants, re-trial following acquittal in certain serious cases, and significantly increasing the sentencing powers of magistrates’ courts. Most of these provisions were incorporated into the Criminal Justice Act 2003 including: greater investigative powers for the police; the introduction of new charging arrangements that may increase time spent by defence lawyers at police stations; the introduction of a sophisticated ‘conditional caution scheme’;¹⁰⁴ complex new evidential provisions which are likely to contribute to more case preparation and longer trial times; new provisions on pre-trial disclosure that will entail more work for defence lawyers in all not guilty cases; prosecution appeals in certain cases; and the possibility of re-trial for certain serious offences. Sentence indication and increased powers of sentencing for magistrates’ courts may, on the other hand, have the effect of increasing the proportion of cases dealt with in magistrates’ courts. Again, there was no indication in the White Paper that the legal aid implications of such policies were either considered or costed, although it is clear that they must have consequences for legal aid expenditure.

In July 2004 the Secretary of States for the Home Department and for Constitutional Affairs, and the Attorney General presented to Parliament their strategic plan for criminal justice for the period 2004-08, *Cutting Crime, Delivering Justice*.¹⁰⁵ This promised, amongst other things, that by 2008 150,000 more offences would be brought to justice,¹⁰⁶ and the police detection rate would be raised from 19% to at least 25%. The Strategic Plan does refer to legal aid, relying in particular on the Fundamental Legal Aid Review to put ‘criminal legal aid spending on a sustainable basis in the longer term’.¹⁰⁷ However, it does not attempt to cost the legal aid implications of any of the policies and targets set out in the document.

One of the most recent consultation documents issued by the Home Office is *Policing: Modernising Police Powers to Meet Community Needs*.¹⁰⁸ This proposed a radical overhaul of police powers of arrest, increased powers to detain suspects at police stations for longer periods, expanding the ‘police type’ powers of civilian staff, increasing crime detection powers, and further increases in police powers related to

¹⁰³ Cm 5563.

¹⁰⁴ Accompanied by a 26 page Conditional Caution Code of Practice. For diversion policies and practices alone, practitioners (and the police) will need to be familiar with this, together with Home Office Guidance *Final Warning Scheme: guidance for the Police and Youth Offending Teams* running to 58 pages, and the Home Office Circular on ‘simple’ cautions.

¹⁰⁵ Cm 6288.

¹⁰⁶ It should be noted that it appears that this is not in addition to that announced in the *Narrowing the Justice Gap* Framework Document.

¹⁰⁷ *Cutting Crime, Delivering Justice*, *op cit*, n. 103, p. 35.

¹⁰⁸ Home Office, August 2004.

identification. Most of these proposals were incorporated into the Serious Organised Crime and Police Bill that is currently before Parliament, and which also establishes a Serious Organised Crime Agency. Such developments clearly have implications for legal aid expenditure. As we have demonstrated, increasing police investigative powers are likely to lead to an increase in average cost per police station claim. However, the consultation paper does not mention legal aid and as far as we are aware, the implications for criminal legal aid expenditure have not been considered.

The Home Office has undertaken interesting and innovative work to try to establish the costs of economic and social costs of crime.¹⁰⁹ Part of the rationale for this was to ‘help us to prioritise, focusing scarce resources on policies that have the biggest impact on harm caused by crime, rather than simply the number of crimes’.¹¹⁰ In assessing cost, the research included the costs of ‘responding to crime and tackling criminals’, described as the costs to the criminal justice system, but made no attempt to include costs in terms of legal aid expenditure. Whilst this is of general relevance, it is particularly relevant to policing and prosecution policies concerning what, in legal aid terms, are very high cost cases. If a ‘whole cost’ approach was taken, different policies may be adopted and difference decisions taken.

That it is possible to consider the legal aid implications of crime and policing policies is demonstrated by the Home Office White Paper *Safety and Justice*, which concerned policies on domestic violence.¹¹¹ This paper not only sought to assess potential cost implications of the policies proposed in terms of policing and court time, but also did so in respect of criminal legal aid expenditure.¹¹²

5. Other Implications

Policy on legal aid costs has tended to focus on supply management with minimal attention paid to the impact of criminal justice policy on the legal aid budget. Our analysis suggests that policy changes have increased the demand for criminal defence work in terms of volume and quantity of service. There are two principal implications:

1. Existing management of supply (fixed fees in particular, but competitive tendering also) has no mechanism for understanding and reflecting upward pressures on the amount of work which needs to be done for clients.

¹⁰⁹ Home Office Research Study 217, Home Office, 2000.

¹¹⁰ *Ibid.*, p. V.

¹¹¹ (2003) *Safety and Justice: The Government’s Proposals on Domestic Violence*, Cm 5847.

¹¹² *Ibid.*, Annex D: Partial Regulatory Impact Assessment.

2. The setting of a capped civil legal aid budgets, alongside an uncapped criminal budget is problematic where the total of the two budgets is *de facto* capped. Increases in the criminal budget are met from reductions in the civil budget. There are strong arguments for separating the two budgets and ensuring that mechanisms for predicting and managing the criminal budget take proper account of criminal justice reform.

This suggests that when criminal justice reform is being progressed it needs to take account of, and properly cost, the implications of changes in the volume and quantity of defence representation that it is going to occur as a result. Furthermore, there needs to be some mechanism for understanding the impact of more gradual cultural changes in the criminal justice system on criminal defence costs. Some changes in police practice are not based on policy initiatives but practical and technological advances, such as greater use of CCTV footage.

Understanding how the interplay of broad criminal justice policy, prosecution practice and defence response impacts on criminal defence costs is not easy, particularly on the limited statistical information available at the moment. There is a need for more research and modelling of costs drivers. This would almost certainly need to involve the detailed examination of historical case records of both prosecution and defence, more in-depth analysis of criminal justice statistics and costs data available to the DCA and LSC, and consideration and testing of predictive mechanisms for cost analysis. It also requires significant political will. It is easy to understand the desire of government to reform criminal justice policy, without properly funding the defence side of the equation. Supplier-induced demand provides a convenient political justification for so doing. But our analysis shows that the system itself creates significant demand: it has increased the number and seriousness of cases being processed through the police stations and the courts and it has probably increased the volume of work that needs to be done on those cases. At the moment those demands are being met out of the civil legal aid fund, reductions in profitability for private practitioners or, perhaps most worryingly, reductions in the quality of service being provided to defendants.