

LEGAL AID AND THE DECLINE OF PRIVATE PRACTICE: BLUE MURDER OR TOXIC JOB?

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"I think we are learning that solicitors are getting away with blue murder," The Hon John Trickett, MP, Member of the Public Accounts Committee.

"I am fed up with massive form - filling, low pay and very poor return on all the effort put in to getting franchises. If I could get out of this toxic job, I would." Respondent, LAPG-Law Society Survey

Introduction

The administration of legal aid in England and Wales has changed dramatically since the scheme was wrested from the control of the solicitors' profession at the end of the 1980's. The Legal Aid Board and its successor body the Legal Services Commission have pursued a vigorous development of supplier-purchaser arrangements, which has included quality assurance requirements and detailed specifications for the contracting of legal aid work. They have also pursued diversification within the supply base by encouraging greater use of the not-for-profit (NFP) sector in the provision of legal advice services.² Nevertheless private practice is the dominant supplier of legal aid services both in terms of number of providers and amount spent. NFPs amount to about 8% of the total supplier base.³ As a result, *judicare* remains at the heart of the legal aid scheme. In parallel to the Commission's policies, aimed at exerting greater control over

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² See, Moorhead, R, Sherr, A and Paterson, A. (2003). *Contesting Professionalism: Legal Aid and Non Lawyers in England and Wales*, Law and Society Review, forthcoming.

³ NAO (2002), Executive Summary paragraph 5 rider 2 on tape.

quality and cost, the Government has broadly maintained a policy of no remuneration increases for legal aid lawyers in terms of hourly rates. This has prompted a growing concern as to the future of private practice's involvement in the legal aid scheme signalled most recently by the Law Society issuing a consultation paper with envisages, "a significantly reduced role" for private practice in the provision of legal aid.⁴ This paper explores the extent to which private practice's role is declining within the scheme; it examines the reasons for any decline, and, ultimately, it hopes to shed light on the sustainability of a *judicare* element within a mature legal aid scheme.

The introduction of legal aid contracting was a watershed moment in the development of supplier-purchaser arrangements. Solicitors could no longer provide legal help and criminal legal aid as of right. They had to apply for contracts that required quality audits and imposed new controls on how many cases they could start (in civil legal help work) and how they were paid (in civil and criminal work). In legal help and criminal work, this led to a dramatic reduction in the number of suppliers from about 11,000 to about 5,000.⁵ Those giving up legal aid at the advent of contracting are believed to have generally been the smaller providers, who did not generally contribute significant volumes of work to the legal aid scheme. Subsequent to this, however, the number of solicitor firms holding contracts with the LSC has declined by almost 9 percent since the contract system was introduced in January 2000, while the number of firms contracted to provide family law has fallen by 17 percent over the same

⁴ Law Society (2003) *The Future of Publicly Funded Legal Services, a consultation paper by the Law Society* (The Law Society, London), page 7.

⁵ National Audit Office (2002) *Community Legal Service: the introduction of contracting*, Report by the Comptroller and Auditor General, HC 89 Session 2002-2003: 28 November 2002, (London, The Stationery Office), 21 and 25.

period.⁶ In mid 2002, the Legal Services Commission Annual Report contained a striking warning in its annual report:⁷

We are concerned about the changes we are seeing in the supplier base. Between March and April 2002 6 percent of CLS suppliers left, including some firms of good quality. We are picking up intelligence through our regional officers that up to 50 percent of firms are seriously considering stopping all significantly reducing publicly funded work. The likelihood of a substantial number of firms leaving is confirmed by other studies by the legal aid practitioners group (LAPG) and the Law Society. We believe this to be overwhelmingly because of remuneration and profitability. Our studies show that under the current legal aid rates many firms are at best marginally profitable. The LAPG study claims that 54 percent of Legal Aid firms said that that Legal Aid work was unprofitable. With increasing costs it is likely that more firms will choose to leave publicly funded work. We will continue to monitor the situation carefully."

The Commission seemed particularly worried about the decline in the family law area as these suppliers are essentially the backbone of the civil legal aid system.⁸ The decline in work done by private practice is masked slightly as a result of a partial off setting caused by the increase in the number of contracts let to NFP agencies for civil legal help work.⁹

In the same report, the Commission also expressed disappointment that there was no general increases in remuneration rates and they attributed the dramatic drop in the number of general help contracts in April of 2002 explicitly to this.¹⁰

⁶ NAO (2002), *op.cit.*, 23-25.

⁷ Legal Services Commission (2002) *Legal Services Commission Annual Report 2001/02* (LSC, London).

⁸ LSC (2002), *op.cit.* 8.

⁹ LSC (2002), *op.cit.*, page 8 and NAO (2002) *op.cit.* paragraph 4, executive summary.

¹⁰ LSC (2002), *op.cit.* page 13. There were some minor changes. Travel rates were to be raised to a quality with civil rates in the Criminal field and the Commission also launched a scheme to encourage young lawyers into publicly funded work which paid student course fees as well a significant proportion of the minimum salary payable to a trainee solicitor.

Similarly, in the criminal sphere, the introduction of criminal contracting has seen a significant reduction in the number of offices providing criminal defence services. Prior to April 2001, the LSC reported 3,500 offices providing criminal defence services with 2,925 signing contracts and 2,909 being under contract as of 31st March 2002. Similarly, however, there is within the Commission a growing concern:

"about the medium and long term health of the supplier base. Many duty solicitor schemes [covering courts and police stations] have a small number of members and firms with small criminal departments are increasingly thinking of giving up criminal work"¹¹

It was felt that the impact of this exodus would be felt particularly in rural and semi urban areas.¹² There was also, "evidence the average age of those practising in crime is growing with fewer younger lawyers willing to do this type of work."¹³

There are other signs that the reduction in contracts may cause problems. The Commission has begun to report the letting of family contracts as a priority need, interestingly priority need has now spread beyond the traditional areas of urban deprivation: at least some of priority needs are identified in the more affluent and suburban south east.¹⁴ More generally, there was already a concern that the contracting system did not have the geographic coverage that it was desirable for it to have. Of 9,527 wards in England and Wales, 6,800 saw no delivery of legal aid, and these wards covered 60% of the population.¹⁵ Such figures exaggerate the size of any 'advice desert' problem: members of the public may well be able

¹¹ LSC (2002), *op.cit.* 42.

¹² LSC (2002), *op.cit.* 42.

¹³ LSC (2002), *op.cit.* 42.

¹⁴ See LSC (2003) Legal Services Commission Contracting Priorities and Strategies, An overview (LSC, London)

¹⁵ NAO (2002) *op.cit.* 25. Wards are a sub-county/district geographic-political unit.

and willing to travel across ward boundaries to get their advice and the LSC is developing helplines and other ways of reaching poorly served areas. Nevertheless, they serve as an important indicator that legal aid supply is not ubiquitous.

It is not unusual for the Commission (or its predecessor, the Legal Aid Board) to be making a case for better remuneration for practitioners although the public manner of this case-making is more unusual. Nor is it unusual for the profession to be complaining that remuneration rates threaten their involvement in *judicare* legal aid schemes.¹⁶ There is, however, growing evidence that the problems are not as exaggerated as they once were and what certainly *is* more unusual is the Commission's outspoken concern for the long term viability of the legal aid scheme. Even the Lord Chancellor has admitted, "it is true that there has been some weakening of the supply base and there is no doubt that it is attributable to the fees that we can afford to pay." Whilst he goes on to add, "but at present there is a sufficient supply at current rates to meet the demand."¹⁷ In spite of this, the political rhetoric at a parliamentary level, as illustrated by one of the opening quotations to this paper, remains broadly hostile to the scheme and to lawyers more generally.

The divergence between the politics, and Treasury led policy on public funding of legal services, is one part of this paper. The incongruence between an apparently inexorable rise in legal aid budgets and practitioner claims of unprofitability require exploration. Some original research is underway.¹⁸ This paper begins the exploration on the basis of available data. It points to some key problems in the sustainability of a mature *judicare* scheme, particularly within the context of

¹⁶ See, for example, *LCD 'to set' crime targets*, Gazette, 3 April, p.3. The Chief Executive of the LSC reportedly warned the Government its treatment of legal aid was "naïve".

¹⁷ Evidence given to the Committee on the Lord Chancellor's Department Wednesday 2nd April 2003.

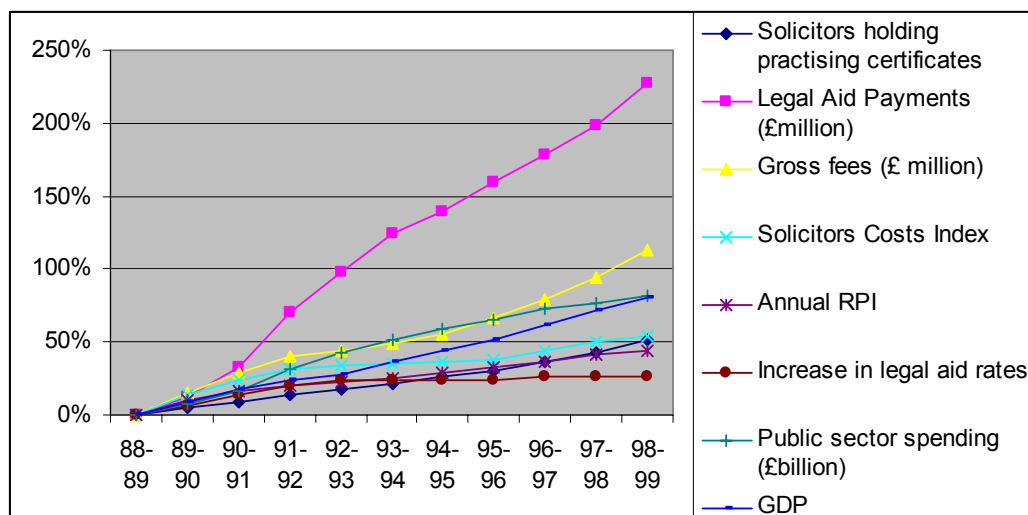
¹⁸ The author is part of the team assessing the Public Defenders Offices. This research includes an attempt to gain a deeper understanding of the costs and profitability of legally aided criminal defence work.

current debates about public spending priorities. Finally it offers, very tentatively indeed, some possible ‘solutions’ to the problems faced.

I. The Public Funding Background

This section outlines in some depth the major indicators relevant to understanding the financing of the legal aid scheme. This puts political rhetoric about an explosion in legal aid costs into perspective, or at least explains the basis for that rhetoric. The following graph summarises data on the rise in legal aid remuneration during the life of the Legal Aid Board¹⁹ and perhaps best illustrates the argument that there has been an ‘explosion’ in the legal aid budget. It sets overall expenditure on legal aid (excluding Crown Court cases²⁰), against key economic indicators such as growth in public expenditure, Gross Domestic Product and inflation (RPI).

Figure 1: Cumulative Percentage Increases in Legal Aid Against Other Indicators (1988-1999)



¹⁹ The Legal Services Commission was the successor body to the Legal Aid Board, established under the Access to Justice Act 1999. The Legal Aid Board was established in 1988 to take over the administration of legal aid from the solicitors’ profession (the scheme was administered by the Law Society).

²⁰ Which were the responsibility of the LCD and Court Service during this period.

The graph shows a significant growth in legal aid budget and also that this growth outstrips the other indicators of economic and other growth shown here. Thus, legal aid expenditure grew much faster than did the gross fees of the profession, inflation, ‘solicitors inflation’ (as indicated by the solicitors costs index²¹), public sector spending or GDP. Indeed, between 1988/89 and 1995/96 the share of gross fees to the solicitors profession attributable to legal aid increased from 10 to 15 percent. Crucially for the profession, however, the levels of remuneration (in terms of hourly rates and standard fees for work) increased broadly in line with public spending, GDP and inflation until 1992/93 but then remuneration rates remained static. This did not stop the amount spent on legal aid increasing, though the slightly gentler slope of the increase after that time suggests that the rate of increase slowed somewhat. The actual figures are shown in the following table.

Table 1: Increases in Legal Aid and Other Indicators (1988-1999)

	Solicitors holding practising certificates	Legal Aid Payments (£million)	Gross fees (£ million)	Solicitors Costs Index	Annual RPI	Percentage Increase in legal aid rates	Public sector spending (£billion)	GDP (£billion)
88-89	52399	430	4455	100.0	115.2	100.0	173	479928
89-90	54734	486	5143	113.8	126.1	106.0	187	525141
90-91	57167	572	5763	123.9	133.5	113.5	203	563735
91-92	59566	732	6218	131.2	138.5	120.5	228	595054
92-93	61329	854	6426	134.2	140.7	123.5	247	615404
93-94	63628	963	6622	135.3	144.1	123.5	262	653582
94-95	66123	1030	6917	136.4	149.1	123.5	275	690575
95-96	68037	1117	7415	138.2	152.7	124.3	287	729001
96-97	71637	1199	7982	143.9	157.5	126.1	299	772856
97-98	75072	1283	8645	150.8	162.9	126.1	306	824164
98-99	79503	1410	9486	153.7	165.4	126.1	315	868642

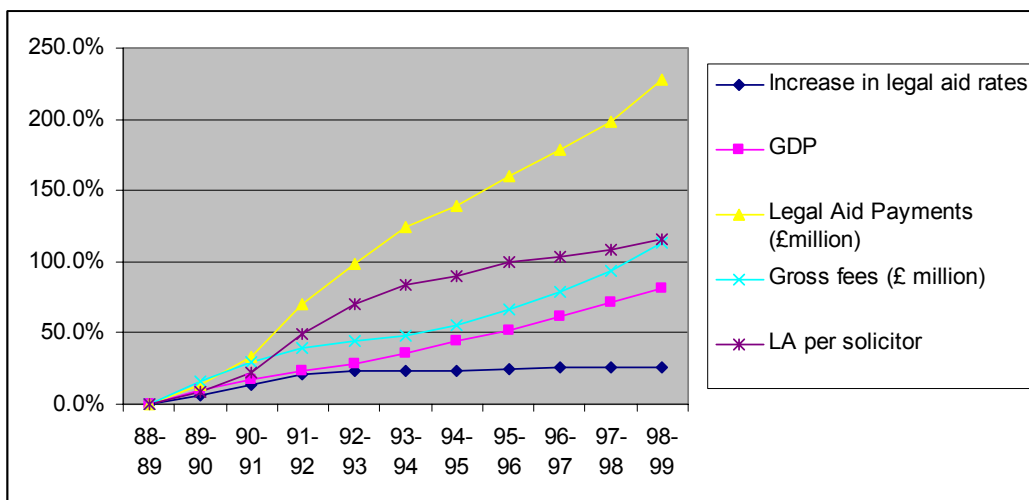
Sources: Law Society, Treasury and ONS Websites, NAO (2002)²²

²¹ These figures were provided by the Law Society and are mainly made up of partners notional salaries; Fee earners salaries; Non-fee earners salaries; Rent & accommodation; Common Services; Bank charges & return on capital.

²² LA fees are net cost to tax payer including disbursements and VAT (Law Society, ASR, 2001(2002)). RPI figures from ONS (Website, March 2003); 01-02 figure for remuneration rates is a crude estimate based on NAO figures (page 23).

These figures suggest growth in the legal aid budget that was way ahead of any other mainstream indicator of growth or spending, and gives a clear indication of why legal aid was perceived, and indeed was, such a problem to politicians and policy makers. The indicator coming closest to it, interestingly, is the increase in gross costs from the solicitors profession as a whole. It is also important, in terms of later discussions about the profitability of legal aid work, to acknowledge the possibility that part of the increase in costs was due to an increase in the number of solicitors (and others) carrying out legal aid work. There is no way of testing for this directly, but it is possible to look at the position in terms of the total legal aid spend (minus crown court expenditure) per solicitor with a practising certificate. This takes account of the general increase in solicitors, but does not consider the growth or contraction of legal aid solicitors, as a proportion of the profession, nor does it take account of the growth or decline in paralegal staff within firms. It thus provides a (fairly crude) indication of legal aid earnings averaged out across all solicitors practising within the profession during this period regardless of whether or not they actually do any legal aid.

Figure 2: Legal Aid budget adjusted by number of solicitors with practising certificates

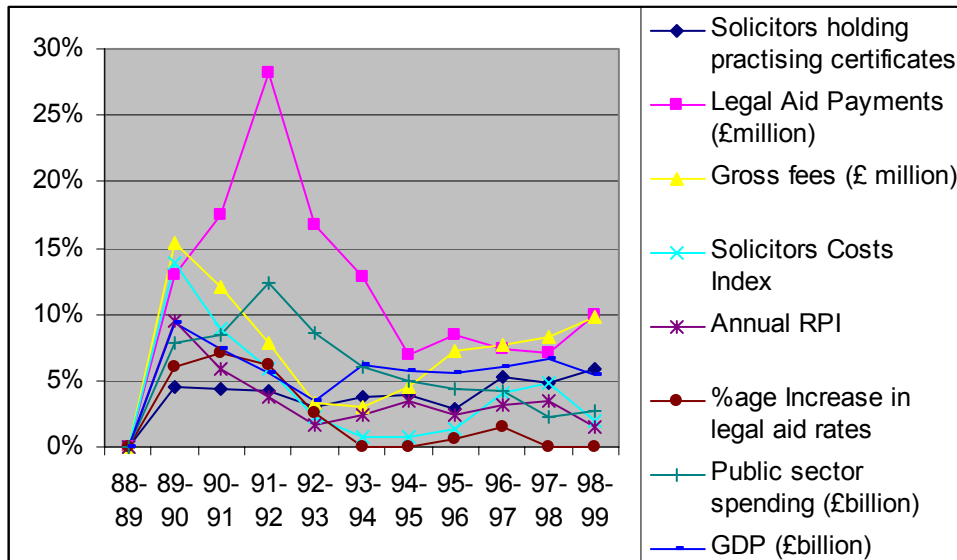


The line for legal aid per solicitor still shows the highest percentage increases, though interestingly the difference between gross fees for the solicitors profession as a whole and net payments from the legal aid fund are less stark, suggesting that

increases (or decreases) in the number of lawyers doing legal aid work could be an important (and hidden) part of the economic equation. If the size of the profession doing legal aid increased relative to the size of the profession generally, then increases in the legal aid earnings per solicitor would be closer to (or lower than) increases in gross fees generally.

A further refinement of the figures is to note that, in some ways, showing cumulative increases can be misleading. The cumulative picture emphasises early increases in the legal aid budget, because the position is always being compared to the position in 1988/89. The following graph illustrates the situation in terms of *annual* (rather than cumulative) growth in the budget. It shows the percentage increase from one year to the next. This suggests a more temporary problem in the early, mid-nineties, with increases in legal aid budgets coming back towards the norm for the other indicators. Even having said this, however, it is clear that increases in legal aid and gross solicitors fees tended to be higher than all other indicators (and closer to increases in GDP). It is also noticeable that remuneration rates have remained more or less stable with minimal increases between 1993 and 1999 (there have been some subsequent increases, but the position seems again to have reverted to a policy of no increase in remuneration rates²³).

²³ Civil rates were increased by about 5% for controlled work (broadly legal help) and 10% for licensed work (broadly representation). See, NAO (2002), op.cit. 23. There was also an increase in criminal rates prior to the introduction of criminal contracts.

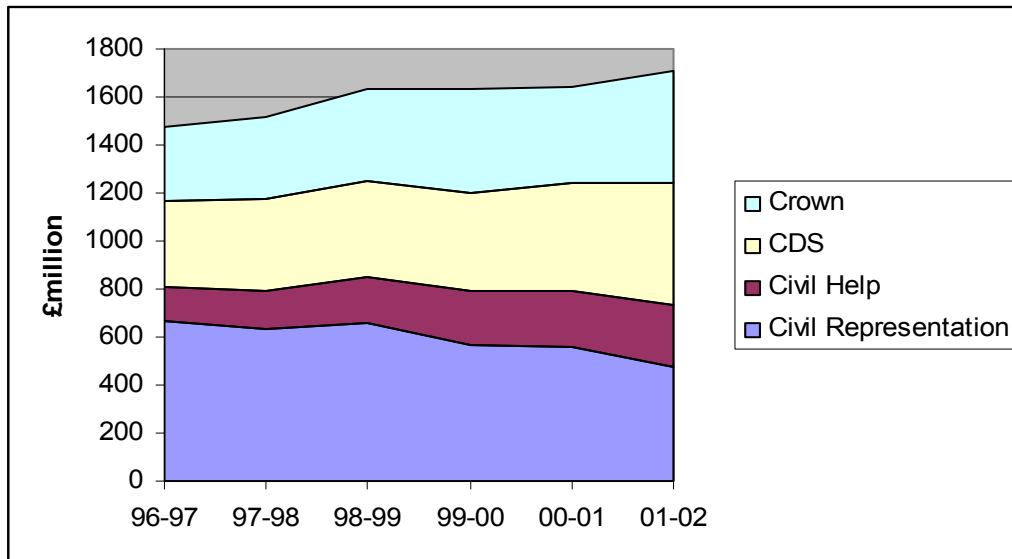


Before coming on to look at the more recent picture, it is worth dwelling momentarily on the possible reasons for the peak increases in the early Nineties. Two particular issues may explain at least some of the rise. One is the end of the conveyancing monopoly. This actually took place pre-1988-89. It seems clear that whilst little work actually went outside of the solicitors profession, the reform did lead to greater competition between solicitors and a reduction in the level of costs claimed for basic conveyancing transactions. However, solicitors were protected in part by the general rise in property prices during that period, offsetting some or all of the reductions in profit resulting from further competition.²⁴ On this theory, it was only when the recession of the early Nineties bit and the housing market collapsed that fees from conveyancing dropped dramatically. This, may have led to a resurgent interest in other sources of work with legal aid seeing an increased supplier induced demand as a result. A second factor, also related to the recession, was the likelihood of greater *need* for legal advice either because the types of work that legal aid covered were in some ways more prevalent during a recession (divorce, compensation claims, debt, housing problems, crime) and that the pool of eligible clients increased because

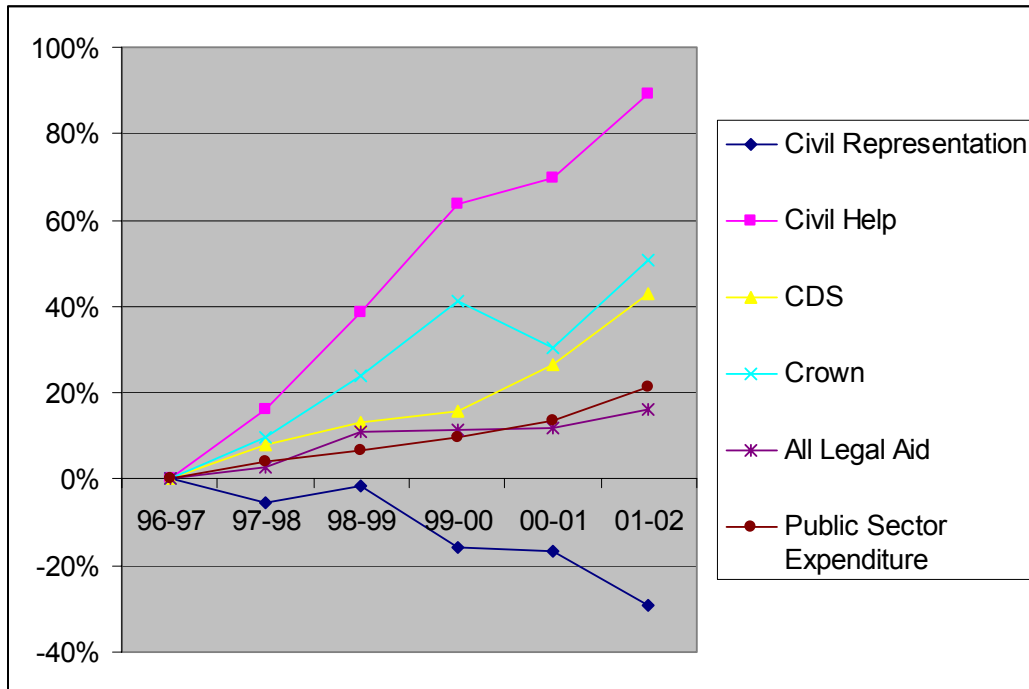
²⁴ I am grateful to Avrom Sherr for this suggestion.

those on welfare benefits or low incomes also increased. Thus, a coalition of the real needs of the public and the desire (of the profession) to supply created very strong conditions for growth in the legal aid fund.

The data so far has tended to concentrate on legal aid as a monolith. With more recent data it is possible to explore trends within broad work types. The following table shows trends in spending within each of the major heads of the legal aid budget (excluding the administration costs of the Legal Services Commission).

Figure 3: Legal Aid Spending (1996-2001)

These more recent figures suggest steady growth in the overall fund, caused by substantial increases in the amount spent on crime and smaller increases in legal help (a substantial part of which is an expansion in immigration work). The spend on civil representation has decreased since 98-99. The next graph shows the cumulative percentage increase from the position in 96-97, and compares the growth/contraction in legal aid budgets with the overall picture for public expenditure. This shows a changed position from the previous ten year period studied with percentage increases in legal aid broadly consistent with those on public expenditure more generally, indeed legal aid has begun to lag slightly behind increases in public expenditure in the last two years. Importantly, however, this position only results from a significant reduction in the spend on civil legal representation. In percentage terms the increases and decreases of the main budget subheadings have been far more dramatic.

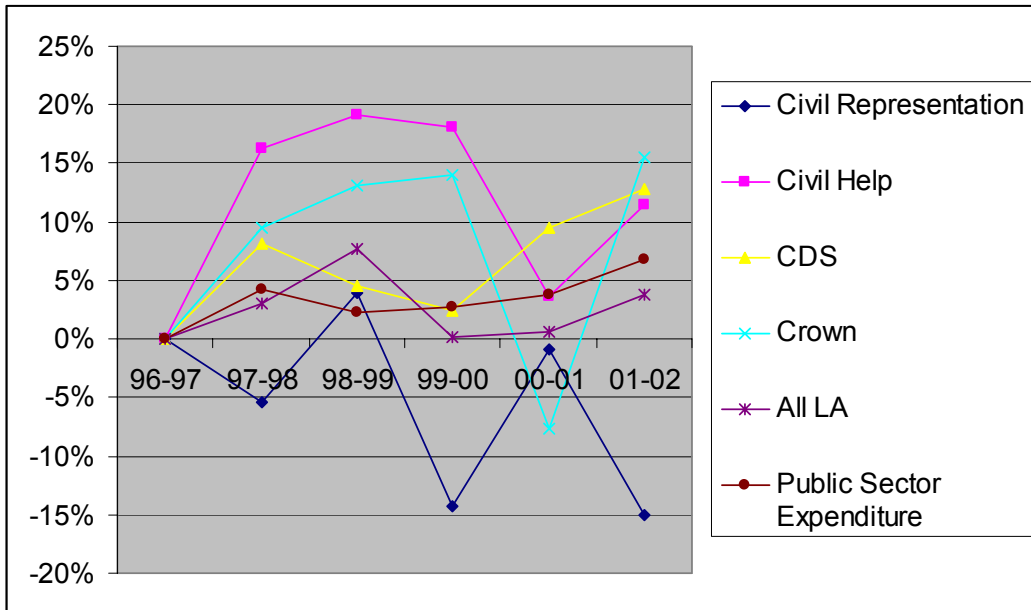
Figure 4: Cumulative increases in legal aid budgets (1996/97-2001/02)

Sources: NAO Report (2002); Judicial Statistics (1996-2001)²⁵

Nor is there any indication yet that the rate of growth in these costs is slowing dramatically as the following graph of annual increases in legal aid budgets and public expenditure show.

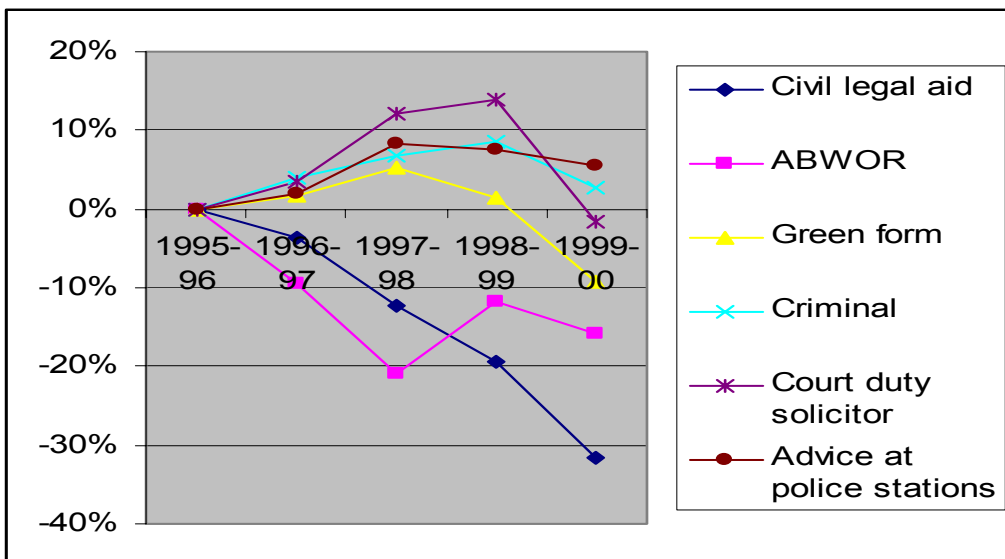
²⁵ The time period for the Judicial Statistics and NAO Statistics are not identical, but are adequate to indicate trends.

Figure 5: Year on Year Changes in Legal Aid (1997-2002)



A possible explanation for this rise in costs would be increases in the numbers of acts of assistance. This does not appear to be the explanation as the following graph shows. It is clear average costs per case have increased too.

Figure 6: Percentage Change in Number of Matters (1995/96 - 1999/00)



Between 1995/96 and 1999/00 total acts of assistance were reported to have increased by an annual average of about 1.8 percent (LAB, 2000, p. 6). Between 2000/01 and 2001/02 the number of acts of assistance had dropped by 18 percent.²⁶ It follows that the explanation for the increase in legal aid budgets is a significant increase in average costs. Some, but probably not all, of this is caused by shifts in the types of work done (e.g. within the legal help category, a recent trend towards more immigration work which generally has higher average costs than other types of legal help). It has also been attributed to a shift towards higher quality work delivering better outcomes for clients.²⁷

Other than a dramatic peak in the early 1990s, the increase in legal aid costs has broadly mirrored the increase generally in solicitors costs. This probably tells us two things. The first is that a significant part of the "explosion" in legal aid costs has been caused by a one off spike in levels of claims. One suggestion is that this was a response to deregulation of the conveyancing market coupled with a subsequent recession which depressed earnings for a large part of high street practice. The second lesson is that whilst legal aid costs have broadly matched increases in solicitors costs generally, these increases have nevertheless been substantially higher than other economic indicators such as inflation, increases in public sector spending and GDP. This calls into question the longer term sustainability of legal aid, at least as long as the solicitors' profession continues to do well relative to the economy as a whole. A policy of ensuring legal aid expenditure does not expand any faster than other aspects of public spending would necessarily mean that legal aid lawyers either lagged further behind their colleagues in private practice or (as appears to be the case at the moment) substantial parts of the legal aid budget are diminished whilst other parts continue to show above trend increases in costs. These shifts within the legal aid budget

²⁶ Calculation based on Annual Reports 2000/02 and 2001/02, page 1

²⁷ Examination of Steve Orchard MBE then Chief Executive of the LSC, by the Public Accounts Committee, 11 December 2002.

delay the ultimate reckoning of whether and how the legal aid system based around *judicare* can be sustained given the economics of private practice. The much lower overall increases in legal aid post 1996/97 have been matched by an overall diminution in the relevant significance of legal aid as a proportion of gross fees.²⁸

II The Profession's Perspective

Having considered the broad economic picture in terms of legal aid spend, this paper now considers the evidence that, in spite of this apparently huge growth in legal aid funding, significant portions of the private profession have decided that legal aid is not for them, and are leaving the public provision of legally aided services to a smaller, and in some areas dangerously small, rump of the private profession.

Law Society's Gazette and Legal Aid Practitioners Group Surveys

For the last two years, the Law Society's Gazette conducted with the Legal Aid Practitioners Group (LAPG) and Criminal Law Solicitors Association a survey of firms undertaking legal aid work. In the most recent survey, they estimate that about 2,000 firms (identified via email capable members of the LAPG/CLSA²⁹ and firms using email who appear on the just ask' web site³⁰ of these) were contacted and 270 firms responded. Given the method of sampling, and the low response rate, these results should be treated with caution. As might be expected the results appear to reveal strong levels of dissatisfaction within the profession. 91 percent of respondents indicated they were not satisfied with the current system of legal aid work. 81 percent were less optimistic about the future (and

²⁸ See Law Society Annual Statistical Report 2001 Legal Aid Payments to Solicitors for the Year 1999-2000 were 13.2% of total gross fees earned compared with 14.9% in 1998/99 and 14.8% in 1997/98.

²⁹ Criminal Law Solicitors Association.

³⁰ This web site contains the Community Legal Service and CDS directory of suppliers maintained by the Legal Services Commission and should be reasonably comprehensive.

only 2 percent were more optimistic). Perhaps more importantly, 70 percent indicated they did not think their firm would be doing this much Legal Aid work in five years time.

More concretely, the respondents also indicated contract areas that they have dropped in the previous year. The following table contains results from this survey, also contains figures from the comparable Law Society/LAPG survey for 2001/2, and figures from the LSCs which indicate actual movement in contract figures for two years (effectively similar periods to that covered by the LAPG/Law Society surveys).

Table 2: Contract Areas Dropped

Contract categories	Number at Mar-03	LSC Data ³¹			Law Society/LAPG Surveys	
		Percentage Change during 00/01	01/02	02/03	01/2	02/3
Actions against the police etc.	72	62%	18%	1%	N/A	-3%
Clinical negligence	294	0.40%	20%	-2%	N/A	-3%
Community care	62	41%	29%	27%	N/A	-4%
Consumer	97	-22%	-25%	-14%	N/A	-29%
Debt	505	-11%	-6%	-2%	-5%	-23%
Education	61	26%	18%	17%	N/A	-4%
Employment	314	-7%	-15%	-1%	-4%	-25%
Family	3,649	-5%	-7%	-3%	-6%	-8%
Housing	678	-6%	-10%	-4%	-7%	-25%
Immigration	656	11%	8%	11%	-5%	-7%
Mental health	355	6%	-1%	1%	-2%	-11%
Personal injury	1,399	-19%	-21%	-6%	-7%	-24%
Public law	38	189%	8%	36%	N/A	-1%
Welfare benefits	574	-5%	-8%	-2%	-7%	-23%
Other	N/A	N/A	N/A	N/A	-9%	N/A
Crime	2,900	N/A	-16%*	-0.03%	-9%	-15%
Total	N/A	8,936	-8%	N/A		
Sample	All	All			150	270

*This drop was probably mainly due to the 'shake out effect' of introducing contracting which occurred a year later in the criminal work than it did in civil. Contracting generally led to the discouragement of initially high numbers of

³¹ Sources: LSC Annual Report, LSC Management data supplied April 2003.

practitioners who's commitment to legal aid was questionable in the first place or who felt that they would not meet the contract requirements for whatever reason³²

Although it is to be expected that the LAPG/Law Society survey might draw responses from those with higher levels of discontents, it did not appear to consistently exaggerate the size of the withdrawal from legal aid in 2001/2.³³

The Commission's unofficial figures for 2002/2003 suggest a more modest reduction in contracts in the mainstream work categories. Family contracts reduced by 3% compared by 7% the previous year and 5% the year before that. Housing reduced by 4% (compared to reductions of 10% and 6%) Welfare benefits reduced by 2% compared with 8% and 5% reductions in previous years and debt reduced by 2% (compared with 6% and 11% in previous years). The Commission are aware, however, that it is in April of any given year (when decisions about contract renewal are to be taken by firms) that any major changes in contract numbers is likely to take place. If the LAPG results for 2002/2003 were reflected in this April's decisions then we might expect to see a much larger reduction in contracts, but in fact there is no such result: the figures seem to suggest a slowing down of any exodus from legal aid (although it is too early to see a trend).

The figures for crime are interesting. There was a net loss of only 9 crime suppliers in the financial year 2002/2003. 156 suppliers left and 147 joined. The LSC has noted that, "It's worth noting that 25% of the drop-outs involved the block movement of staff - either through merger, relocation in one office, or wholesale crime department moves and that around 35% involved suppliers with no take or a take of less than £20k in the last 12 months."³⁴ 14% have lost a crime fee earner and were unwilling or unable to replace them (about a quarter of

³² Page 42, LSC 2002.

³³ As one would expect there is considerable volatility in the figures, given the small sample sizes, and the survey results are inconsistent for work categories where there is only a small number of contractees in the first place.

³⁴ Private communication with author.

these were firms apparently doing low volumes of criminal work); 9% failed their audit, withdrew from the franchising process or were subject to intervention; 2% were reported as being caused by the retirement or death of a sole practitioner or sole criminal partner; and 2% were reported as being the results of criminal work not being profitable.³⁵

The future?

The most recent LAPG/Law Society survey also contains data on future trends beyond 2002/03. Using such surveys to predict future behaviour, particularly in such a politicised arena, is difficult, so these results should be treated with particular caution. The results suggested that one in five of the respondents would give up *all areas* of legal aid work and one in four would give up family law. Given that many of those indicating that they would give up "all areas" would have a contract for family (probably in the region of 80 or 90 percent), this suggests a very serious potential reduction in the number of offices providing family legal aid. 16 percent of respondents were predicting they would give up crime (again many of the "all areas" respondents would also have a crime contract suggesting that the reduction in crime contracts would be considerably larger than 16 percent if this prediction proved correct).

Indeed the survey percentages probably underestimate the size of the problem anyway. The percentages are calculated as a total of all respondents to the survey. If we simply look at the number of family contractees within the survey and make some estimate of how many of them would give up "all areas" then, these figures would suggest that approximately 45 percent of family practitioners (if this sample was representative) were considering dropping family work entirely. Additionally, 44 percent of respondents indicated they were considering reducing the amount of family work they did. Whilst one might expect *actual*

³⁵ Private communication with the author.

reductions to be lower than *predicted* reductions in the supplier base, this nevertheless suggests a very large reduction in practitioners from the two key areas of legal aid scheme.

Is it all about money?

The Legal Service Commission's stated view is that it is principally remuneration that threatens the supplier base. Interestingly, the Law Society Gazette-LAPG survey suggested bureaucracy may be almost as strong a concern. Respondents were asked, "if you have dropped any areas or intend to do so, what are your reasons?" 63 percent indicated lack of money, 60 percent indicated bureaucracy, 36 percent indicated contract costs complaints audits, 20 percent indicated supervisor standards and 13 percent indicated a negative image of the profession. Although it would be tempting to see such a survey as simply the profession's opportunity to amplify its irritation with the LSC, the concern with bureaucracy jumped dramatically from the previous years figures when only 20 percent cited bureaucracy as a reason for dropping or considering dropping an area of legal aid. In contrast, when asked "what would make you stay in legal aid?" more respondents indicated a pay rise (90 percent) than indicated less bureaucracy (79 percent), suggesting that remuneration was perhaps more clearly their strongest concern. Nevertheless, 52 percent indicated overhaul of the cost compliance audit system; 26 percent indicated relaxation of supervisor requirements and 29 percent indicated "public/media recognition for work done". This suggests there are professional/social capital explanations for declining morale which go beyond pure economics.

It is worth dwelling for a moment on some of the comments made to the survey managers when surveys were returned. Many of the responses commented on the *relative* position of legal aid lawyers compared with other lawyers or indeed public sector workers:

"For the vast majority of legal aid lawyers, we work our socks off to make an honest living for our families and we juggle are various

roles as mother, wife and lawyer and don't cry about it. We are not all QCs and city lawyers who can afford to buy our children flats for college."³⁶

"It is interesting but depressing that the counsels' fees and experts' fees continue to rise unabated while we receive £66 [an hour], which is frequently ... reduced on assessment."

"Oh, to be a fireman and be offered 16 percent!"

"We have experienced, committed and well-trained solicitors doing complex housing and community care law, largely for about £40 per hour. Says it all."

"Criminal lawyers are paid less than tradesmen and cannot sustain their positions in general partnerships."

There were frequent references to the hypocrisy of politicians overseeing the system. There were also numerous comments on the level of bureaucracy and cost compliance audits in particular along the lines of the opening practitioner quote in this paper.

"I am so bloody stressed trying to get somewhere near breaking even for the firm and provide a personal service for clients that the legal aid admin is becoming the straw likely to break my back ... as I write this I am realising how determined I am not to be in this position in 12 months' time, and how likely it is therefore that this firm will retreat finally from Legal Aid."

"The bureaucracy transferred from the Legal Aid Board to the practitioners is a cost-cutting exercise which means we have to pay the cost of the administration without any real recompense."

"Its turning into unwieldy bureaucratic quagmire that's badly funded, badly organised, run by people obsessed with facts and figures and little or no understanding of the legal system."

"There has to be something radically wrong with this system which requires as long in accounting for what professional work you have done as the professional activity that you have undertaken. A

³⁶ The last comment refers to a controversy involving Cherie Booth QC, the Prime Minister's wife, who had been involved in negotiating the purchase of two flats one of who was for her son whilst he attended Bristol University.

morning in court requires an afternoon in the office recording your working endeavours."

Many claimed it was the combination of remuneration and bureaucracy which was driving them away:

"The poor rates alone might not compel us to drop legal aid but the combination of that, insane bureaucracy, the constant errors that occur and the contempt they treat us with, all combine to make this an area for those who are not only committed - which we are - but also financial reckless, which we cannot afford to be."

"I have difficulty coping with the ever - increasing bureaucracy and it is no doubt typical as I am sitting here in the office on the Sunday before Christmas trying to catch up with paper work - and yes, I am on call for the police station on Christmas Eve. What price do you put on that? £4.20 an hour stand-by does not recompense for recklessness for my children..... yes, I am bitter."

"Ultimately the introduction of a complicated audit control system plus a very poor level of remuneration relative to other areas of work will drive solicitors out of the system. It is already doing so at a worrying level. The future for legal services is not bright."

Furthermore, it was clear that practitioners fell into two groups. Some appeared to be preparing themselves to exit the system. Others saw themselves as stranded in legal aid work, saddled with an overdraft and no obvious exit route:

"I am a sole practitioner. I am plodding on with no alternative to LSC-funded work available. I am stuck!"

Another aspect was the extent to which levels of remuneration were affecting the ability of the profession to recruit, "it will be too late to get young blood into criminal defence work before a desperate shortage hits," said one respondent. Several others made similar points. Similarly, there were profound problems for firms trying to do legal aid work within mixed practice firms:

"Morale is rock bottom. Every year it gets harder and there is more and more pressure from partners doing private work to make more money. Obviously on Legal Aid rates it's an impossible task, yet why should those subsidise us? It is a totally thankless task."

Finally, a number of comments referred to the general political context and labelling of legal aid practitioners by politicians. Sometimes this was implicit in criticism of fat cats, QCs and so on, but challenges to their own image of professionalism were seen as occurring at a number of levels:

"I object to having my professional judgement (with over 30 years' experience) being overturned by a CLS clerk with two or three weeks' training."

"It is very depressing to always be seen as some sort of vampire, merely sucking the LSC dry for as much money as possible for totally spurious cases."

"Fed up with being the whipping boy for failures in the criminal justice system, and would positively advise newly-qualified against working in crime. Thoroughly pissed off with the LSC - they offer no support, treat us like dirt and assume we are all over claiming."

"Yet we still see the spin to blame it all on "the fat cat" lawyers wanting an adjournment. Rich coming from a "fat cat" politician whose wages are more than my gross, and I have to pay staff from mine."

The SFLA Study³⁷

This national survey, funded by the Solicitors' Family Law Association (SFLA), takes a more in-depth look at some of the issues associated with the sustainability of legal aid in the family sphere. It attempted to address the issue, "whether the resources available to the LSC provide remuneration at a level such that solicitors and barristers will continue to accept publicly funded clients alongside their more generously remunerated private client work." Firms were sampled at random from a list of firms with active contracts in family work, with a 'booster' sample for London. The head of the family department was interviewed on the telephone in 508 firms (a response rate of 68 percent of sampled firms). Fourteen firms advised the researchers that they no longer accepted family clients under legal

³⁷ Davis, Gwynn, Steven Finch and Lee Barnham (2003) *Report of a survey of solicitor firms with active family law contracts with the Legal Services Commission in 2002* (SFLA, 2002)

aid. Beyond this, firms that had already left the contracting scheme would not be included in the survey. Hence the researchers state that the survey may underestimate the scale of any attrition of legal aid practitioners.

Lowest common denominator approach?

One issue which this survey addresses is the extent to which legal aid has been delegated down to the lower level (and therefore cheaper) fee earners. 96 percent of firms reported that solicitors with over four years' post-qualification experience undertook publicly funded family work within their firm. They conclude:

“It seems clear enough, on this evidence, that legal aid is *not* being left to trainees and the very recently qualified. If there *is* a cut-off point for accepting publicly funded family work, it must be further down the line in terms of experience – that is to say, *beyond* four years' post-qualifying experience.”

On this evidence, the conclusion is perhaps a little strong. The way in which the question was posed in the survey does not deal with the possibility that more of the legal aid cases are delegated down to lower level staff than are handled by experienced lawyers in the department. Nevertheless, it is interesting that significant numbers of solicitors with considerable experience retain an active interest in legal aid work.

The SFLA study confirms a finding from the LAPG-Gazette survey. Respondent firms did appear to be seeking to reduce the amount of legal aid that they took on as the following chart shows.

Figure 7: SFLA Study - Proportion of the family department's time that was/is/will publicly funded

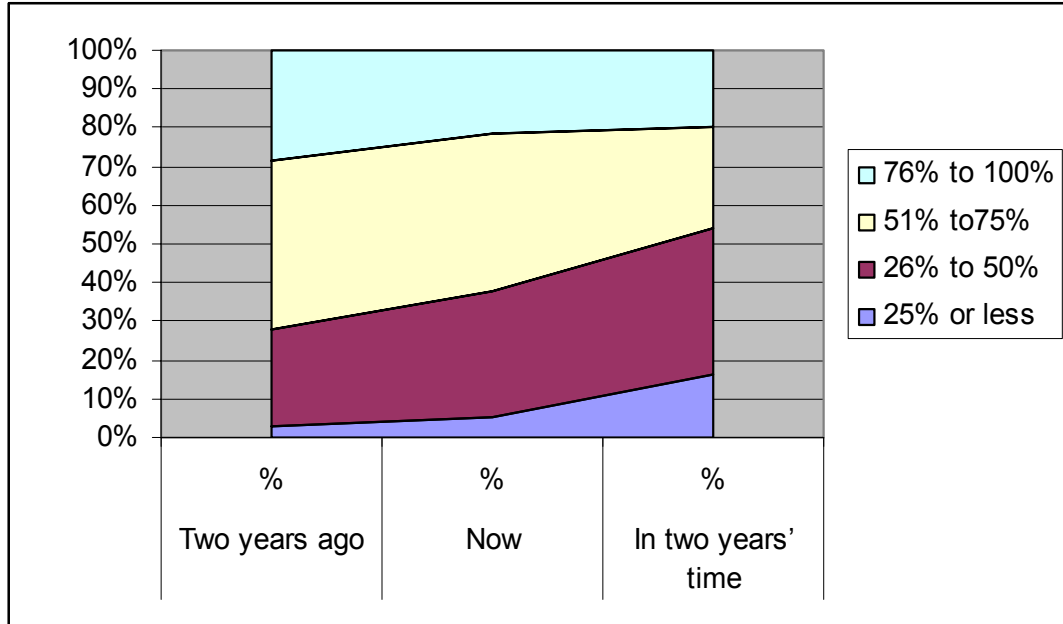


Table 3: Proportion of the family department's time that was/is/will publicly funded

	Two years ago	Now	In two years' time
	%	%	%
25% or less	3	5	16
26% to 50%	25	33	38
51% to 75%	44	41	26
76% to 100%	29	22	20
Base (all answering)	457	485	451
Don't know	37	9	43
Not applicable (do not currently take legal aid clients)	14	14	14

It appears that firms deriving only modest levels of income from legal aid were most likely to be contemplating giving up legal help (what used to be known as 'green form'): about 10 percent of firms were contemplating this. Such firms were also more likely to be contemplating giving up certificated work. Of those

firms who said they spent less than 25 percent of the time of their family department on publicly funded work, only 8 percent said they would 'definitely' accept clients under a full Certificate in two years' time.

However, Davis et al also state, "many firms had not experienced, and did not anticipate, any significant change." Though in summary, "Over half the family departments interviewed seemed to be shifting in the direction of a reduced reliance upon legal aid. This downward trend is consistent across all regions." They also suggest that London and the South-East have already (pre-survey) moved further in terms of greater withdrawal from legal aid.

London was different from the rest of the country in other ways. London firms that had contracts for family work with the LSC, appeared heavily dependent upon that income. Davis *et al* suggest that, "whereas in the provinces it is common for family departments to have a 'mixed economy' – part private and part publicly funded – in London there is a small cadre of legal aid specialists whose family departments primarily serve this client group."

Solicitor informants were also asked whether, in their experience, barristers' chambers were more or less willing to undertake publicly funded family work compared with two years ago (prior to the introduction of graduated fees). This is because of a particular controversy over the level of these fees. Over 50 percent reported that it was more difficult to secure the services of a barrister for publicly funded family work than it was prior to the introduction of graduated fees. Barristers' reluctance to work under graduated fees was most widely reported in London and the South-East, and least commonly asserted in the North (although even there this problem was widely reported). There was some variation by case types, and barristers were also reported to be more reluctant to undertake particular tasks. Over 60 percent of solicitors reported that counsel were more reluctant to attend conferences when they were funded under graduated fees. 50 percent of firms reported that counsel were reluctant to prepare documents or to give advice in writing if they were being funded under graduated fees. A third of

solicitors also told the researchers that they had undertaken advocacy themselves when, given the choice, they would have preferred to instruct counsel. Of this group, 90 percent said that the problem had got worse since the introduction of graduated fees. Similarly, a third of solicitors said that they had been opposed by publicly funded counsel who were inadequately skilled or experienced and two-thirds reported that this problem had got worse since the introduction of graduated fees.

Discussion: the decline of judicare or rattling of sabres?

Setting the results of these practitioner surveys studies against the broad data for legal aid expenditure presents us with a puzzle. How can it be that the profession has continued to protest at the profitability of legal aid, when the economic data suggests that growth in legal aid fees has far outstripped other economic indicators? More pertinently, how can it be that such protests have gathered sufficient force to be reflected in the diminution in the supplier base? The basic economic data suggests that practitioners are earning more, not less. Can it really be the case that profitability has declined in such circumstances?

The first thing the economic data shows is that remuneration arguments can not be confined to a consideration of hourly rates. In spite of static rates of remuneration, unit costs have increased, sometimes substantially. It is typically assumed that, partly because of moral hazard problems, legal aid systems are particularly prone to such supplier-induced inflation.³⁸ The comparative increases in legal aid costs relative to solicitors gross fees would seem to support this view. Conversely, there is some evidence that this may not be the case. The National Audit Office reports, “For the ten year period from 1991-92 to 2001-02 the Commission has compared the average increase in costs of bills it has paid with those where costs have been increased between the parties. This suggests

³⁸ Bevan, G. (1996) *Has There Been Supplier-Induced Demand for Legal Aid?* (1996) 15 Civil Justice Quarterly 99.

that the cost of bills paid by the Commission has increased, on average, at 7.6 per cent per year, compared with 15.3 per cent for costs agreed between the parties.” In other words, legal aid costs increased more slowly than *inter partes* costs. Interestingly, Fenn and Rickman also found recent dramatic increases in non-legal aid costs in personal injury cases.³⁹ For low value (<£15k) RTA cases (personal injury cases are now more or less totally excluded from the legal aid scheme) showed an increase of approximately 25 percent in base costs for these cases over the 18 months from mid-2000 to the end of 2001, and an approximately 10 percent increase in disbursements over the same period. The LSC’s internal findings would tend to suggest that increases in lawyers costs generally (as opposed to simply within the context of legal aid) have tended to outstrip inflation and that the LSC has been relatively successful in containing this upward pressure on costs. Fenn and Rickman’s study would also support the first part of this conclusion, but they suggest that the introduction of the Woolf Reforms on civil procedure (which were felt likely to be followed by significant frontloading of costs) is at least one cause of the increase. This is because the increase in base costs⁴⁰ and disbursements over this period has been greatest for *non-litigated* case.⁴¹

The contradictions between these findings and the overall figures reflecting the relative position of legal aid against solicitor costs more generally is difficult to massage away. It is difficult to see how legal aid costs can really have been growing more slowly than litigation costs generally, given the growth of legal aid relative to the level of solicitor gross costs. One explanation is that the growth in costs for transactional legal work was much lower than for litigation and that

³⁹ Fenn, P and Rickman N (2003) *Costs of Low Value RTA Claims 1997-2002: A report prepared for the Civil Justice Council* (CJC website). Any uplift from a conditional fee agreement (CFA) is excluded from this calculation, as this would add significantly to any ‘inflation’ in costs.

⁴⁰ The term base costs excludes any rise in costs attributable to uplifts associated with conditional fee agreements (a particular type of contingency fees permitted in England and Wales for litigation).

⁴¹ Fenn and Rickman (2003) *op.cit.*

legal aid costs simply reflected the dynamics of litigation. This seems unlikely, given then the apparent success of the big City firms. It is plausible however that the adversarial nature of litigation, and the rather unusual economics of litigating under a loser pays rule (sunk costs, and risks of paying the other sides costs increasing the amount of work that it is economically rational to put into litigation)⁴² that gives rise to higher rates of inflation than other forms of good or service. Put more simply, under an adversarial system there is always a temptation to do more than is necessary, and the risk of not doing more is losing your own investment and paying for your opponents.⁴³ Where one party does more, the other party has to do more in response.

Another aspect of the debate is the extent to which increases in costs reflect other pressures on the system. Increases in divorce costs in the 1980s were found in one study to reflect in part real increases in the work done and the demands of parties to the litigation.⁴⁴ The point has been made in the context of wider work types: e.g. crime⁴⁵ and personal injury work (where Fenn *et al* explain the findings outlined above in part by the introduction of the Woolf reforms).⁴⁶ Reform of immigration policy and recent criminal justice reforms (in particular the introduction of Narey hearings) may well account for some of the substantial recent increases in legal aid costs. What emerges from these studies is the view that policy reform may often have unintended or underestimated knock-on costs

⁴² G. Kadfield, *The Price of Law: How Markets for Lawyers Distorts the Justice System* (2000) 98 Michigan Law Review 953.

⁴³ This latter problem does not generally apply as strongly in legal aid cases, as the client and the lawyer are largely protected against costs orders in favour of their opponents.

⁴⁴ T. Goriely (1991) *Legal Aid for Family and Care Work*, Background Paper 1, Nuffield Research Project (Legal Action Group, London).

⁴⁵ D. Wall (1996) *Legal Aid, Social Policy and the Architecture of Criminal Justice: The Supplier Induced Inflation Thesis and Legal Aid* (1996) 23 Journal of Law and Society 549.

⁴⁶ See, also Goriely, Moorhead and Abrams (2001) *More Civil Justice? The impact of the Woolf Reforms on pre-action behaviour* (Law Society and Civil Justice).

for legal aid budgets. This is the explanation offered for a 14% overspend in this years legal aid budget.⁴⁷

Whilst such arguments may explain some of the reason for above 'normal' increases in legal aid costs, there is a nagging doubt whether *all* of the increase is explained by such effects. As a Legal Action Group study referred to it, there is, "some element of legal aid costs which is difficult to pin down and which has so far eluded the government and legal aid authorities."⁴⁸ The difference between increases in cost caused by increases in the required work and other "supplier induced" increases is crucial. The latter is suggestive of the profession taking up some slack in the remuneration regime to improve profitability without an increase in necessary inputs (the work requires to complete a case) or increases in remuneration rates. Even where increases in overall costs are the result of increased work needing to be done, this may increase profitability if the actual cost of doing more work is held the same (through lawyers working harder without extra salary, for instance). As the next sections shows, this may not increase profitability as much as a simple look at headline figures would suggest.

A diminishing return from increased average costs?

An increase in average costs suggests that lawyers have been able to charge more for cases in spite of the absence of substantial increases in remuneration. This suggests one of three explanations: they are *doing more* work on cases; they are *better recording* the work that is done; or they are charging *inappropriately/fraudulently* for work. If the first explanation is true to any extent, lawyers would either have to be increasing the number of staff that are working on cases. The result is that individual staff do not gain, as their earnings

⁴⁷ See, P. Ronan (2003) *Irvine: Low pay is problem*, 10 April, p. 3 Council and Lord Chancellor's evidence to the Committee on the Lord Chancellor's Department, 2 April.

⁴⁸ Goriely (1991) *op.cit.*

(in terms of fees) are not increased by the increase in work done on cases⁴⁹ or they would have to work harder to increase their fees earned. It is worth noting that each of these explanations, with the exception of pure fraud, increases the costs of improving the amount of fees earned (i.e. not all gains in fees increased would increase profitability £ for £). Increasing staff increases overhead and salary costs; increasing hours worked increases the social costs of working within the legal aid sphere (and these social costs may have to be compensated for, e.g. out of hours payments, or show up in higher ‘wastage’ or burnout); and better recording of time probably requires, or at least has been seen as requiring, greater investment in computerised time recording systems and more administration. As a result, increases in fees would not produce *equivalent* increases in profits. This suggests there is a diminishing return from increasing the time spent on cases. As we shall see, the social cost may also include a diminished sense of professional worth through external pressures exerted by their own firms and internal reactions to those pressures.

Changes in the gearing of firms to ensure that cheaper, lower level staff do work that was once the preserve of better paid staff is one way of reducing such diminution. The extent of changes in gearing is unknown. The SFLA study suggests that senior staff remain active in legal aid work, and (as noted above) the LSC has pointed to an opposite concern in crime: the cohort of crime practitioners is ageing.⁵⁰

Relative value not absolute profit

A further explanation for the apparent willingness of private practitioners to withdraw from the system centres around arguments about relative value. Economists tell us that it is not absolute wealth which makes us happy but

⁴⁹ Firms might benefit if the costs of employing staff was less than the benefits of the extra work done on cases.

⁵⁰ There is a difference between age and experience, of course, and ageing staff could include unqualified clerks not solicitors. So gearing changes would be possible without altering age profiles towards youth.

relative wealth.⁵¹ The remuneration rates of legal aid are low by private practice standards generally, and have always been so. Enforcing a freeze in remuneration rates sends a powerful signal to practitioners about their relative value. Similarly, visible salaries (publicised in the trade press) which may form the yardstick for informal comparison within the profession, concentrate mainly on the City firms, where newly qualified solicitors in the 'Magic Circle' firms earn £50,000 plus and trainees can earn substantially more than well established legal aid lawyers.⁵² Many legal aid practices tend to base their trainee salary structure around the Law Society minimums (£14,600 in central London and £13,000 outside).

There are other elements to this notion of relative value which may be important. Legal aid practitioners practising in mixed firms (those that do private client and legal aid work) seem particularly conscious of the pressure for profit. With static hourly rates, and the pressure to do more work for the same pay, the ability of legal aid departments to keep pace with their private practice client colleagues is diminishing, particularly if they have now wrung any efficiency gains out of working harder and recording more time. Indeed, one way of interpreting the numerous graphs at the beginning of the paper is to point out that the ability of legal aid practices to increase earnings appears to have tailed off in recent years. This may be one reason for the acuteness of the problem now. Anecdotal evidence suggests that mixed practices are increasingly being forced to either give up legal aid or force legal aid practices to split off into their own firms. It is also easier for mixed practices to realign legal aid practitioners into other areas of non-legally aided work, so they may be more likely to withdraw than practices focused solely or mainly on legal aid.

⁵¹ Clark A.E. and Osward A.J. (1996) *Satisfaction and Comparison Income* 16 Journal of Public Economics 359-381.

⁵² *Magic circle firms commit to £50,000 salary benchmark*, Legal Week, Student Special March 2003. Many of the bigger firms offer £28,000 in the first year of a traineeship. Some offer more.

The existence of escape routes

Another possible explanation for the current problems is that there have been more recent opportunities for legal aid practitioners to do other work. Put another way, a question which is begged by the apparent exodus of legal aid practitioners is, where do they go? The answer given to this question is varied. Some anecdotal evidence suggests it is into contingency and conditional fee work. Contingency work is permitted in tribunals and there have been recent relaxations in rules on damages to allow larger claims which has bolstered this type of work.⁵³ It also appeals to practitioners with a leaning towards advocacy. For a while, too, conditional fee work in personal injury was perceived as being highly profitable, although a string of test cases on costs issues, and the dominance of claims management firms, has substantially dented confidence in this area. It should also be observed that the property market has been (at least until recently) extremely buoyant and it is conceivable that we are witnessing the reverse process to the early-1990s recession led boom in legal aid, with practitioners diverting back into conveyancing.

The absence of escape routes, but also of entrances

As the quotations have shown, some legal aid practitioners clearly do not feel there is an alternative to continuing in legal aid. They will continue until insolvency or retirement. There is also perceived to be a diminishing cohort of law students willing to become legal aid practitioners, partly because of a decline in idealism amongst students and partly because of the economics of student debt, minimum salaries and the financial appeal of more commercial options. There is little solid data on this problem, but it is another area where anecdotal evidence is reasonably strong.⁵⁴ The LSC has acknowledged the issues by seeking to fund a

⁵³ See, for example, *Value of tribunal awards jumps*, the Times, 6 May 2003, p.4. There was an 8 fold increase in the level equal pay compensation awards and a 60% increase in race discrimination awards.

⁵⁴ See, LAPG (2002) *Legal Aid: The Next Generation* (LAPG, London).

substantial part of the cost of traineeship for some legal aid solicitors firms and would be trainees. There appear to be doubts about the feasibility of continuing this scheme in the light of budgetary restraints.⁵⁵ An interesting related problem is the perceived recruitment crisis, particularly (but not solely) in criminal work. Reportedly a ‘carousel effect’ occurs whereby staff move from one firm to another; and some are tempted out of the system altogether (particularly by the Crown Prosecution Service which recently increased its salaries as part of a recruitment drive but also by the Public Defenders Service). In the civil sphere in particular, firms are vulnerable to the loss of supervisors (see below). Some firms leaving the scheme are likely to be the casualties of this carousel: unable or unwilling to recruit fresh fee earners and supervisors they give up on legal aid. This also suggests that the decline in legal aid practices indicated by the decline in the number of contracts may also indicate an increase in the concentration of legal aid into bigger firms, more able to retain and replace staff. A further result of any carousel is a diminution in partners profits as employee salaries increase to ensure attraction/retention.

Supervisor standards

Legal help contracts are let for suppliers meeting quality criteria specified by the LSC in the Quality Mark. A relatively new part of this, introduced in April 2001, requires contractees to have an experienced person acting as a supervisor in each area of law that they hold a contract. The supervisor requirements differ depending on which work category is under consideration, but in broad terms supervisors are required to either a) maintain a current caseload in each of the work categories that they supervise; or b) demonstrate their experience in that work category by reference to direct supervision and involvement in cases in the twelve months prior to their being audited. Panel membership (e.g. in family and clinical negligence), or membership of certain duty schemes (e.g. in crime), is

⁵⁵ See, Lord Chancellors evidence to the Committee on the Lord Chancellors Department, op.cit.

sufficient to demonstrate such experience in some work categories. Another route to supervisor requirements involves the supervisor certifying that they carried out 350 hours of casework in each of the previous three years. Others, e.g. housing, employment, debt, immigration and welfare benefits, require demonstrable experience in a range of LSC specified case types and skills (e.g. representation). There are other requirements for supervisors to be accessible, to keep themselves and staff up to date, to undergo regular training in each work category and subscribe to or have access to certain key texts and journals.

In effect, firms are now required to specialise in areas where they have at least one member of staff with enough experience to meet the supervisor requirements. For clients it should mean that under contracts they would gain access only to advisers that are *supervised* by experienced practitioners. Although the work itself does not all have to be carried out by staff meeting experience requirements, the supervision requirements have undoubtedly made it harder for firms to stay in legal aid work.⁵⁶ The LSC has begun to experiment with peer review as an alternative way of demonstrating competence in an area of work in the absence of a suitable supervisor.

Bureaucracy

The Gazette-LAPG survey evidence suggested that bureaucracy is one of the principal causes for disenchantment identified by the profession itself. It is important to acknowledge that the Quality Mark, and the Commission's approach to auditing it, whilst imposing bureaucratic costs also produces a degree of positive support within the profession particular in terms of the improved capacity to manage that the standards appear to encourage.⁵⁷ It also imposes real

⁵⁶ Moorhead *et al* (2003) *Quality and Access*, forthcoming.

⁵⁷ NAO (2002) *op.cit.* 21; Sommerlad, H (2002) *Costs and Benefits of Quality Assurance Mechanisms in the Delivery of Public Funded Legal Services: Some Qualitative Views* (Paper to the LSRC International Conference, Oxford); Bridges, L, Cape, E, Abubaker A. and Bennett C. (2000) *Quality in Criminal Defence Services: A report on the evaluation of the Legal Aid Board's pilot project on the contracting of criminal advice and assistance* (London: 2000, LSC).

costs on the profession and may have a broader cultural impact:⁵⁸ diminishing a sense of professional worth, and encouraging them into a mode of thinking which sees compliance and avoidance, rather than quality and performance, as the name of the game. Research in this area tends to suggest that the profession is fairly evenly split between those who are positive and those who are negative about quality assistance. One way to interpret this diversity is to view the quality bureaucracy as having a bifurcation effect: it may improve quality and system management (in some or all firms); whilst also disengaging or demotivating (some or all) practitioners. In spite of the real gains from having better managed, better quality firms, the difference between *doing* a good job and *demonstrating* that a good job has been done may gnaw at the professional's self-image and undermine part of the reasoning for becoming a lawyer in the first place.⁵⁹ The economic pressure to bill more on the same rates may similarly have a deprofessionalising impact: incentivising behaviour which practitioners indulge in but also recognise as distasteful, unprofessional, improper or dishonest.

This effect is interesting as it runs counter to one of the ethical-economic benefits of public interest work. It is accepted by legal scholars and ethicists, that the ability to '*do good*' in ones work (as one might portray the legal aid lawyer's role) has a value which to some degree compensates practitioners for reduced earnings and status vis a vis the rest of the profession.⁶⁰ It could be argued that the profession's hostility to bureaucracy is its way of showing that this public interest premium is being eroded by techniques of surveillance and control. This may also explain, in part, the understandable but sometimes overheated hostility of legal aid lawyers to pro bono work conducted by commercial firms. Pro bono work erodes one of their few claims to relative 'wealth'/standing: a sense of

⁵⁸ Sommerlad N (2002) op.cit.

⁵⁹ Kronman A.T. (1993) *The Lost Lawyer* (Bek Knapp Press, Cambridge, MASS), p.2

⁶⁰ See, for example, Abel, R.L. (2001) *Choosing, Nurturing, Training and Placing Public Interest Law Students* 70 Fordham Law Review 1563-1571, 1567; Kronman, op.cit.

ethical-moral superiority. Alternatively, their hostility may simply be a reaction to loss of self-regulation/control in this area and the demystification, or even debunking, of myths that surround professional rhetoric about the quality of lawyers.⁶¹

Cost Compliance Audits

Economic and professional values collide most potently in the field of cost compliance audits. Prior to contracting, the Legal Aid Board (as it then was) assessed all bills but did so without supporting papers contained in the lawyer's file. Generally, bills were a single form, containing a brief narrative and an unsupported breakdown of the work done. Under contracting, firms were required to submit much less detailed information when making a claim but the Commission decided to shift to a more thorough assessment of a sample of files (and supporting documentation maintained on those files for the purpose). Firms are graded as to their level of cost compliance on a scale of 1 to 3. (1 being good, 3 being poor).⁶² It is open to the Commission to extrapolate any costs reductions found on the sample of files to the entire caseload of the relevant solicitors' office. So if on a sample of 20 files a firm's legal help costs were found to have been overclaimed by an average of 30 percent it is open to the Commission to reduce the entire legal help costs claimed by the firm by that sum. In practice extrapolation only takes place against Category 3 firms, and it usually takes place against a background of reviews and appeals of the decisions taken by costs auditors.

This process has not been well received by the profession. Practitioners' complain about arbitrary and inconsistent decisions being taken on cases, by staff without appropriate training and experience of the work they are assessing. They

⁶¹ Moorhead *et al* (2003) *op.cit.*

⁶² Firms categorised as poor overclaimed by 20% on their sample of files

also complain about the increased pressure that this has on the need to increase the amount of routine, non-productive recording of work on a file. The following case, derived from an LSC Costs Appeals Committee, indicates the type of problem that practitioners' believe they have faced:

“The background to the case was that the costs of listening to a tape of interview were disallowed by auditors on the grounds that there were no reasons specifically noted on the file as to why the tape had been listened to. The transcript of the tape, served by the CPS, provided only a short summary of what was a 29-minute interview. In rejecting the regional director's appeal, the costs appeal committee held: "CRIMLA 5 and the contract require there to be evidence on the file to show that the decision to take a particular step was reasonable in light of the fee-earner's then knowledge. But there is nothing in CRIMLA 5 or the contract to require the fee earner to make a note, on the file, of the factors leading him or her to decide that it is reasonable to take a particular step. The reasonableness could be assessed from a review of the file overall...In the case of [x] the fee earner was aware that the transcript...was short by comparison with the length of the interview, so it was apparent that some of the interview was missing from the summary. The fee earner was also aware that the defendant had not been represented at the police station. These two facts or circumstances were apparent from the contents of the file. The fee earner was not required as a matter of law to make any note on the file of what her reasons were."⁶³

The LAPG director, ramming home the point about the quality and training of auditors, said:

"This decision also clearly has implications for the Commission as to the level of training and qualification required for its auditors. They need to be able to identify from surrounding circumstances when particular steps are or are not reasonable."

As the National Audit office indicated, audit results were initially used as an education tool to 'educate' firms into improved costs compliance, "actual recovery was exceptional"⁶⁴ 35 percent of firms were assessed as Category 3

⁶³ LAPG (2003) Audit challenge victory, Date: 13 Mar 2003, LAPG website (<http://www.lapg.co.uk>).

⁶⁴ NAO, *op.cit.*, 13.

(the poorest rating) in 2001-0.⁶⁵ This suggests a significant level of overclaiming it is also clear that there was considerable regional variation in the level of firms being categorised as Category 3. In one region (Nottingham) 58 percent of suppliers audited were given a category 3 rating, whereas only 18 percent of suppliers in Cambridge were so rated).⁶⁶ This gives some credence to practitioner claims that auditing practice was not consistent though some of these differences would be attributable to genuine differences in compliance by solicitors firms regionally.

The cost compliance audits are interesting for a number of reasons. Issues of professional judgement vie with public accountability and fiscal prudence. There are bound to be problems with ex post assessment of costs, particularly where auditors are not experienced lawyers themselves. For similar reasons, issues of consistency and credibility are likely to arise. Equally, it should be remembered that cost compliance audits were a source of considerable hostility from the profession and given as a reason for giving up legal aid work. Part of the explanation may be the practitioner view that cost auditors are incompetent. There are other possible explanations, however. Cost auditing is a fairly intrusive exercise. Unlike other aspects of the quality audit procedure, case files are looked at in detail and professional judgements are called into question. As such, cost audits represent a heightening of intrusive regulation of the supplier - purchaser arrangement. The age and qualification of auditors may represent a cultural challenge to professional self-image independent of their competence. Both of these explanations suggest that (to practitioners) cost auditing represents an unhelpful intrusion into the professional domain. However, there is of course an alternative explanation. Given the high levels of failure and the significant problems found on files during costs audits, it may be the case that the profession's hostility is in fact linked (at least in part) to a recognition that their

⁶⁵ NAO, op.cit., 12.

⁶⁶ NAO, op.cit., 12.

capacity to increase the work done on files to make up for static and low remuneration rates is now at an end. As such, the economic and sociological explanations conflate and cannot be separated.

Summary and Conclusions

It is an essential part of public administration that the cost of public services is controlled and does not increase at unsustainable rates. This paper shows how, in the early 1990s, legal aid expenditure did increase at a rate significantly in excess of all other reasonable economic indicators, including the gross fees of the solicitors profession as a whole. This increase, alongside static, or near static, rates of remuneration per hour for legal aid solicitors accounts for some of the gulf between the political rhetoric about legal aid and lawyers and the self perception of the legal aid profession. Towards the end of the 1990s, increases in legal aid more closely followed increase in gross solicitors costs. Nevertheless, these increases were still substantially higher than other economic indicators. Subsequent to this, expenditure on legal aid has remained roughly on trend with public expenditure as a whole, but only because of a significant reduction in the total cost of civil representation. In terms of gross fees, the figures suggest that professional claims as to the profitability of legal aid work at least in some of the areas of legal aid should not be taken at face value. It is true that there has been a drop in the level of legal aid fees relative to solicitors gross fees as a whole, but this may be consistent with the removal of personal injury (etc) from the scheme. If this is true, in terms of gross fee income, legal aid work would appear to be broadly in the position it was a few years ago (if not better). That the basic economics should look like this presents a conundrum when placed against the apparent exodus of firms from legal aid and the increasingly hostile and desperate tone of the professions response to legal aid reform.

There are a number of possible explanations for this which have been explored above. Some of these explanations are economic. Legal aid lawyers appear to have responded to static remuneration rates by doing more work on cases,

recording more work or charging inappropriately/fraudulently for work done. The first two of these explanations are likely to reduce the profit margin on work done even whilst the overall amount of work charged for has increased. There may thus be a diminished return from increasing unit costs. There are other associated costs of contracting such as the audit and quality assurance process which also add to the costs and would diminish profit margin reducing any benefit from an increase in overall legal aid bills.

A more subtle explanation is the extent to which legal aid lawyers are basing their own assessments of worth of legal aid around relative assessments of value. Legal aid lawyers may be assessing themselves (against other visible comparators). Legal aid remuneration rates are mostly in the region of £50-70 per hour depending on the type of work being charged. This compares very unfavourably with average charging rates for assistant solicitors in (say) family law of £106, salary partners £124 and partners £128.⁶⁷ Ordinarily, those using private charge out rates are not constrained in the number of hours they can do per case and the level of justification they have to provide for work done. These factors may combine to diminish their sense of value. Similarly, solicitors may compare salaries with the most visible salaries on offer in the legal profession: those in the city. It is of course unrealistic to compare trainee solicitors in legal aid firms and trainee solicitors in commercial and City firms but experienced lawyers who see students fresh out of law school on relatively high salaries may take every opportunity open to them to reassess their practice. It is also probable that as the capacity to make more out of legal aid has diminished in the most recent times, legal aid practitioners have been made particularly aware by their colleagues in mixed private practice firms that the profitability of legal aid work is poorer than private paying work. This coupled with the existence of potential escape routes whilst other parts of the legal market are relatively strong may mean that this is an opportune time for firms or individuals to leave legal aid

⁶⁷ Solicitors Firms Business Survey 2001, Law Society page 8.

work. An interesting question that this leaves is whether the system is sufficiently flexible to allow for future of new entry into the system.

These economic problems are coupled with administrative and bureaucratic issues. The existence of supervisor standards reduced the number of people able to supervise legal aid contracts within firms. As firms lose a supervisor, they may be tempted to pull out of contracts. Similarly, the existence of supervisor requirements increases the transaction costs of starting up and maintaining contracts. This is one aspect of a concern with the costs of administration of contracts. There may also be cultural effects on legal aid lawyers perception of their own worth which, may have a real impact on their willingness to work for lower levels of remuneration and salary than other parts of the legal profession. Intervention, supervision and bureaucracy *even though they may improve the overall quality of a system* may undermine the value practitioners place on a public interest ethos over and above remuneration. Costs compliance audits represent a particularly interesting part of this of this problem showing keenly how professional and economic values conflate.

More recent data on legal aid contracts and the SFLA study suggest that rather than leading to an total decimation of the legal aid scheme, the impact of economic and social pressures within private practice is likely to be uneven. Firms committed to large volumes of legal aid appear least likely to withdraw. It is the smaller, mixed practices which appear more likely to withdraw or scale back legal aid provision. There is also significant anecdotal evidence that the problems are uneven geographically and across work categories. Thus, such evidence suggests that criminal work is reasonably profitable (particularly if handled by a large "factory" firms) whereas civil legal help is generally perceived as unprofitable or only bordering on profitability; with similar views being held for family. What the above analysis shows more than anything else is the absence of good quality published data on the economics of law firms and the operation of profit making organisations within the judicare system. We need to know much more about the cost bases of firms, how different patterns of fee

earners work together, the economics of "gearing" ratios between different levels of fee earner and so on. We also need to know more about the relative position of legal aid to "commercial" private practice and how the employment market operates in terms of legal aid and other practitioners. Similarly, the existence of alternative to legal aid practice and the way that legal aid practice responds to changes in economic circumstances within the profession, are all areas which are under explored. The LCD is believed to be looking into these areas now. Partly because of this, it is difficult to offer conceptual or policy solutions to the problems faced.

It seems reasonably clear that, if it could be achieved politically, greater diversity of remuneration rates and systems which, for example, could take account of firm size and geography, would enable the Commission to tackle areas of work or geography where problems are particularly acute. The Law Society have canvassed a shift towards greater salaried provision. Whilst it is tempting to perceive such provision as cheaper, there is evidence from the voluntary sector that it may not be cheaper⁶⁸ set up costs of public defenders offices are also considerable, particularly where these are from a "cold start".⁶⁹

If part of the problem is genuinely concern about relative value and private practitioners doing legal aid work comparing themselves against private practitioners doing more commercial work, then shifting legal aid out of mixed practices may have some benefits. Lee Bridges has suggested the Commission should consider "buying out" private practice firms as a way of establishing a salary presence without the start up costs of establishing client basis, premises, etc. If ways could be found to bring legal aid lawyers into a salaried service without the Commission taking on substantial capital liabilities, then it may be possible to adapt the judicare scheme into a model which was not so driven by the

⁶⁸ Moorhead et.al (2001) *Quality and Cost* (Stationery Office, Norwich).

⁶⁹ See, Goriely et al (2001) *The Public Defence Solicitors' Office in Edinburgh* (Scottish Executive CRU, Edinburgh).

profit-cost recovery growth of private practice. Even if this were the case, such models would need to take account of increases in legal costs which are extrinsic to lawyers (such as criminal justice reform).