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# **The effects of changes to legal aid on lawyers' professional identity and behaviour in summary criminal cases: A case study**

LUCY WELSH\*

*This article explores the effects of changes to legally aided representation on criminal cases in magistrates' courts according to data collected in an area of South East England. I consider the political factors that motivated changes to legal aid and suggest how these issues affecting lawyers' understanding of their role, and how that understanding affects the relationships between defendants, lawyers and the magistrates' courts. I argue that the research indicates a potential relation between solicitors' risk taking behaviour in obtaining funding and the reintroduction of means testing; remuneration rates affect the service that defendants receive and that the reintroduction of means testing decreased efficiency in summary criminal courts. Ultimately, I argue that changes to legal aid funding have increased lawyers' uncertainty about their role, leaving them torn between acting efficiently and providing a good level of service.*

## INTRODUCTION

As austerity measures have taken hold across government departments since the financial crisis of the mid-late 2000s, publicly funded legal representation has become an increasingly politicised issue and reducing access to legal aid is one way in which governments have sought to save money. As a practitioner,<sup>1</sup> the changes troubled me but there appeared to be little ability to resist change while maintaining a service for clients. From an academic perspective,

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<sup>1</sup> I practised as a defence solicitor for 10 years, and worked in the criminal justice system for 13 years up to 2015.

I sought to consider possible explanations for these changes and their impact on access to justice. In that context, this paper sets out the findings of my research on the effects of changes to legal aid in summary criminal cases.<sup>2</sup> I sought, via empirical research, to identify trends in lawyer behaviour which have been influenced by changes to legal aid funding, particularly the standardised fee system and the reintroduction of means testing. While standard (fixed) fees were reintroduced in the mid-1990s, there has been relatively little empirical research which examines their impact on lawyer behaviour in summary criminal proceedings. This paper aims to partially fill that gap by providing a recent empirical analysis of lawyers' reactions to changes in the funding of summary criminal cases. In 2006, means tested eligibility for legal aid in magistrates' courts was reintroduced, and there has been little research which addressed the impact of that change. I sought to assess the potential impact of these two changes on lawyers' understanding and interpretation of their role and, by implication, the effect on the service that defendants receive.

Recent governments' legal aid policies, fuelled by scepticism about the effectiveness of public service professionals, have demanded ever more efficiency and sought to cut costs across the criminal justice system. I suggest that, as a result of changes to legal aid policy, lawyers are increasingly torn between giving effect to business needs or client needs. As lawyers become progressively uncertain about legal aid payments, they increasingly struggle to manage their professional and ethical duties towards clients. Services offered to defendants may suffer as lawyers' sense of professional identity is challenged by prevailing economic structures that undermine the roles and rituals of everyday practice.<sup>3</sup> Consequently, relationships between lawyers, courts and defendants appear to be under increasing levels of strain.

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<sup>2</sup> Summary criminal cases are those which are dealt with only in the magistrates' courts and, generally, carry a maximum penalty of six months' imprisonment.

<sup>3</sup> This is analogous to crisis experienced by healthcare professionals, demonstrated by J. Waring and S. Bishop, 'Healthcare identities at the crossroads of service modernisation: The transfer of NHS Clinicians to the independent sector?' (2011) 33 *Sociology of Health and Illness* 661

This article begins with an analysis of the political background which led to changes in legal aid policy. I then set out the present system of funding relevant to this paper, followed by the findings of studies which have documented lawyers' reactions to earlier changes to legal aid provision. After explaining my own research method, I illustrate and analyse my findings. I conclude that the evidence suggests that recent changes to legal aid have challenged the professional paradigm of legally aided work. In particular, I update the research which found that fixed fees appear to have had a negative impact on the service that defendants receive, and the research indicates a potential relationship between the reintroduction of means testing and increasing financial uncertainty for lawyers. Consequently, lawyers are increasingly placed in the iniquitous position of being forced to choose between acting in clients' best interests or in the interests of their business, the courts and the government.

#### CHANGING POLITICAL ATTITUDES AND APPROACHES TO LEGALLY AIDED REPRESENTATION

Traditionally, the professional paradigm of legal practice adopted a privileged position of civic morality based on access to justice and 'universalistic notions of service'.<sup>4</sup> Legally aided criminal defence services burgeoned in the 1960s and early 1970s, when experts were emphasising the ethical, service-led and altruistic nature of professional work.<sup>5</sup> This context may have informed the development of a habitus in which lawyers traditionally identify with symbolic (individualised, procedurally rigorous) approaches to justice.<sup>6</sup>

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<sup>4</sup> H. Sommerlad, 'Criminal Legal Aid Reforms and the Restructuring of Legal Professionalism' in *Access to Criminal Legal Aid: Legal Aid, Lawyers and the Defence of Liberty*, eds. R. Young and D. Wall (1996) 292 at 293

<sup>5</sup> K. Macdonald, *The Sociology of the Professions* (1995)

<sup>6</sup> C. Tata, 'Displaying Justice. What, if anything, does "ritual individualisation" at conviction and sentencing achieve?' *Socio-Legal Studies Association Annual Conference*. Newcastle University. 6 April 2017.

However, in the UK during the 1970s, ‘in contrast to the previous sympathetic professional portrayal, there emerged a more judgemental one’<sup>7</sup> towards publicly funded criminal defence lawyers. Le Grand notes how, against a desire to increase efficiency in public services, professionals have come to be seen as self-serving and obstructive.<sup>8</sup> The discourse which advocated distrust of public sector professionals has been particularly obvious in relation to publicly funded lawyers.<sup>9</sup> This attitude, coupled with the rise of consumerist culture from the 1970s, recast the delivery of ‘justice’ ‘as a disaggregated assortment of ‘skills’ and ‘services’’.<sup>10</sup> In light of this background, Young notes that the government became ‘determined to resist the arguments for any further colonisation of the magistrates’ courts by publicly-funded lawyers’,<sup>11</sup> through strategies of cultural change and cost containment.<sup>12</sup> According to Goriely, during the 1990s ‘government policy towards legal aid appeared to be driven solely by the exigency of cost control’.<sup>13</sup> In line with these themes, the government reintroduced the system of payment by way of fixed fee per case (rather than by hourly rate) in 1993, the implications of which are discussed below.

It was also at this time that the supplier induced demand theory became popular in policy circles.<sup>14</sup> The theory suggests that lawyers construct the need for legal assistance by providing unnecessary services.<sup>15</sup> Professional/state interactions are influenced by the strategies adopted by both entities,<sup>16</sup> and Sommerlad’s work suggests that the advent of this theory reduced

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<sup>7</sup> D. Newman, *Legal Aid, Lawyers and the Quest for Justice* (2013) 13

<sup>8</sup> J. Le Grand, ‘Knights, Knaves or Pawns? Human Behaviour and Social Policy’ (1997) 26(2) *J. of Social Policy* 149

<sup>9</sup> H. Sommerlad, ‘The Implementation of quality initiatives and the New Public Management in the Legal aid sector in England and Wales: bureaucratisation, stratification and surveillance’ (1999) 6(3) *International J. of the Legal Profession* 311

<sup>10</sup> Sommerlad *op. cit.*, n.4, p23

<sup>11</sup> R. Young, ‘Will Widgery do? Court Clerks, Discretion and the Determination of Legal Aid Applications’ in *Access to Criminal Legal Aid: Legal Aid, Lawyers and the Defence of Liberty*, eds. R. Young and D. Wall (1996) 137 at 140

<sup>12</sup> Sommerlad *op. cit.*, n.9

<sup>13</sup> T. Goriely, ‘The Development of Criminal Legal Aid in England and Wales’ in *Access to Criminal Legal Aid: Legal Aid, Lawyers and the Defence of Liberty*, eds. R. Young and D. Wall (1996) 26 at 51

<sup>14</sup> C. Tata, ‘In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and ‘Ethical Indeterminacy’ in *Criminal Defence Work*’ (2007) 34(4) *J. of Law and Society* 489

<sup>15</sup> *id*

<sup>16</sup> Macdonald, *op. cit.*, n.5

lawyers' morale, as they felt it reflected the government's lack of understanding about the nature of legally aided work.<sup>17</sup> The theory of supplier induced demand remains unproven,<sup>18</sup> and Tata highlights the problem of trying to determine what constitutes 'need' in a quasi-market which relies to a large degree on complex professional decision-making according to case details, ethical issues, clients' needs and lawyers' own interests.<sup>19</sup> In this context, it is important to remember that the state exercises significant control over the necessity for a 'market'; prosecutions are state designed, instigated and funded.

Despite the reintroduction of fixed fees, both Cape and Moorhead<sup>20</sup> and Hynes and Robins<sup>21</sup> identify an increase in summary criminal legal aid claims in the late 1990s, and in an attempt to gain further control over such costs, the government decided that the number of firms providing legal aid in criminal cases should be limited by a franchising system.<sup>22</sup> The franchising of public services had gained popularity in the 1980s when 'politicians were beginning to 're-invent government' by contracting out services to private suppliers'.<sup>23</sup> This reflects a political preference for managerial techniques used by commercial business, and a desire to become purchaser instead of provider of public services.<sup>24</sup> This also reflects the rise of new public management in service based institutions, which has been well documented by, among others, Sommerlad.<sup>25</sup> Osborne and Gaebler suggest that the entrepreneurial spirit

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<sup>17</sup> H. Sommerlad, 'Reflections on the reconfiguration of access to justice' (2008) 15(3) *International J. of the Legal Profession* 179

<sup>18</sup> E. Cape and R. Moorhead, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (2005) <<http://www.legalaidreform.org/criminal-legal-aid-resources/item/112-identifying-cost-drivers-in-criminal-defence-work>>

<sup>19</sup> Tata, *op. cit.*, n.14

<sup>20</sup> Cape and Moorhead, *op. cit.*, n.18

<sup>21</sup> S. Hynes and J. Robins *The Justice Gap. Whatever happened to legal aid?* (2009)

<sup>22</sup> C. Falconer, *A Fairer Deal for Legal Aid* (Department for Constitutional Affairs Cm 6591, 2005).

<sup>23</sup> T. Goriely, 'Revisiting the Debate Over Criminal Legal Aid Delivery Models: Viewing International Experience from a British Perspective' (1998) 5(1) *International J. of the Legal Profession* 7 at 8

<sup>24</sup> D. Osborne and T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (2000)

<sup>25</sup> Sommerlad, *op. cit.*, n.9; H. Sommerlad, 'Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid' (2004) 31(3) *J. of Law and Society* 345

adopted by governments since the 1980s requires them to restructure markets, including via contracting schemes.<sup>26</sup>

Against that background, during the 1990s, the government decided that firms who wished to provide publicly funded advice in criminal proceedings would have to hold a contract for those services issued by the Legal Aid Board,<sup>27</sup> which was replaced in 1999 by the Legal Services Commission ('LSC'). The LSC was charged with developing and maintaining criminal legal aid funds under the Criminal Defence Service ('CDS'). The launch of CDS led to an approximate 15 per cent drop in the number of firms providing legal advice in criminal proceedings, which resulted from the fact that those firms who only conducted a very small amount of criminal defence work were unable to meet the contracting criteria.<sup>28</sup> As franchising regimes were introduced, managerial influences took greater control over criminal defence solicitors, because the contracts devised by the LSC required lawyers to adopt specific working practices which the LSC (not necessarily the firm) regarded as appropriate. This represented a challenge to the lawyer/client relationship,<sup>29</sup> and to lawyers' professional identity, because the contractual terms of the legal aid franchising system appear to place limits on lawyers' ability to make flexible, autonomous decisions. As Sommerlad noted, 'the development of a direct relationship with the state raised the possibility of managerial control over the legal aid sector'<sup>30</sup> as governments made explicit attempts to circumscribe and define lawyers' roles.<sup>31</sup> Wall also notes that such provisions 'are employment conditions which

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<sup>26</sup> Osborne and Gaebler, *op. cit.*, n.24

<sup>27</sup> Hynes and Robins, *op. cit.*, n.21

<sup>28</sup> *id*

<sup>29</sup> R. Young and D. Wall, 'Criminal Justice, Legal Aid and the Defence of Liberty' in *Access to Criminal Legal Aid: Legal Aid, Lawyers and the Defence of Liberty*, eds. R. Young and D. Wall (1996) 1; E. Cape, 'Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers' *Legal Ethics* (2006) 9(1); 56

<sup>30</sup> Sommerlad, *op. cit.*, n.4, p297. See also H. Sommerlad, 'Some Reflections on the Relationship between Citizenship, Access to Justice and the Reform of Legal Aid' (2004) 31 (3) *International J. of the Legal Profession* 345-68

<sup>31</sup> E. Cape, 'Rebalancing the Criminal Justice Process: Ethical Challenges for Criminal Defence Lawyers' (2006) 9(1) *Legal Ethics* 56

provide a mechanism of governance and define a new type of legal professional<sup>32</sup> who has to work with ‘the competing rationalities that arise from the conflicting professional agendas of the groups involved in the process’.<sup>33</sup> Conflict may result from struggles over jurisdiction,<sup>34</sup> arising from the unique public/private position of legal aid lawyers:<sup>35</sup> that is, the question of whether the legal profession or the state is best placed to determine the operation of legal aid.

Government initiatives reflected a neoliberal style agenda in which managerial influences of competitive business practices were applied to public institutions via contracting provisions.<sup>36</sup> This move prioritised economy and efficiency over adversarial criminal justice principles and placed the demands of efficiency and case management above the needs of defendants (and victims). I suggest that, via neoliberal philosophy (particularly its manifestation through managerialism), debates about the meaning of access to justice have been lost in concerns about efficiency. These changes challenge the normative features of the profession which had developed in the 1960s, which in turn hinders lawyers’ understanding of, and ability to exercise, their professional obligations towards their clients. Indeed, Sommerlad demonstrates that managerialism has led to the exclusion of marginalised welfare citizens (including many defendants) from debates about citizenship, while demands for efficiency and value for money have neglected to consider the complex issues surrounding access to justice.<sup>37</sup>

As if to exemplify these issues, in 2006 Lord Carter performed a review of legal aid and came to the view that the procurement of criminal legal aid was inefficient.<sup>38</sup> He went on to state:

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<sup>32</sup> D. Wall, 'Keyholders to Criminal Justice? Solicitors and Applications for Criminal Legal Aid' in *Access to Criminal Legal Aid: Legal Aid, Lawyers and the Defence of Liberty*, eds. R. Young and D. Wall (1996) 114 at 115

<sup>33</sup> *id*

<sup>34</sup> Macdonald, *op. cit.*, n.5

<sup>35</sup> T. Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (1987)

<sup>36</sup> I use the term neoliberalism as a portmanteau term but understand it as a complex and often contradictory set of political practices that tend to substitute economic market rationalities for welfare rationalities and, in the UK at least, have typically developed following crises of political ideology (J. Peck, 'Zombie neoliberalism and the ambidextrous state' (2010) 14 *Theoretical Criminology* 104).

<sup>37</sup> H. Sommerlad, 'Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid' (2004) 31(3) *J. of Law and Society* 345

<sup>38</sup> Department of Constitutional Affairs 'Procurement of Criminal Defence Services: Market-based reform' (2006) <[http://www.legalaidprocurementreview.org.uk/docs/leaflet\\_pcapp.pdf](http://www.legalaidprocurementreview.org.uk/docs/leaflet_pcapp.pdf)>

‘we had to break the hold of the criminal practitioners and force them to restructure so we could get more control over the costs of provision’.<sup>39</sup> Carter viewed legal aid provision in criminal proceedings as a market which should be ‘driven by competition based on quality, capacity and price’.<sup>40</sup> The government was also concerned that a number of firms were conducting only a small amount of legally aided crime work and were disproportionately draining resources; something that Crouch might term ‘over provision’.<sup>41</sup> Over provision also allows greater choice in provision than pure market forces would accommodate,<sup>42</sup> and the government sought to restrict such choice (perhaps in contradiction with neoliberal principles of consumerism<sup>43</sup>). Carter was keen to expand payment by way of fixed fee in criminal legal aid, based on a ‘swings and roundabouts’ logic.<sup>44</sup> That logic dictates that losses on cases which took more time than the fixed fee allowed for would be compensated by gains made during straightforward matters.<sup>45</sup> Such logic requires lawyers to shift focus away from ethical obligations towards their clients and further towards business demands of their firms. The National Audit Office noted that, in implementing such provisions, the former LSC was unable to understand its supplier base,<sup>46</sup> which left suppliers feeling ‘alienated’<sup>47</sup> and ‘fragmented and disillusioned’.<sup>48</sup>

There have been further important changes to the way in which representation in summary criminal proceedings is funded in the first two decades of the twenty-first century (discussed

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<sup>39</sup> Hynes and Robins, op. cit., n.21, p53

<sup>40</sup> S. Leech, ‘Solicitors ‘Deserting’ Legal Aid’ (2006) <[www.http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/6115514.stm](http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/6115514.stm)>

<sup>41</sup> C. Crouch, ‘Citizenship and Markets in Recent British Education Policy’ in *Citizenship, Markets and the State*, eds. C. Crouch, K. Eder and D. Tambini (2001) 111

<sup>42</sup> id

<sup>43</sup> W. Larner, ‘Neo-liberalism: Policy, Ideology, Governmentality’ (2000) *Studies in Political Economy* <<http://spe.library.utoronto.ca/index.php/spe/article/view/6724/3723>>

<sup>44</sup> Tata, op. cit., n.14

<sup>45</sup> id

<sup>46</sup> National Audit Office ‘C&AG Report on Accounts: Community Legal Service Fund and Criminal Defence Service accounts 2008-09’ <[http://www.nao.org.uk/publications/0809/lsc\\_accounts.aspx](http://www.nao.org.uk/publications/0809/lsc_accounts.aspx)>

<sup>47</sup> Hynes and Robins, op. cit., n.21, p1

<sup>48</sup> Law Society, ‘Access to Justice Review’ (2010) <<http://www.lawsociety.org.uk/new/documents/2010/access-to-justice-review.pdf>> at 3

below), which make it clear that government policies continue to prioritise managerial goals over lawyer/client/court relationships. However, given that lawyers facilitate the efficient administration of criminal justice,<sup>49</sup> the government remains, to an extent, reliant on their presence in summary criminal proceedings. This further compromises lawyers' independence as they are obliged to submit to government demands for efficiency while also attempting to represent their clients' best interests. The data set out below highlights how one group of lawyers feels that its role has been further compromised, and how this has influenced the way that they handle cases.

## THE PRESENT SYSTEM OF FUNDING

The most common form of legally aided representation in magistrates' courts is publicly funded advice, case preparation and representation at court under a Representation Order granted on behalf of the Legal Aid Agency.<sup>50</sup> In order to obtain legally aided representation, an applicant must pass both the merits test and the means test. The merits test is based on the interests of justice, and the test has remained largely unchanged since guidance was given on the criteria in 1966. The criteria are broadly based either on the risk of loss of liberty or livelihood, case complexity or the inability of defendants to properly follow the proceedings.<sup>51</sup> However, in 2006 the administration of the test shifted from court legal advisers to non-legally qualified court support staff<sup>52</sup> amid the executive's concerns that court legal advisers were too

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<sup>49</sup> Young and Wall, *op. cit.*, n.29

<sup>50</sup> Defendants are also entitled to one-off free representation in court (except at trial) for imprisonable offences, or if they appear in custody, under the provisions of the duty solicitor at court scheme.

<sup>51</sup> The full criteria are; the case involves a substantial question of law, conviction would be likely to lead to loss of liberty or livelihood, or would cause substantial reputational damage, the defendant may be unable to understand the proceedings or to present his own case due to a language barrier, mental illness, or other incapacity, the nature of the defence requires that witnesses need to be traced, or prosecution witnesses will need to be expertly cross-examined, it is in the interests of someone other than the defendant that the defendant should be represented (Home Office, 'Report of the Departmental Committee on Legal Aid in Criminal Proceedings' (H.M.S.O. Cmnd 2934 1966))

<sup>52</sup> I recall this shift as a practitioner, and the greatest concern appeared to be the delay it would cause in knowing whether legal aid had actually been granted. Of course, that concern can only be stated anecdotally.

often persuaded to grant legal aid so that they would be relieved of some of their duties towards unrepresented defendants.<sup>53</sup>

The removal of legal adviser discretion in granting legal aid was only one of a number of measures designed to reduce legal aid expenditure. Also in 2006, means testing was reinstated for those seeking representation via legal aid in magistrates' courts. Means testing was reintroduced (via the Criminal Defence Service Act 2006) in light of concerns that its abolition had caused an increase in criminal legal aid expenditure,<sup>54</sup> even though the system had historically been very costly to administer.<sup>55</sup>

Applications for legal aid are now submitted to Legal Aid Agency administration centres, along with numerous documents (wage slips, previous convictions, charge sheets, bank statements and, for self-employed applicants, full tax returns and accounts), and processed thereafter. The former LSC came under severe criticism for delay in processing applications, which left people unrepresented in serious cases.<sup>56</sup> Solicitors interviewed by Kemp argued 'that the administrative requirements of the means test could be too onerous for some people and this could have the unintended consequences of restricting access for eligible applicants, particularly those who are vulnerable.'<sup>57</sup> Kemp further found that those who are self-employed particularly struggled to obtain legal aid due to the burdensome requirements about the provision of evidence in support of an application for funding.<sup>58</sup> As will be seen below, this finding was supported by comments made within my primary research. There is also concern

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<sup>53</sup> Young, *op. cit.*, n.11

<sup>54</sup> V. Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (2010) <[http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices\\_29092010.pdf](http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf)>

<sup>55</sup> P. Kenway 'Means-testing in the Magistrates Court: Is This Really What Parliament Intended?' New Policy Institute (2006)

<sup>56</sup>C. Baksi and J. Hyde, 'LSC Debt Collection Tactics Slammed' *Law Society Gazette* 16 March 2011, 1. The administration centres have also been criticised for delay in processing applications (C. Baksi, 'Djanogly Urged to Ease Legal Aid Backlog' *Law Society Gazette* 23 June 2011, 3).

<sup>57</sup>Kemp, *op. cit.*, n.54, p6

<sup>58</sup> id

that the funding thresholds for criminal legal aid are set too high, representing a ‘gulf between the reality of the new test and the image of it presented by speakers during parliamentary debates.’<sup>59</sup> Despite the reintroduction of means testing in 2006, Kemp notes that by 2010 ‘no research has examined the impact of the change on defendants accessing legal representation’<sup>60</sup> in magistrates’ courts. By 2012, lawyers in Kent described the system as discriminatory, unfair and unworkable.<sup>61</sup> Lawyer led campaign groups felt that the reintroduction of means testing placed considerable burdens on defence solicitors, who ‘were expected to bear the cost of administering the scheme’ in assisting applicants to complete the forms, gather evidence of means and liaise between the legal aid body and the client.<sup>62</sup> This begins to illustrate the way that lawyers’ professional duties towards their clients are compromised, as time spent organising legal aid may reduce time spent dealing with clients’ concerns.

When legal aid is granted, payment is generally made by way of standard fee. The fees are designated by case categories. Category one fees broadly cover guilty pleas, uncontested breaches of probation orders and cases that are discontinued. Category two fees cover trials, cases that are fully prepared to trial but either the defendant pleads guilty or the case is discontinued, contested breaches of probation orders and cases in which mixed pleas (i.e. a guilty plea to one charge and a not guilty plea to another) are entered. Category three fees deal with committals to the Crown court that are discontinued. The categories are further subdivided into lower, higher and non-standard fee claims based on the amount of work done. The non-standard fee is an ‘escape’ fee. Once the non-standard fee threshold is reached, work conducted is paid on an hourly basis. Important research on the potential effect of fixed fees

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<sup>59</sup> Kenway, *op. cit.*, n.55, p2

<sup>60</sup> Kemp, *op. cit.*, n.54, p16

<sup>61</sup> C. Baksi, 'Abolish 'Unfair' Means Testing, say Criminal Lawyers' (2012) <[www.lawgazette.co.uk/news/abolish-unfair-means-testing-say-criminal-lawyers](http://www.lawgazette.co.uk/news/abolish-unfair-means-testing-say-criminal-lawyers)>

<sup>62</sup> Hynes and Robins, *op. cit.*, n.21, p118

in summary criminal proceedings is discussed below. Since this research was conducted, the claimable fees have been reduced by 8.75% despite the fact that there had been no rise in payment rates for over 10 years.

## LAWYERS' REACTIONS TO CHANGING LEGAL AID POLICY

Sommerlad conducted a wide ranging review of research on the impact of changes to legal aid policy in the two decades up to 2008.<sup>63</sup> Her analysis highlighted that legal aid sector lawyers have been affected by funding alterations in a number of ways.<sup>64</sup> Sommerlad demonstrates that lawyers felt that reforms reduced their professional autonomy and ability to use discretion (both key features of professional identity<sup>65</sup>), that they were increasingly being made subject to intrusive surveillance, and that they were cynical about quality initiatives; particularly as 'partners are propelled into ever greater cost consciousness'.<sup>66</sup> As such, Sommerlad argued that changes to the structure of legal aid provision in terms of rationalisation, increased competition and greater regulation have transformed the 'structure, culture and ethos of the profession'.<sup>67</sup>

Gray, Fenn and Rickman's important research suggested that solicitors would tend to react to the reintroduction of fixed fees by reducing the amount of work they did on cases that would clearly not exceed the threshold for a lower standard fee.<sup>68</sup> They also found that firms were splitting case fees where there was more than one charge alleged so that two claims could be made.<sup>69</sup> However, the evidence did not support a theory that solicitors would increase core

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<sup>63</sup> Sommerlad, op. cit., n.17

<sup>64</sup> id

<sup>65</sup> J. Evetts, 'The Construction of Professionalism in New and Existing Occupational Contexts: Promoting and Facilitating Occupational Change' (2003) 23(4/5) *International J. of Sociology and Social Policy* 22

<sup>66</sup> Sommerlad, op. cit., n.9

<sup>67</sup> Sommerlad, op. cit., n.17

<sup>68</sup> A. Gray, P. Fenn and N. Rickman, 'Controlling Lawyer's Costs through Standard Fees: An Economic Analysis' in *Access to Criminal Justice. Legal Aid, Lawyers and the Defence of Liberty* eds. R. Young and D. Wall (1996) 192

<sup>69</sup> id

costs to ensure that cases went beyond the standard fee categories.<sup>70</sup> Stephen, Fazio and Tata's research on the Scottish system found that, following the reintroduction of standard fees, solicitors were putting less effort into conducting cases and were reducing 'expenditure on those activities which are incorporated in the core payment of the standard fee and increasing activities which are outside the core costs and are separately compensated'.<sup>71</sup> This behaviour allowed lawyers to increase the volume of cases taken, thereby demonstrating economically rational behaviour.<sup>72</sup>

Tata and Stephen found that solicitors believed remuneration changes meant that they were spending less time on face-to-face contact with clients, and that this caused defence work to be less effective.<sup>73</sup> Further efficiency drives meant that solicitors were increasingly pressurised into dealing with cases in routinized ways. McConville, Hodgson, Bridges and Pavlovic found that such problems existed in the early 1990s,<sup>74</sup> and that lawyers placed heavy reliance on standardised services provided by non-qualified staff to build relationships because discontinuous service from *lawyers* (who were mainly court based) was a business necessity.<sup>75</sup> While I have never experienced the use of unqualified staff in magistrates' courts to act as 'runners' for lawyers in the same way that McConville *et al* describe (perhaps because there are no longer funds for such employees), my research suggests that the problems that these studies identified have worsened given that further drives for efficiency and cost cutting have occurred since that time.

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<sup>70</sup> id

<sup>71</sup> F. Stephen, G. Fazio and C. Tata, 'Incentives, Criminal Defence Lawyers and Plea Bargaining' (2008) 28(3) *International Rev. of Law and Economics* 212 at 213

<sup>72</sup> id. Despite these trends, profit costs only rose in line with RPI and at a lower rate than GDP (Cape and Moorhead, *op cit.*, n18)

<sup>73</sup> C. Tata and F. Stephen, "Swings and Roundabouts': Do Changes to the Structure of Legal Aid Remuneration Make a Real Difference to Criminal Case Management and Case Outcomes?' (2006) <[http://staff.law.strath.ac.uk/staff/cyrus\\_tata/public/Swingsper cent20andper cent20Roundaboutspers cent20Draft106.pdf](http://staff.law.strath.ac.uk/staff/cyrus_tata/public/Swingsper cent20andper cent20Roundaboutspers cent20Draft106.pdf)>

<sup>74</sup> M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused. The Organisation and Practices of Criminal Defence Lawyers in Britain* (1994).

<sup>75</sup> McConville *et al* (id) felt that this significantly undermined lawyer/client relationships of trust and the ethical status of the legal aid lawyer's work. During the course of my research, I only observed direct client/lawyer contact. There was a notable absence of reliance on unqualified assistants at court which featured heavily in McConville *et al*'s study.

## METHOD

I sought, via empirical research,<sup>76</sup> to test and update the findings of research discussed above in relation to recent changes to legal aid policy. The objective of the research was to begin to illuminate accounts of the effect(s) of changes to legal aid policy on lawyer behaviour in summary criminal courts. Such courts are an often neglected site of study as a result of ‘the fascination that most lawyers have for jury trials.’<sup>77</sup> My research took the form of a case study which ‘is concerned with the complexity and particular nature of the case in question’<sup>78</sup> and is generally associated with a specific organisation or community. The subject of the case study was a particular criminal justice area (as designated by the Ministry of Justice) in an area of South East England. As a result, the research takes an idiographic approach in which the findings cannot necessarily be applied regardless of time and place.<sup>79</sup> I was aware of the potential limitations of conducting a case study which is limited both geographically and temporally, and so I conducted two forms of ethnographic research in an attempt to obtain as holistic a view of that particular case as possible. It should also be noted here that I had been a practitioner in the area of study at the time of conducting this research, which affected both the design of the study and collection of data in ways that I discuss below.

The empirical research consisted of observations followed by semi-structured interviews. The purpose of the observation and interviews was to become ‘immersed in a social setting for some time... with a view to gaining an appreciation of the culture of a social group’<sup>80</sup> from a greater distance than I had previously experienced. I conducted the equivalent of 20 days of

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<sup>76</sup> The empirical research was conducted as part of my PhD study (L. Welsh, *Magistrates, Managerialism and Marginalisation: Neoliberalism and Access to Justice* (2016) PhD Thesis, University of Kent)

<sup>77</sup> B. Bell and C. Dadomo, 'Magistrates' Courts and the 2003 Reforms of the Criminal Justice System' (2006) 14(4) *European J. of Crime, Criminal Law and Criminal Justice* 339 at 341

<sup>78</sup> A. Bryman, *Social Research Methods* (2012) 66

<sup>79</sup> id

<sup>80</sup> id, p369

observation in magistrates' courts in South East England<sup>81</sup> between October 2012 and February 2013, during which time I observed a range of hearings including sentencing, bail applications, trials and case management hearings. I subsequently analysed the observation diary to identify themes and then drew out examples in support of those themes.

As is demonstrated by studies conducted by, among others, Carlen<sup>82</sup> and McBarnet,<sup>83</sup> observation of court processes can assist in uncovering the nature of relationships between court personnel and patterns of workgroup behaviour.<sup>84</sup> While Baldwin notes that courtroom observers may feel a sense of exclusion and alienation<sup>85</sup> from the proceedings (akin to defendants), my previous experience working in these courts allowed me to understand the nuances of court personnel behaviour. Conducting observations also allowed me to step back from my ordinary involvement in summary criminal procedures to make a preliminary assessment of the behaviour of advocates and defendants in court. There was a risk that my presence would affect the usual rhythm of working life and that the participants may have altered their behaviour. However, the fact that I was a partially participating observer<sup>86</sup> did, I think, minimise that risk. I had a similar experience to Flood, who said:

‘Being active in the field as participant can mean that others identify one as belonging to a particular group...My being so categorised meant that my situation was perceived as harmless and enabled me to observe things that I might not have been able to see if my position was different.’<sup>87</sup>

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<sup>81</sup> The particular criminal justice area incorporates four magistrates' courts in an area of South East England.

<sup>82</sup> P. Carlen, *Magistrates' Justice* (1976).

<sup>83</sup> D. McBarnet, *Conviction: Law, the State and the Construction of Justice* (1981).

<sup>84</sup> J. Baldwin, 'Research on the Criminal Courts' in *Doing Research on Crime and Justice* eds. R. King and E. Wincup (2000) 237.

<sup>85</sup> *id*

<sup>86</sup> I take this definition of my role from Bryman, *op. cit.*, n78, in that I was (at that time) a participant in the groups' core activities (i.e. I was a defence solicitor practising in the same courts I was observing) but I was not involved in the cases that I observed. The data obtained by interviews is as significant a data source as observation.

<sup>87</sup> J. Flood, 'Socio-Legal Ethnography' in *Theory and Method in Socio-Legal Research* eds. R. Banakar and M Travers (2005) 33 at 43

Further, while the presence of an observer can result in reactive effects, several advocates (both prosecuting and defending) commented that, although my presence as observer was unusual, they did not pay a lot of attention to what I was doing, and did not feel a need to be on their best behaviour, because I was already an 'insider' or 'on their team'. I was, therefore, able to observe usual (as opposed to moderated) courtroom behaviour, as well as benefit from my own knowledge of the court system. This point does, however, have to be balanced against the risk of over-identification with the research subjects, which means that it is important to retain reflexivity and recognise the potential bias that my role created. I do however argue elsewhere that some of my findings have been generated specifically as a result of my familiarity with the proceedings.<sup>88</sup> In addition, observations allowed me to focus the interviews on particular topics that required further exploration.

I interviewed 19 advocates (12 defence lawyers and seven prosecutors) during Spring/Summer 2013. I did not interview defendants for a number of reasons. Firstly, I wanted to locate the findings in the context of policy change and so I needed interviewees who had both long term experience of the system and an understanding of such changes. Secondly, there was no base line data of pre-change defendant experiences from which I could work, particularly taking into account that the study was geographically limited. Thirdly, given my practitioner-observer role, interviewing defendants in that area would have been particularly ethically problematic. I did decide to interview both prosecutors and defence solicitors to try to obtain as holistic a view as possible of the effects of changes to legal aid. It was interesting to note that advocates on both sides of the adversarial process expressed largely convergent views about the impact of means testing on publicly funded criminal defence representation.

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<sup>88</sup> L. Welsh, 'Are Magistrates' Courts really a 'Law Free Zone'? Participant Observation and Specialist Use of Language' (2013) (13) *Papers from the British Criminology Conference* 3

As I was keen to analyse the impact of changes to legal aid, the advocates selected for interview must have had experience of summary criminal proceedings both before and after the reintroduction of means testing for publicly funded representation, which was confirmed at the time of interview.

It will be apparent from the above that I had previously worked alongside all of the advocates that I interviewed.<sup>89</sup> While this meant that I had to be careful to remain reflexive about my role, it also brought several benefits. I was able to gain access to interview prosecutors with relative ease. I do not doubt that this was partly as a result of my familiarity with the courts I was examining; I was viewed as a familiar and trusted face – someone who was already a member of the workgroup and could consider the workgroup’s interests. This meant that I was able to examine the issues from both sides of the adversarial system. As Kemp says, it is important that the effects of policy are understood, especially at a local level and on a ‘whole system’ basis.<sup>90</sup>

The interviews were separated into two sections, with one set of questions about legal aid and another about magistrates’ court practices more generally. It was important that elements of the interviews were structured in order to obtain comparable data, but respondents were also encouraged to explain their opinions as they felt appropriate.<sup>91</sup> Interviewees were asked outright if they felt that the reintroduction of means testing had any effect on proceedings in the magistrates’ court. I also asked questions about whether they conducted work when payment was uncertain because I had observed behaviour (during the first stage of empirical research) which suggested that issue arose. Participants were also asked what they thought

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<sup>89</sup> I did not, however, interview my former colleagues within the firm that I had worked for because I felt that I was too familiar with the firm’s procedures and client matters to be able to conduct an impartial interview.

<sup>90</sup> Kemp, *op. cit.*, n.54

<sup>91</sup> This is similar to the approach adopted in Sommerlad, *op. cit.*, n.9

generally about the fee structure in relation to legally aided representation. In terms of magistrates' court practices, interviewees were asked about the effect of policies designed to improve efficiency and about lawyer/client relationships. I transcribed the interviews then thoroughly read and re-read the transcripts to identify themes and subthemes via 'recurring motifs in the text'<sup>92</sup> which were then used to categorise and organise the data. However, it must also be remembered 'that all accounts from interview can only be understood in the context of the interview and any information given cannot be taken to mean the 'truth''<sup>93</sup> because they may simply reflect an account of after the event rationalisations.<sup>94</sup>

Despite the limitations set out above, the fact that my data is relatable to similar studies does suggest that the propositions advanced have broader applicability across the summary criminal justice system. As such, it may be possible to tentatively suggest that these findings provide, as Sommerlad did, 'an insight into the possible impact of the reforms'<sup>95</sup> in the context of change since 2010, particularly when one takes into account the reliance placed on discursive professional practice in this field.<sup>96</sup>

#### THE EFFECT OF FIXED (STANDARD) FEES ON DEFENCE SERVICES

During the 1960s, the government had decided that the fairest way to pay advocates was by hourly rate. However, as noted above, fixed fees were reintroduced in the 1990s as a result of concerns that legal aid costs had risen by 300 per cent.<sup>97</sup> There exists, however, 'relatively little published direct empirical examination of the effects of standard fees for summary work'.<sup>98</sup> While my research findings are based on data from a relatively small interview and

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<sup>92</sup> Bryman, *op. cit.*, n.78, p554

<sup>93</sup> S. Bano, 'Standpoint', 'Difference' and Feminist Research' in *Theory and Method in Socio-Legal Research* eds. R. Banakar and M. Travers (2005) 91 at 103

<sup>94</sup> Sommerlad, *op. cit.*, n.9

<sup>95</sup> *id* p317

<sup>96</sup> *id*

<sup>97</sup> Young and Wall, *op. cit.*, n.29

<sup>98</sup> Tata and Stephen *op. cit.*, n.71 p2

observation sample, the views expressed by solicitors about the effect of working under a fixed fee scheme seem to be surprisingly candid, and support Sommerlad's argument that economic controls on lawyers' publicly funded work create 'an irresistible pressure towards routinized justice and the positioning of legal aid clients'.<sup>99</sup> It was not possible to detect any behavioural patterns relating specifically to fixed fees via observation so these findings are based on the data obtained via interview.

Seven of the twelve defence solicitors interviewed expressed an opinion about the level of payment received under the fixed fee scheme. Most of those interviewees indicated that the fixed fee payment scheme was in principle acceptable – either because 'on average it pans out' because the difficult cases are subsidised by the straightforward ones,<sup>100</sup> or because the level is 'about right when you can get legal aid'.<sup>101</sup> Interviewee O said that the system is 'not great but it's, I guess it's OK' because it is possible to break out of the fixed fee system and be paid per hour in lengthy or complicated cases – the non-standard fee.<sup>102</sup> All of these issues were considered by interviewee F, who summarised the situation as follows:

'I think that the fee structure at the moment is not too bad... I understand entirely the logic behind standard fees... in any standard fee situation, there are going to be cases where you lose and there will be cases where you win. It's not ideal, obviously I'd prefer to be paid for everything I do, but that would also mean that there would be some cases where I would be putting in a bill for less than £50... I think that it is a very good thing when you go outside standard fees you are paid for what you do and that is looked at by the Legal Aid Agency and they will tax it down if they think you're billing stuff that you shouldn't be billing for because that

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<sup>99</sup> Sommerlad, *op. cit.*, n.17, p183

<sup>100</sup> Interview A at 4. This provides an example of 'swing and roundabouts' logic described above.

<sup>101</sup> Interview S at 4

<sup>102</sup> Interview O at 5

incentivises two things. First of all, it incentivises hard work on the client's behalf and secondly it means that you don't do unnecessary things... So I don't have very much complaint or really any complaints about the magistrates' court fee structure'.<sup>103</sup>

In contrast, interviewee C described the profession as 'on its knees' due to the fact that there has been no rise in the fees paid since the late 1990s and payment rates are too low.<sup>104</sup> Kemp also found that solicitors asserted that they 'were not adequately paid for the services they provided and they felt this would have a detrimental impact on the quality of service'.<sup>105</sup>

Interviewee K was similarly disparaging in saying:

'Fixed fees in the magistrates' and Crown court act, can act as a disincentive to do work thoroughly and properly... I think the whole system is underfunded and does not act as an incentive to more or less provide quality and good service. Whereas I was brought up for most of my career to say to clients 'if you pay me privately you'll get no better service than if you've got legal aid', that parted some time ago.'<sup>106</sup>

Interviewee K was clearly of the view that the level of remuneration received under legal aid affects the service that defendants receive. Most of the defence solicitors interviewed did generally acknowledge that payment via the fixed fee system provides an incentive to work less thoroughly on cases than if payment were made by the hour, even if they agreed with the system in principle. This data demonstrates how the payment system can place lawyers in a

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<sup>103</sup> Interview F at 5

<sup>104</sup> Interview C at 3. Interviewee I made a similar comment. The National Audit Office criticised the low remuneration rate in publicly funded criminal defence representation (National Audit Office *C&AG Report on Accounts: Community Legal Service Fund and Criminal Defence Service accounts 2008-09*. (2009) <[http://www.nao.org.uk/publications/0809/lsc\\_accounts.aspx](http://www.nao.org.uk/publications/0809/lsc_accounts.aspx)>)

<sup>105</sup> Kemp, op. cit., n.54, p107

<sup>106</sup> Interview K at 6

position where they feel it necessary to compromise their duties towards clients. This was particularly clear in the context of increased case complexity brought about by New Labour's 'relentless law-making'<sup>107</sup> which, for example, enabled prosecutors to more easily admit character or hearsay evidence under the provisions of the Criminal Justice Act 2003. Such provisions placed greater constraints on lawyers' time, particularly in the context of static fixed fees, and appears, therefore, to have further damaged their ability to act as autonomous professional decision-makers. Consequently, the gap between ideals of symbolic, liberal approaches to justice and the reality of assembly line approaches to access to justice becomes apparent.<sup>108</sup>

Of those defence solicitors who did acknowledge that payment via fixed fee could mean that less time would be spent on case preparation than if hourly rates were paid, three were keen to say that the system did not affect the way that they personally work, while also acknowledging that their resources are stretched. The remaining defence solicitors tended to acknowledge that fixed fees provide a disincentive to put in extra work on a case, but in general terms – such as by saying 'it's human nature, you try and do as little as you can get away with and I think that's the big fault of the fixed fee system'<sup>109</sup> - rather than indicating that it affected their behaviour personally. By way of example, interviewee A, noting that initial contact with clients is focused on how to get paid, and that this taints the relationship (highlighting the dichotomy between instrumental (efficient) and symbolic (individualised) approaches<sup>110</sup>), said:

'You're inclined to get through things as quickly as possible. You're torn between doing something properly which is what you want to do and... working for

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<sup>107</sup> Hynes and Robins, op. cit., n.21, p115

<sup>108</sup> Tata, op. cit., n6

<sup>109</sup> Interview B at 4

<sup>110</sup> Tata, op. cit., n6

minimum wage... It's not that people suddenly don't want to do their jobs properly, it's just that you can't and it's incremental and we probably don't even notice that sort of jaded approach is creeping in.'<sup>111</sup>

Overall, interviewed solicitors appeared to be of the view that a fixed fee payment scheme was acceptable in principle, but that remuneration rates are too low to be able to provide a good service. These findings therefore support the work of Kemp,<sup>112</sup> and Tata and Stephen,<sup>113</sup> which suggested that the fee system means lawyers spend less time on cases and with clients, and goes further to indicate that this issue remains part of lawyers' everyday work practices. The results also echo Sommerlad's finding that lawyers feel client services suffer in the face of demands for ever greater cost efficiency because 'There is virtually no time for a human dimension or real diagnosis'.<sup>114</sup> Consequently, the process loses a display of human dignity<sup>115</sup> which may further undermine professional claims to an ethical status.

Interviewee F spoke of the struggle between the professional obligations of the job as against trying to run a profitable business:

'When you've got fixed fees there is always going to be a time at which you start looking at your watch and you start thinking 'how much are we actually being paid to do this?'... And that mental calculation has got to be done by anybody who is running a business. And there comes a point where on a fixed fee structure... you are thinking enough's enough and you have to start looking at, you know, exactly what level of service you are providing... yes, we are supposed to be providing a

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<sup>111</sup> Interview A at 4-5

<sup>112</sup> Kemp, op. cit., n.54

<sup>113</sup> Tata and Stephen, op. cit., n.73.

<sup>114</sup> Sommerlad, op. cit., n.17, p186

<sup>115</sup> Tata, op. cit., n.6

professional service but that doesn't mean that we aren't also having to run, try and run a profitable business and it's very difficult to do that if you don't have an eye on costs and the amount of time you are spending doing work for which you can't be paid.'<sup>116</sup>

This supports Newman's finding that lawyers were concerned to process cases as quickly as possible because, in order 'to sustain themselves, many lawyers insisted that they were forced to compromise their behaviour'.<sup>117</sup> However, unlike Newman, who said 'lawyers did not provide any discernible sense of regret at behaving in the manner they did',<sup>118</sup> my interviewees described themselves as 'torn' between their duties to the client and business needs. In their after-the-event accounts, they expressed insight into the difficulties this can cause defendants in that they described a temptation to 'cut corners' or perform as little work as possible in order to maximise profit.

These comments appear to specifically undermine the (supplier-induced demand) theory that lawyers provide unnecessary services in order to maximise income by claiming higher fees. Instead, and in line with managerial demands for efficiency, my findings and those of other studies suggest that lawyers seem to generally work to volume. This supports the findings of Gray *et al* which suggested that defence solicitors tended to reduce the amount of time spent on cases that would clearly not break out of the lower standard fee category.<sup>119</sup> In fact, the comments made by advocates entirely support the findings of Stephen *et al* in Scotland, who noted that the introduction of fixed fees meant that solicitors put less effort into conducting

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<sup>116</sup> Interview F at 6-7

<sup>117</sup> Newman, *op. cit.*, n.7, p 86

<sup>118</sup> *id* p87

<sup>119</sup> Gray *et al*, *op. cit.*, n.68

cases and reduced ‘expenditure on those activities which are incorporated in the core payment of the standard fee.’<sup>120</sup>

In line with above-mentioned concerns about reduced respect for autonomous professional decision making, the behaviours which appear to be reflected in the data suggest that changes to legal aid policy have succeed in transforming ‘traditional value rationality into an instrumental calculative rationality’.<sup>121</sup> This may have been achieved by undermining solicitors’ ability to act according to values traditionally espoused by public sector professionals.<sup>122</sup> Such behaviours could also be described as a shift away from ethical rationalities (based on normative beliefs that actions are morally good) towards means-end rationalities which are oriented further towards self-interest within given regulatory boundaries.<sup>123</sup> This may undermine lawyers’ understanding of their professional role. It is however, important to remember that ‘action cannot be understood as simply an adjustment to “given” realities...*action motivated by values..*’ is essential to provide context to behaviour.<sup>124</sup>

Against that background, advocates expressed that they felt constrained by the business circumstances in which they found themselves, and that this caused some conflict with their professional duties, which could provide evidence of tension between ethically motivated rationalities and environmental moulding. Young and Wall had predicted that the contracting scheme under which standard fees were introduced would mean that firms would struggle to remain profitable, and anticipated that ‘if the only way of making a profit under legal aid is to

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<sup>120</sup> Stephen *et al.*, op. cit., n.71, p213

<sup>121</sup> Sommerlad, op. cit., n.17, p187

<sup>122</sup> *id*

<sup>123</sup> S. Kalberg, ‘Max Weber’s Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History’ (1980) 85(5) *American J. of Sociology* 1145

<sup>124</sup> *id* p1170. Emphasis in original.

offer hurried, standardised services, then access to justice must suffer'<sup>125</sup> as lawyers are pressurised into dealing with cases (rather than clients) in standardised ways.<sup>126</sup> As such, lawyers are no longer able to clean the criminal process of its impurities by individualising cases,<sup>127</sup> which appears to create a sense of professional discomfort. Tata's research also confirms that lawyers often struggle to 'interpret and reconcile the apparently competing demands of client interests on the one hand and self-interest on the other'.<sup>128</sup> Again, my findings provide support for that argument, which raises issues about professional self-image.

Advocates did express some discomfort with their position, which may suggest they feel their ability to act in accordance with professional values is challenged by the competing interests which they must balance. Lawyers suggested that they would prefer to take a more robust, resistant approach to bureaucratic procedures in favour of client-centred approaches<sup>129</sup> if the pressure of running a business were not present. Newman was of the view that lawyers actively embraced the working patterns encouraged by fixed fees, and that this was demonstrated by a 'clear disregard for their clients'.<sup>130</sup> In contrast to Newman's study, defence advocates that I interviewed appeared to recognise that payment by fixed fee incentivises volume processing of cases over spending a significant degree of time examining the fine details of any given case, and expressed discomfort about such processes. Standardised, hurried case management clearly has the potential to place defendants at significant risk of inadequate access to justice in the proceedings as evidential or legal points may not be identified or pursued. Here exists a clear conflict between lawyers' duties to clients, stakeholders, the legal system and society at large which has been exacerbated by changes to

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<sup>125</sup>Young and Wall, *op. cit.*, n.29, p12

<sup>126</sup> Sommerlad, *op. cit.*, n.17; Newman, *op. cit.*, n.7

<sup>127</sup> Tata, *op. cit.*, n6

<sup>128</sup> Tata, *op. cit.*, n14

<sup>129</sup> McConville *et al* describe firms who adopt this approach as those which take a political stance and are resistant to policy ideals, as distinct from those who have adopted a more crime control, managerialist stance (McConville *et al*, *op. cit.*, n.72)

<sup>130</sup> Newman, *op. cit.*, n.7, p87

legal aid. Such conflicts appear to further challenge lawyers' understanding of their professional obligations.

#### THE EFFECT OF MEANS TESTING: LEVELS AND METHODS OF REPRESENTATION

Perhaps in line with a preference for volume case processing, levels of representation in summary criminal proceedings remain high. Of 183 cases observed during my fieldwork, only 40 defendants appeared to be unrepresented, of whom 22 would have been entitled to representation under legal aid provisions. Of the 143 defendants (78 per cent) who were represented, 75 defendants were represented under the terms of a Legal Aid Order, 23 were represented by a duty solicitor and the remaining 45 were either privately funded or solicitors were acting *pro bono*. I was not able to ascertain the reasons that some defendants were not legally represented.

My observations reflect a similar level of representation to that found by Kemp<sup>131</sup> (82 per cent). I did, however, observe during the course of the research that lawyers believe more defendants are appearing without legal representation. Six of the nineteen interviewees specifically referred to a greater number of defendants appearing without representation since means testing was reintroduced. Kemp similarly found that the number of defendants appearing without legal representation had increased since the reintroduction of means testing.<sup>132</sup>

Several more interviewees generally asserted that proceedings now take longer to conclude because things need to be explained to unrepresented defendants in greater detail. During the course of a conversation observed between a barrister and legal adviser at one magistrates'

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<sup>131</sup> Kemp, *op. cit.*, n.54

<sup>132</sup> *id*

court in late 2012, counsel observed that he thinks more people are appearing without representation since means testing was reintroduced. The legal adviser agreed with that observation and asserted that cases involving defendants appearing without representation take longer to be dealt with. Despite these comments, the proportion of unrepresented defendants remained relatively low. However, it seems that, although levels of representation remain reasonably high, lawyers are not necessarily confident about being remunerated for the service they provide.

#### MEANS TESTING AND EFFICIENCY DRIVES; UNCERTAINTY FOR LAWYERS

During the course of both observation and interviews (particularly in the latter) it became apparent that solicitors were representing defendants at financial risk to their firm. This appeared to result from the delay caused by the reintroduction of means testing combined with a politically perceived need to act efficiently. As the determination of the means and merits tests moved away from the court arena, advocates could not be sure legal aid would be granted prior to undertaking work required by the court.

During observation, I saw advocates completing their client's application for legal aid while already acting in court and solicitors complaining about being required to conduct case management hearings when they were not in funds. Similar sentiments emerged during the course of interviews, with interviewee S saying that work is conducted when remuneration is uncertain

‘All the time, all the time. I'd say if I was to go to court with six cases a day, roughly for example at least one of them would be a bit of a wing and a prayer job where you're hoping you would [be paid]...’<sup>133</sup>

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<sup>133</sup> Interview S at 4

Three of the seven prosecutors interviewed did not notice advocates working when they were unsure if they would be paid but all of the other nineteen interviewees described this as a relatively common occurrence since the reintroduction of means testing. While defence solicitors predictably had the strongest views about this issue (see below), four of the seven prosecutors interviewed also commented that they had a sense of defence solicitors doing work when they were unsure about payment a lot of the time, or that they had a sense of such behaviour every time they appeared in court. It was clear from the interview data that uncertainty resulted from the fact that solicitors were not necessarily confident that their potential client would pass the means test. Several defence solicitors said that they worked in this way ‘all the time’, others described it as a daily occurrence and several talked about attempting to secure payment via legal aid in terms of taking a risk or a gamble. Interviewee F explained that when there are problems with legal aid

‘These cases end up being dealt with *pro bono* by solicitors who, you know, have an ongoing, or have had an ongoing, relationship with the client and don’t want to see people stuck high and dry. I don’t think it happens for trials but I’m pretty sure it happens quite a lot for guilty pleas.’<sup>134</sup>

It must also be recognised that there may be other reasons why solicitors represent defendants on a *pro bono* basis, including to maintain good working relationships with the court and prosecutors. A high degree of co-operation exists between court personnel, which seems to be crucial to the smooth running of busy courts. Acting in a co-operative way also enables defence solicitors to maintain credibility and therefore remain a member of the exclusive, familiar group of personnel who work in summary criminal courts.<sup>135</sup> Alternatively, by

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<sup>134</sup> Interview F at 2

<sup>135</sup> Carlen, *op. cit.*, n.82; R. Young, ‘Exploring the Boundaries of Criminal Courtroom Workgroup’ (2013) 42 *Common Law World Review* 203.

continuing to act in such circumstances, lawyers may be performing a type of ‘defiant resilience’<sup>136</sup> in which they try to act in accordance with the habits of their field by emphasising the service-orientated nature of their work. This may be a coping mechanism that enabled them to protect their professional identity despite organisational change.

However, defence advocates recognised that, by taking risks in relation to the likelihood of payment, they are playing into the hands of a system that considers efficiency to be of paramount importance. As such, solicitors have displayed little resistance to legal aid reforms, perhaps as a result of the strength of the workgroup culture of co-operation.<sup>137</sup> For example, interviewee K said

‘Magistrates were trained and said absence of legal aid is no reason to adjourn and again solicitors were not, I think a) because we are professional and care about our clients but b) because we’re terrified someone else will come along and look after them and we’ll lose our market share, solicitors have facilitated the courts...we’ve allowed it to happen and we shouldn’t have done.’<sup>138</sup>

It seems that, as Burke *et al* found in relation to probation services, lawyers are finding it increasingly ‘difficult to reconcile what they perceive as public sector values within a new working environment that emphasized competition’.<sup>139</sup> This provides further evidence of lawyers feeling torn between a sense of duty towards their clients and a fear of losing work, and thereby harming their business. Those difficulties appear to create a sense of disempowerment towards the reform of legal aid, which may affect the level of service received

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<sup>136</sup> L. Burke, M. Millings and G. Robinson ‘Probation migration(s): Examining occupational culture in a turbulent field’ (2017) 17(2) *Criminology and Criminal Justice* 192 at 201

<sup>137</sup> Carlen, *op. cit.*, n.82

<sup>138</sup> Interview K at 3. Interviewee C also said ‘You’re expected to do it and we’ve all jumped into line and we do it’ (3)

<sup>139</sup> Burke *et al.*, *op. cit.*, n136, p198

by defendants as lawyers attempt to resolve the problem of conflicting imperatives through a mixture of compromise and pragmatism.<sup>140</sup>

#### (IN)EFFICIENCY, DELAY AND CHANGES TO LEGAL AID

As discussed above, the administrative requirements of the legal aid application procedure mean that it is difficult to know if or when legal aid will be granted. Defence solicitors also complained that it might take as long to try to resolve issues with legal aid as it would to actually prepare the case. Three quarters of defence solicitors and five of the seven prosecutors interviewed felt that problems with obtaining legal aid cause delay in summary criminal proceedings. These problems are however set against an administrative desire to increase efficiency in summary criminal proceedings. Efficiency measures became increasingly important in the criminal justice system as 'managerialism increased its influence over the courts in the late 1980s and early 1990s'.<sup>141</sup> As Faulkner and Burnett note, criticisms about inefficiency in the criminal justice system were in fact based on higher expectations of what the criminal justice system could achieve rather than on any actual deterioration in performance.<sup>142</sup>

The concern to ensure efficiency was also manifest in the introduction of the Criminal Procedure Rules (Cr.PR). Their provisions mean that 'magistrates are under constant pressure to avoid unnecessary hold-ups and to be especially wary of granting adjournments unless there are persuasive reasons'.<sup>143</sup> Consequently, defence lawyers appeared to feel that their professional decisions were more likely to be challenged by the court. For example,

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<sup>140</sup> For an account of similar rationalisations in criminal courts, see A. Mulcahy, 'The Justifications of `Justice': Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts' (1994) 34(4) *British J. of Criminology* 411.

<sup>141</sup> A. Sanders, 'Community Justice. Modernising the Magistracy in England and Wales' Institute of Public Policy Research (2000) < <http://www.ippr.org/publications/community-justicemodernising-the-magistracy-in-england-and-wales> > 13.

<sup>142</sup> D. Faulkner and R. Burnett, *Where Next for Criminal Justice?* (2012)

<sup>143</sup> T. Grove, *The Magistrate's Tale* (2003) 49

Interviewee O expressed annoyance that his assessment about the need for witness attendance at trial would likely be challenged by the court, which wanted the trial to conclude as swiftly as possible. He clearly regarded such challenges as an affront to his professionalism in stating ‘You’re a professional and you should be treated as one who is competent’.<sup>144</sup>

The same interviewee went on to express irritation that lawyers’ competence is not as highly regarded, or rewarded, as that of other professions. Nearly half of interviewees<sup>145</sup> expressed concern that their professional integrity was being challenged by the fee structure in the context of ever greater demands for efficiency, which caused them to feel demoralised. Interviewee B said

‘I think the profession is generally demoralised...if you pay peanuts you get monkeys and I think that’s what’s happening...I think we are a profession and we should have been treated like a profession. I don’t think we are anymore. I think we are treated like a commodity’.<sup>146</sup>

In the same context, there was a tendency for lawyers to compare their treatment to that of other professionals in a negative way, and express some bitterness about feeling undervalued. Several interviewees<sup>147</sup> compared their profession to doctors, but felt that they were not treated with a comparable level of respect by government departments who make decisions in relation to funding and case progression. Consequently, they expressed feeling that their sense of professionalism was being diminished, that their opinions were not valued and that the courts and government did not understand the nature of their work.<sup>148</sup> Interviewee C commented that

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<sup>144</sup> Interviewee O at 12.

<sup>145</sup> Interviews B, F, G, I, J, Q, K, O, R, S, P

<sup>146</sup> Interview B at 15

<sup>147</sup> Interviews B, G, J, O, R

<sup>148</sup> Interview A, B, O, K.

he was worried that the government had ‘an agenda against firms’<sup>149</sup> while Interviewee G likened defence lawyers’ relationship with government as akin to an overbearing parent/child relationship in which the government simply tells lawyers what to do without properly understanding the nature of the issues: ‘It’s like what your parents say to you when you’re a kid ‘if you don’t like it, it’s my house, it’s my rules, you’ll get what you’re given.’’<sup>150</sup> This provides further evidence that lawyers report feelings of disempowerment, which might create conflict between their professional duties.

In light of demands to complete cases at increasing speed, Riddle noted that lawyers were concerned that legal aid applications would not be processed in sufficient time for the first hearing, that adequate prosecution case papers would not be available and that trying to conduct case management at too early a stage in the proceedings could breach lawyer-client privilege if instructions are unclear.<sup>151</sup> However, the Ministry of Justice<sup>152</sup> still took the view that the defence benefited from causing delay in the system, despite the fact that, as the Law Society pointed out,

‘Defence practitioners have no interest in prolonging cases. Defence lawyers have been subject to significant reductions in legal aid fees, and are paid on the basis of a fixed, standard or graduated fee scheme for criminal cases. The incentive on them is for cases to proceed quickly’.<sup>153</sup>

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<sup>149</sup> Interview C at 12

<sup>150</sup> Interview G at 30

<sup>151</sup> H. Riddle, ‘Advancing the case for swift action’ *Law Society Gazette* 18 October 2012, 32.

<sup>152</sup> Ministry of Justice, *Swift and Sure Justice: The Government’s Plans for Reform of the Criminal Justice System* Command Paper CM 8388 (2012) < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217328/swift-and-sure-justice.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217328/swift-and-sure-justice.pdf)>

<sup>153</sup> The Law Society, *Response of the Law Society of England and Wales to ‘Swift and Sure Justice: The Government’s Plans for Reform of the Criminal Justice System’* (2012). < <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/swift-and-sure-criminal-justice-system-reform-proposals/>>

During the course of my research, defence advocates raised concerns that delay in obtaining legal aid not only means that they cannot start preparing cases as early as they would wish to, but also that the inability to prepare properly means that defendants are sometimes forced into situations which are not necessarily beneficial to them. For example, interviewee B expressed concern that it was difficult to know how far to take instructions unless or until legal aid is in place and, as interviewee E noted, forcing defendants to enter a plea before the advocate is prepared forces solicitors to advise defendants to enter a not guilty plea, because the burden of proving the case remains with the prosecution. One prosecutor noted that demanding efficiency when legal aid is not in place causes delay at later stages;

‘We are told that we should object to an adjournment just so that the defence can get legal aid but it got very difficult for people to sort out their legal aid... forcing a plea always forced a not guilty at an early stage which would have an impact on the case management hearings’.<sup>154</sup>

Interviewee H, another prosecutor, similarly commented that the reintroduction of means testing ‘delays the start of legal aid and therefore delays defence solicitors from taking proper instructions’.<sup>155</sup> Interviewee C commented that the courts require decisions to be made about the conduct of cases at a time when advocates ‘don’t necessarily have the opportunity to go through the papers as much as we would wish’.<sup>156</sup> Interviewee K expressed some criticism of this behaviour, as noted above, in stating ‘means testing delays the grant of legal aid and so solicitors continue to facilitate the system to run at speed by allowing cases to be progressed, representing people when they don’t have legal aid.’<sup>157</sup>

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<sup>154</sup> Interview M at 7.

<sup>155</sup> Interviewee H at 1

<sup>156</sup> Interview C at 8

<sup>157</sup> Interview K at 2

Both defending and prosecuting interviewees therefore expressed the view that, by refusing to adjourn cases when legal aid is not in place, cases ultimately take longer to be dealt with. Forcing pleas at too early a stage in the proceedings is detrimental for all participants.<sup>158</sup> The difficulty appears to result from a combination of delay in obtaining legal aid, the court's desire to improve efficiency in the proceedings (which means that applications for adjournments are less likely to be tolerated by the Bench) and advocates' desire to conform to usual co-operative workgroup behaviour. As a result, lawyers are less able to act as self-regulating, autonomous professionals, which further challenges their self-image as service providers.

## CONCLUSION

This paper has set out the findings of my research which details accounts of the impact of particular changes to the structure of legal aid on lawyer behaviour. The impact of successive changes to legal aid policy on both lawyers and defendants is multi-layered. The remuneration regime means that the quality of legally aided defence services suffers, while the data suggests that changes brought about by reintroducing means testing have caused delay and uncertainty for lawyers, which also appears to have a negative impact on lawyer/client relationships. Although the small scale nature of the research means that conclusions must be made tentatively, my findings lend support to the research conducted by Kemp,<sup>159</sup> Newman,<sup>160</sup> Gray *et al.*,<sup>161</sup> Sommerlad<sup>162</sup> and Stephen *et al.*<sup>163</sup> These findings suggest that legal aid cuts have challenged lawyers' occupational identity, which has placed greater strain on lawyer/client

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<sup>158</sup> Such pressures also appear to justify increased use of plea negotiations, particularly charge bargaining in which the prosecutor may reduce the severity of charges in exchange for an early guilty plea. My interviewees all spoke favourably of plea negotiations. One prosecutor, Interviewee J, indicated that plea negotiations tick the right boxes for the CPS but undermine victim needs because "statistics seem to be the important thing." Alge describes such processes as another example of managerialist tendencies in criminal legal aid practice (D. Alge, 'The Effectiveness of Incentives to Reduce the Risk of Moral Hazard in the Defence Barrister's Role in Plea Bargaining' (2013) 16(1) *Legal Ethics* 162)

<sup>159</sup> *id*

<sup>160</sup> Newman, *op. cit.*, n.7

<sup>161</sup> Gray *et al.*, *op. cit.*, n.68

<sup>162</sup> Sommerlad, *op. cit.*, n.9; Sommerlad, *op. cit.*, n.17,

<sup>163</sup> Stephen *et al.*, *op. cit.*, n.71

relationships. Lawyers appear to feel torn between four things that can affect their work; their duties towards clients, courts, their firms and their funders (that is, the government).

Lawyers are obliged to act in their clients' best interests, while also acting as officers of the court. The contracts under which legal aid is paid also dictate conditions of defence lawyers' working practices. Lawyers conveyed that they feel their duties towards clients are compromised by both the payment regime and demands for efficiency from the courts which are reflective of governmental desires to increase efficiency. They recognise that the payment regime incentivises standardised case progression but added that uncertainty about whether or not they will be paid, alongside demands that they conduct case management regardless of funding, mean that they may make decisions which are not necessarily in the client's best long term interests. This issue is set against lawyers' acute awareness that they need to maintain a good reputation among clients to sustain their business, as well as maintain a good reputation with the court in order to retain a degree of negotiating power. However, the ability to negotiate, and thereby exercise professional decision-making skills, has been undermined by demands for efficiency, which advocates appear to feel are used to undermine respect for their professional autonomy. It seems that lawyers conduct cases when they are uncertain about payment out of a sense of professional obligation to both their clients and the courts, but they recognise that they may not always be providing a high quality service. Demands for efficiency, in conjunction with funding changes, appear to have placed greater strain on lawyers' obligations towards their clients as against their obligations to their firms and, perhaps to a lesser extent, their obligations towards the court and the government. It seems clear that lawyers feel the administrative obligations placed on them by the funding regime compromise their autonomous decision-making abilities while the payment regime itself

disincentivizes meticulous case management. This undermines lawyers' ability to individualise cases in a way that would provide an ethical status to their work.<sup>164</sup>

Delay caused by the reintroduction of means testing increases uncertainty about funding for lawyers and defendants. Such delay and uncertainty affects the lawyer/client relationship in that it limits the ability of a solicitor to provide full advice at early stages in the proceedings, and potentially intensifies a 'need' to cut corners already brought about by the fixed fee system. This provides evidence of the tension placed on lawyers' self-image in terms of a desire to act in their clients' best interests which is constrained by the practicalities of conducting the work, a sense that their professional status is undervalued by government and a desire to retain credibility with both clients and their peers. It appears that these issues challenge the collective consciousness of criminal defence lawyers in the pursuit of what they perceive as their legitimate interests, through which they gain respectability. While this data is from a small sample, it supports the findings of similar studies, which suggest legal aid cuts have at least contributed to a particular crisis of professionalism about what it means to be a criminal defence lawyer.

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<sup>164</sup> Tata, *op. cit.*, n.6