

Fees for Family Barristers:
A Statistical Analysis

Professor Paul Fenn

Nottingham University Business School

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1. Introduction

The background to the analysis presented in this report is summarised elsewhere in a document provided to me by the LSC [“Family Advocacy – Data Narrative” April 2007]. The central issue of concern in that document was the apparent increase in total expenditure by the LSC on the Family Graduated Fee scheme (FGF) in recent years. The brief I was given was to use appropriate statistical procedures to address the following questions:

Is overall expenditure increasing? [In] what percentage of cases, public and private, are Counsel used at the moment? What is the trend in use of Counsel over time?

While some preliminary analysis had been undertaken by the LSC, and was reviewed in their document, this was at a relatively aggregated level, both in terms of time (yearly data) and in terms of the decomposition of costs (public/private). I was therefore provided with a detailed dataset of bills paid by case category and function between May 2001 and September 2007, and I have drawn on this below.

Moreover, the LSC recognised that there were methodological issues involved:

Is the increase in reported costs of Counsel a real increase or merely as a result of the changes to FGF in February 2005? How much of any trend is due to genuine fees increase and how much is due to change in the case length in the sample over time?

That is, there was a valid concern that comparisons between the costs of closed cases started after February 2005 and those started before that date would be biased because of the differences in the average caselength between these groups. In this report I describe a way of obtaining a time series of mean costs for a subsample of cases which are comparable in terms of caselength. This allows me to infer whether the February 2005 changes to the FGF scheme have been instrumental in increasing scheme costs, and if so which components of payment have been responsible.

Moreover, changes to the scheme were also made at an earlier date (November 2003) and similar methodological considerations apply to identifying the effect of these changes. The following Table sets out my understanding of the relevant changes to the scheme made at these two dates (paragraph references are taken from the LSC’s FGF Manual):

Table 1: Changes to FGF Scheme

Para.	Change from 1/11/03	Change from 28/2/05
10.3.3	Certain proceedings excluded from scheme	
10.11.5	Some scheme cases moved from category 4 to category 2	
10.17.5		Up to 2 F1s per case
10.17.13		New F3 allowed in category 1 cases
10.17.24		Up to two F4s per case
10.17.27	F5 can include PHR (previously in F3)	
10.21.9		Restrictions on SIPs removed for F1s and F2s
10.27.1		New SIPs created
10.27.2		SIPs restructured – now category-specific
10.31.1	Additional “bolt-on” for case management conference (F4?)	
10.31.2		Additional “bolt-on” for contested injunctions (F2?)

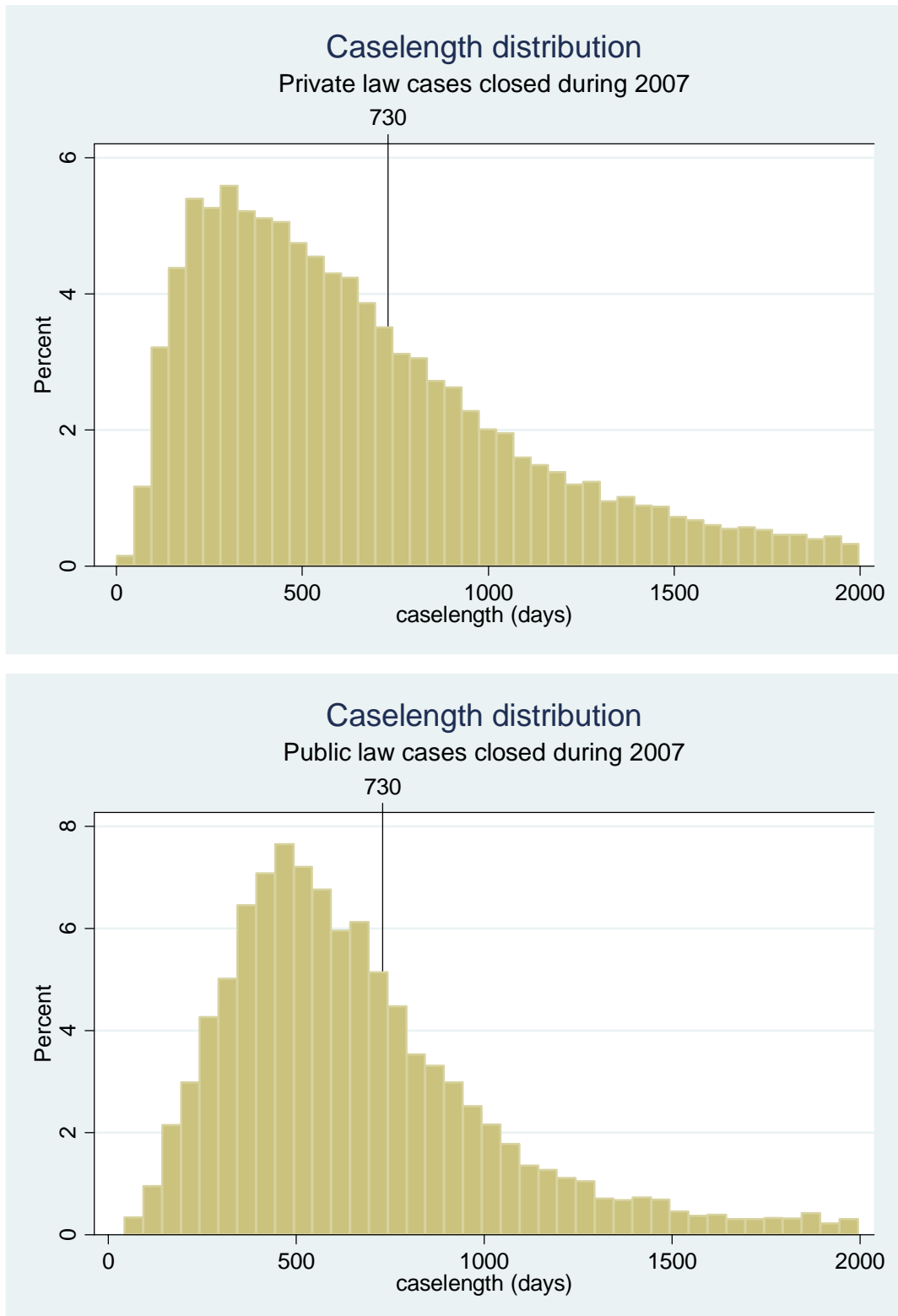
While these rule changes in relation to payment under the FGF scheme could help explain the reasons why overall expenditure has increased, there have been other fundamental changes to the procedures adopted in public family law cases during this period. In particular, the Protocol for Judicial Case Management in Public Law Children Act Cases was implemented in November 2003 with the objective of reducing delay in proceedings related to care and supervision orders. Because this fundamentally affected the way in which these public law proceedings were managed, it may well have had an impact on payments under the FGF scheme. However, as the protocol was implemented simultaneously with some of the rule modifications referred to in Table 1 above, there may be some difficulty in determining responsibility for changes in costs on grounds of timing alone. In this report I have first tried to identify the timing of cost changes, and then the sources of those changes in terms of volume and unit cost movements, in order to establish the causes of overall scheme cost inflation.

2. Methods

It is crucial when comparing cases issued before and after the key dates discussed above that we compare like with like. The ideal would be to compare a cohort of new claims paid under the provisions of “scheme 1” (before November 2003) with cohorts of new claims run under “scheme 2” rules (between November 2003 and February 2005) and “scheme 3” rules (after February 2005), and follow all of these cases up to closure, measuring the total payments made under various headings and comparing these across the schemes. This ideal is not possible, because a significant number of cases arising under the provisions of schemes 2 and 3 will not yet have reached closure, so any comparison based on a dataset of closed claims would be biased (caselengths would differ between the comparison groups).

My solution to this problem is to use the available closed case databases (case-level and transaction-level), but to restrict my analysis to a fixed “window” within these databases relating to a common pre-determined caselength. The following histograms show the distribution of observed caselengths for recently closed private and public law cases in which counsel was used:

Figure 1: Caselength distribution for cases where counsel was used



Specifically, I compare monthly cohorts of issued cases which have caselengths up to two years. It can be seen from Figure 1 that the substantial majority of all family law cases are closed within two years of issue (65% of all private law cases, and 68% of all public law cases). This observation period was therefore chosen in order to maximise the proportion of cases included in the analysis, while at the same time allowing the inclusion of a reasonable number of monthly cohorts with issue dates after February 2005. Using this methodology, the period of analysis is from May 2001 to September 2005 (the latter is determined as the latest month which allows the fixed caselength to be observed given that the datasets include information on case closures up to end-September 2007).

3. Results: case-level data

3.1. Case volume over time

The analysis begins by exploring the LSC's dataset of family law cases for which legal aid certificates have been issued. These may or may not involve a payment to counsel. Figures 2a and 2b below show respectively, the volume of cases per month of issue, and the proportion of these where counsel was used. In this and all subsequent charts, the vertical lines indicate the division between issue dates under schemes 1, 2 and 3 as defined above.

Figure 2a shows that there has been little in the way of a trend change in the total numbers of new public and private family law certificates issued during the period January 2001 to September 2005 and which were subsequently closed within two years. Figure 2b by contrast shows that, for public law cases, the proportion where counsel was used has increased during the period. Prior to 2003, the proportion of public law cases in which counsel was used rarely exceeded 30%; in 2003 and the early part of 2004 there was a progressive increase in this proportion, subsequently varying within the range 32-34%. Taking these two figures together, it would appear that, while the volume of private family law cases in which counsel have been involved has remained relatively stable since 2001, the numbers of public family law cases in which counsel have been involved has increased, with the timing of this increase seeming to occur some six months immediately before the switch from scheme 1 to scheme 2, and continued to rise in the six months immediately after the switch.

Figure 2a: Volume of cases in sample by month of issue

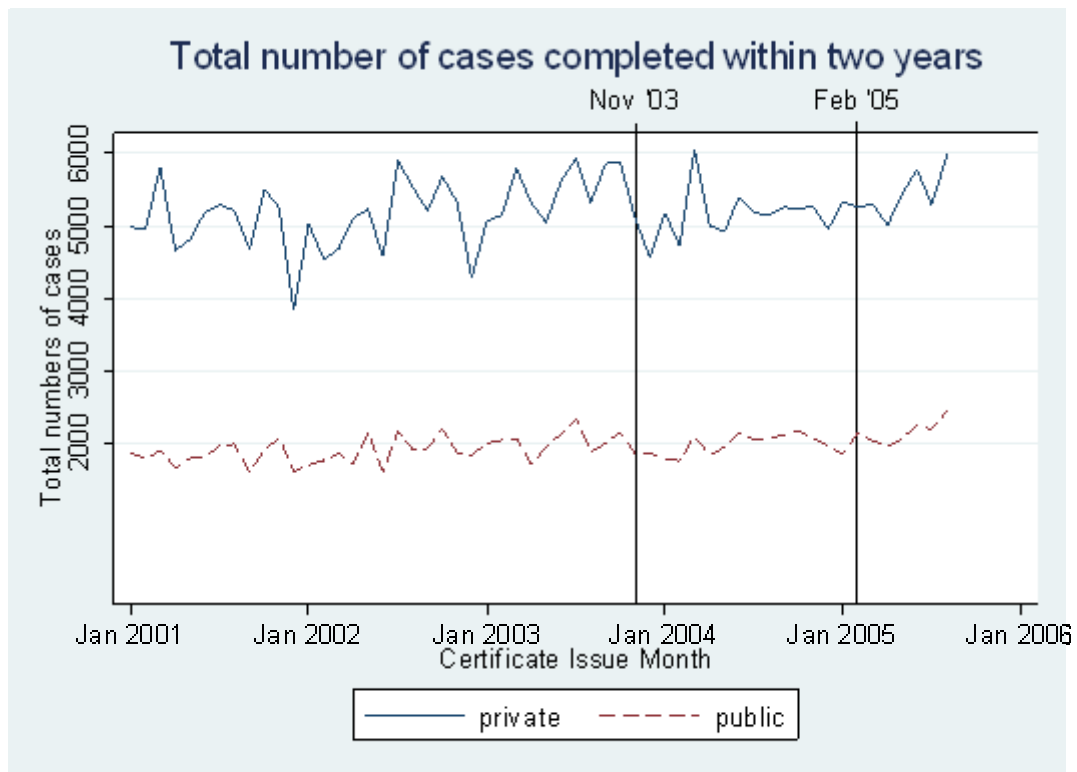
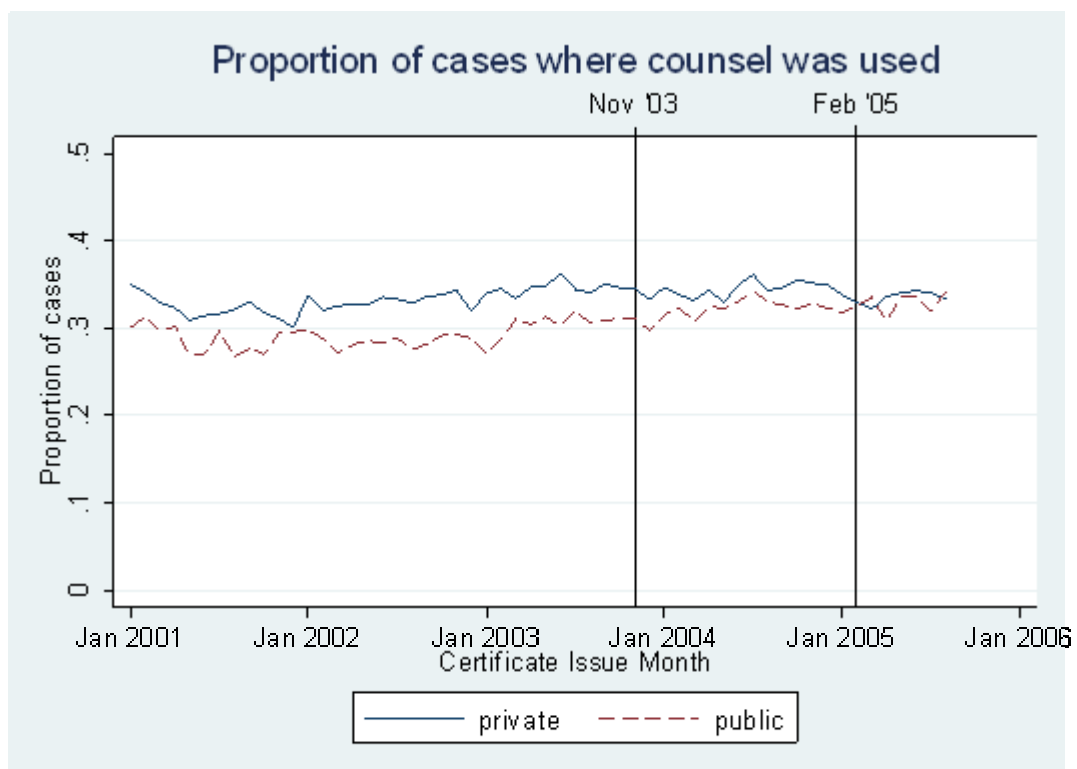


Figure 2b: Proportion of cases in sample where counsel used by month of issue



3.2 Total payments on family law cases where counsel was used

Figures 3a and 3b shows the total payments made by the LSC over time on private and public family law cases respectively, for the monthly cohorts of cases issued and completed within two years. The charts relate only to cases where counsel were used, and show the total allowed payments on counsel fees, profit costs and disbursements for these cases.

In relation to private law cases, there seems to have been a steady drift upwards in total allowed payments since the inception of the FGF scheme in all three types of payment. Total fee payments to counsel on cases issued in May 2001 and closed within two years were approximately £1m; by November 2003 the equivalent figure was approximately £1.5m. While this total payment seems to have stabilised during the “scheme 2” period, it appears to have risen quite sharply under “scheme 3”. Total payments on cases issued in January 2005 and subsequently closed within two years were approximately £1.5m; the equivalent figure for cases issued in September 2005 and subsequently closed within two years was approximately £1.8m.

In relation to public law cases, a similar rate of increase in fee payments is observed from May 2001 to November 2003. However, there was no similar stabilisation of total payments to counsel after that date; indeed, there was a substantial increase in total payments on cases issued during the six month period after November 2003. By comparison with the year prior to November 2003, total counsel fee payments on cases issued during the “scheme 2” period were 24% higher. Moreover, this pattern was matched by similar increases in total payments to solicitors in relation to both profit costs and disbursements.

3.3 Total payments on family law cases where counsel was not used

Figure 4a and 4b relate only to cases where counsel were *not* used, and show the total allowed payments on profit costs and disbursements for private and public law cases respectively, for the monthly cohorts of cases issued and completed within two years. While there appears to have been little change in total payments to solicitors for private family law cases where counsel was not involved, there is by contrast an increase over the whole period in the total payments to solicitors in public family law cases where counsel was not used, both in relation to profit costs and disbursements. This increase appears to accelerate during the six months following November 2003, in a similar way to payments on cases where counsel was involved.

One inference from Figures 3 and 4 may be that the amount of advocacy undertaken by solicitors in addition to that undertaken by counsel has increased since November 2003. If so it seems likely that the case management protocol implemented in November 2003 is responsible for these developments, unless there is evidence of other factors which may have influenced behaviour during the relevant period.

Figure 3a: Total payments where counsel was used; private law cases

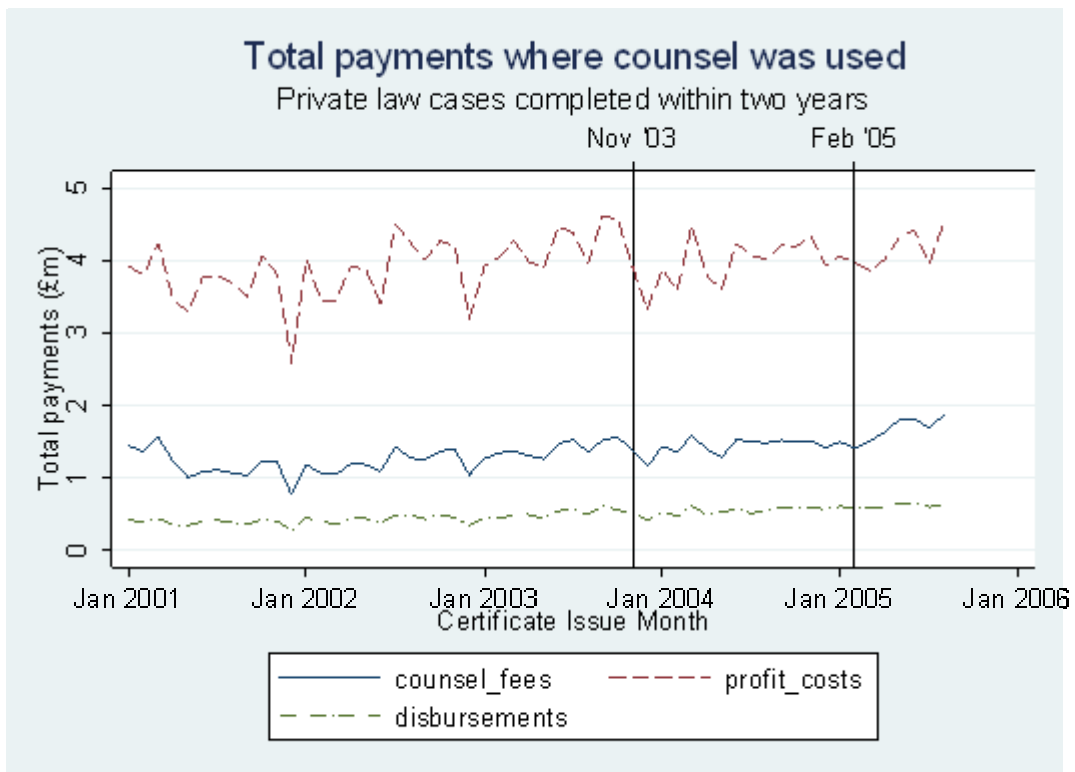


Figure 3b: Total payments where counsel was used; public law cases

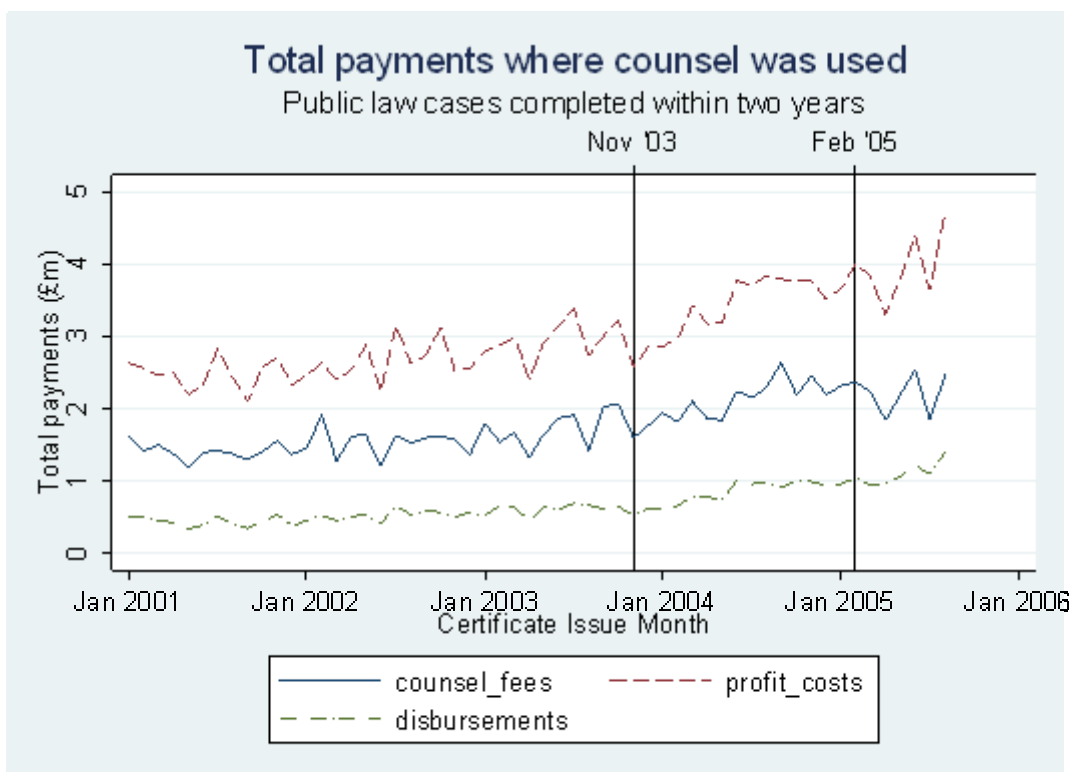


Figure 4a: Total payments where counsel was not used; private law cases

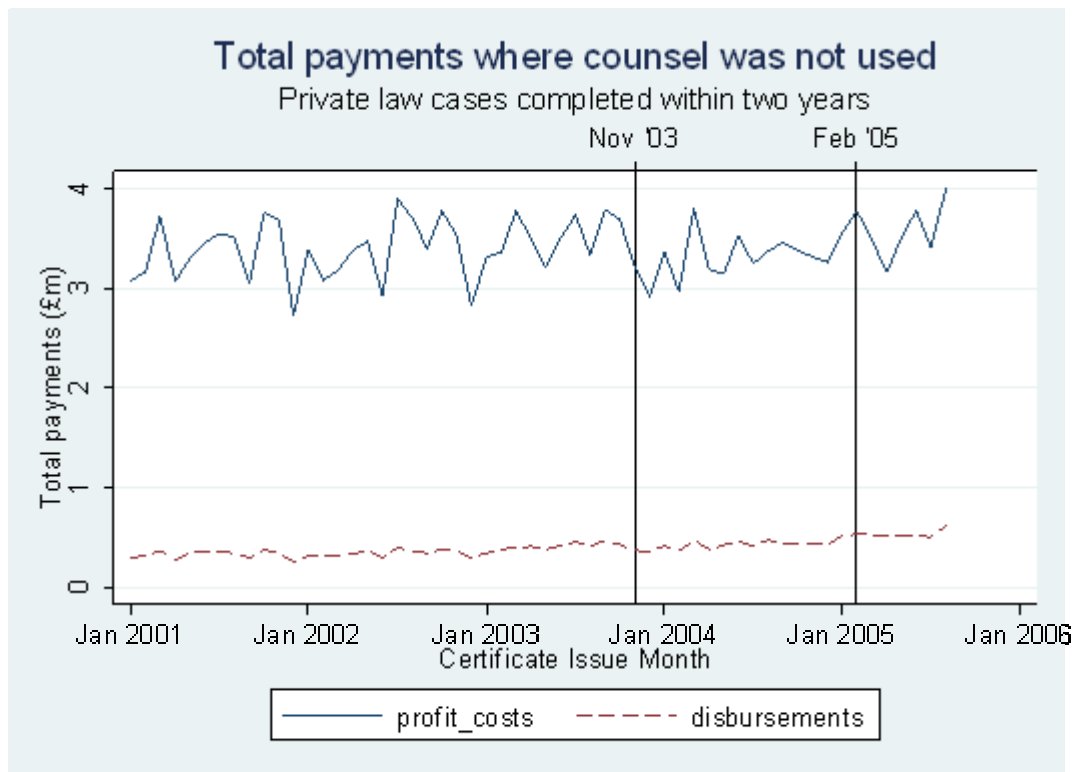
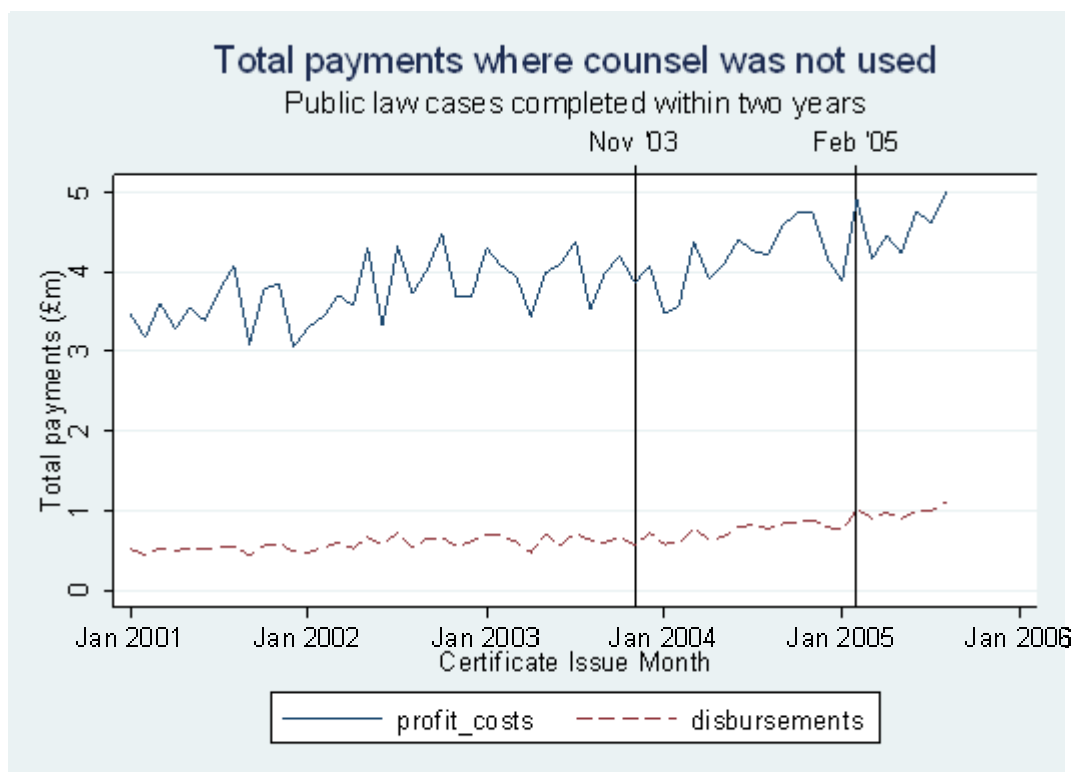


Figure 4b: Total payments where counsel was not used; public law cases



3.4 Summary

Analysis of the case level data over time using comparable caselengths suggests that there is a clear difference between private and public law cases in relation to the overall cost inflation observed since the FGF scheme was introduced. Interestingly, the significant increases in payments to counsel for work on public law cases after November 2003 was accompanied by an increase in the proportion of cases where counsel was used, as well as a corresponding increase in costs incurred by solicitors on these cases. As far as private law cases are concerned, the key development appears to be a significant increase in total payments to counsel after February 2005 which was not matched by similar changes to payments made to solicitors.

In the following section I attempt to explore in more detail the components of these cost changes using data from individual payments to counsel made under the FGF scheme.

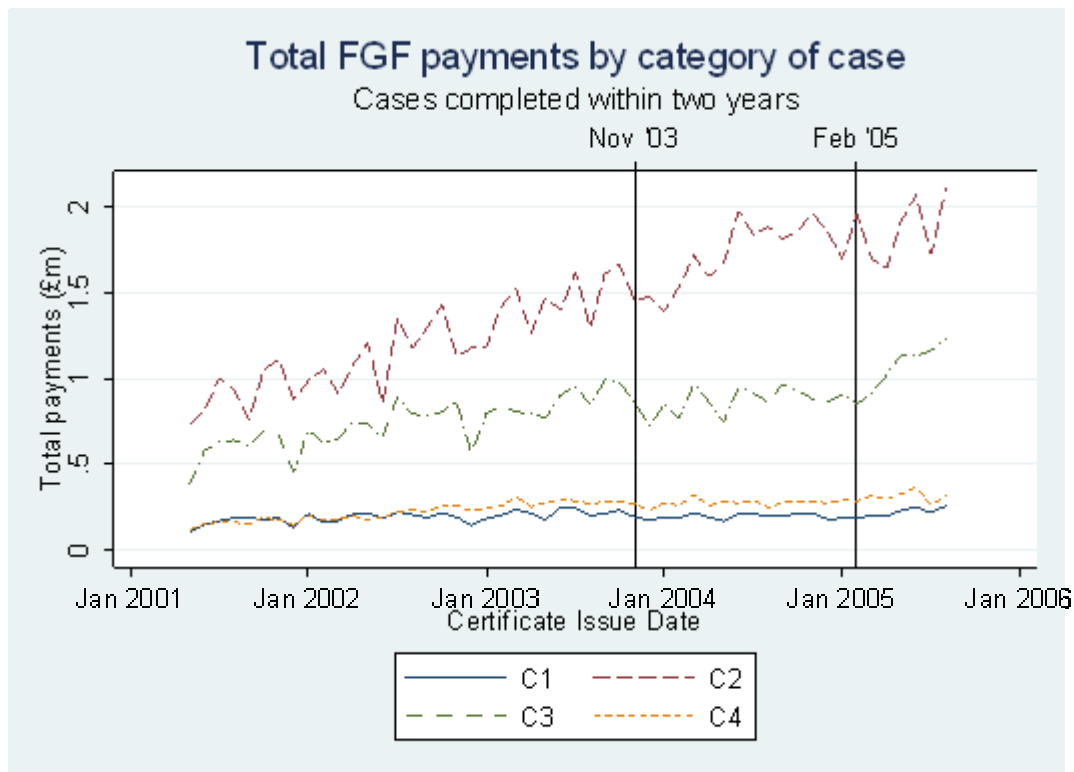
4. Results: transaction-level data

4.1. Introduction

I have used the LSC's database of transactions to explore changes in various components of payments to counsel. Again, the time series of monthly cohorts have been created by reference to cases which are comparable in terms of caselength (i.e. cases issued within a given month and subsequently completed within two years). Figure 5 shows the total FGF payments made on each monthly cohort of cases, for each category of claim over the period May 2001 to September 2005. In this report I am mainly concerned with categories 2 and 3 (public and private law cases respectively), given that these represent by far the largest components of the overall costs of the scheme. [Results for categories 1 (family injunctions) and 4 (other family work) are presented in the Appendix]

Prior to January 2003 there seems to have been a steady build in the payments made under all categories, which may be explained by the progressive implementation of the scheme after May 2001. After January 2003, total FGF payments for category 2 and category 3 cases show a similar pattern to those in Figures 3a and 3b: that is, there is a substantial increase in FGF payments made on public law (category 2) cases during the "scheme 2" period, and a substantial increase in FGF payments made on private law (category 3) cases during the "scheme 3" period.

Figure 5: Total FGF payments by category of case



4.2 Total FGF payments by function

Total payments on category 2 and 3 cases are broken down by “function” in Figures 6a and 6b respectively. The five functions are as follows:

- F1: Pre-litigation and other advisory work
- F2: Applications for injunctive relief
- F3: Interim applications and review hearings (including the case management conference hearing)
- F4: Conferences
- F5: Main hearings (including secondary hearings)

Figure 6a seems to establish that the main drivers of FGF costs for public law cases are payments relating to hearings – interim hearings (F3) and primary/secondary hearings (F5). These both increased during the “scheme 2” period. During the “scheme 3” period, payments on interim hearings appear to have increased for public law cases, but these seem to have been offset by reductions in payments on primary hearings.

While payments on interim and final hearings again dominate the overall cost of private law cases (Figure 6b), there is a significant increase in payments for conferences (F4) after February 2005 – perhaps reflecting the possibility of billing for up to 2 conferences per case under “scheme 3”. This, together with a marked increase in payments for interim hearings, seems to be the main factor behind the overall cost inflation in respect of private law cases after February 2005.

Figure 6a: Total FGF payments by function; public law cases

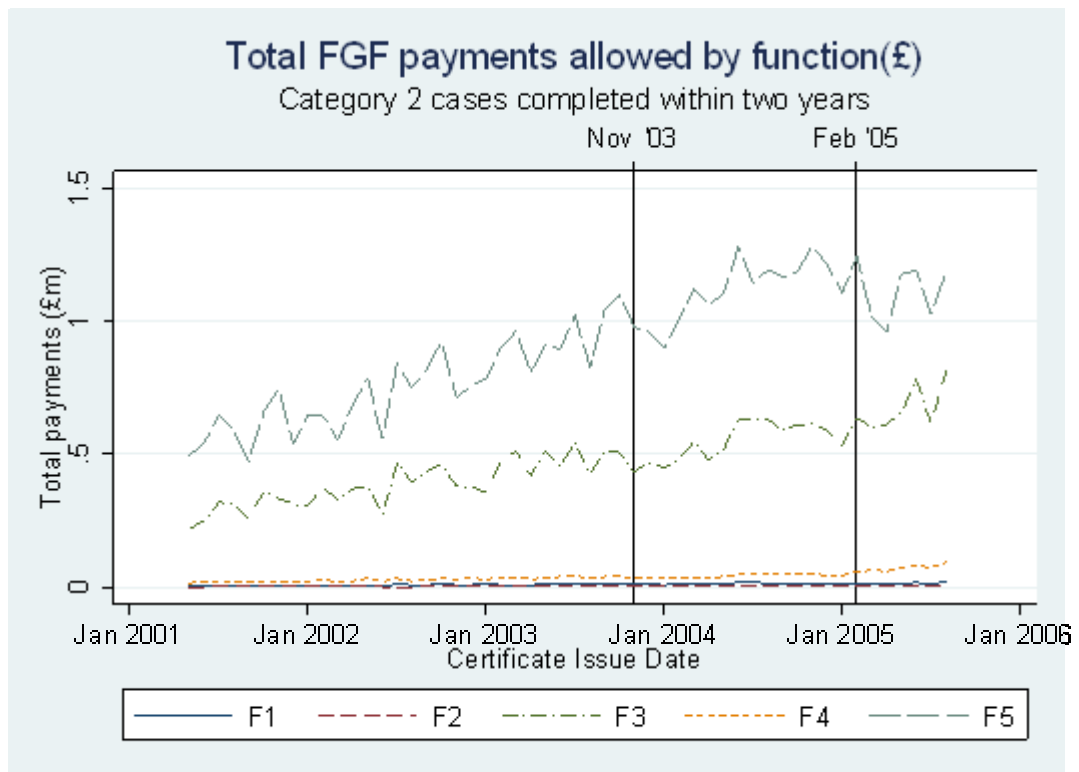
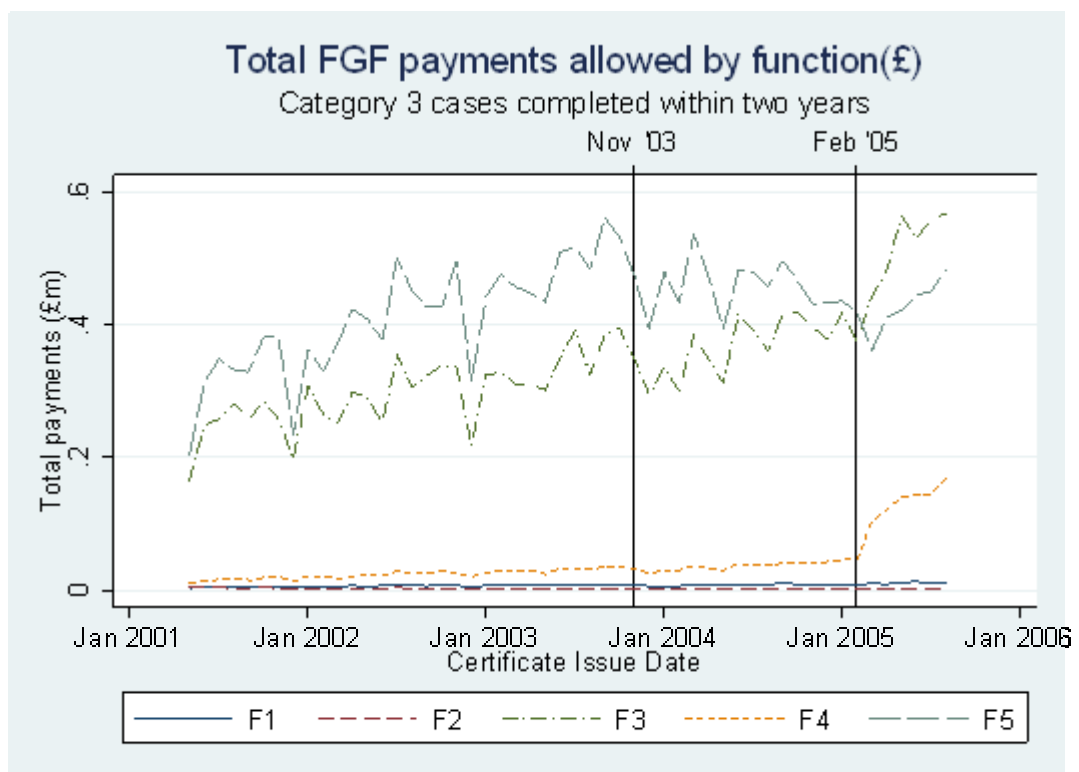


Figure 6a: Total FGF payments by function; private law cases



Having identified the principal cost drivers in terms of payments for specific functions, it is possible to decompose these effects still further. First Figures 7a and 8a below show, for public and private law cases respectively, the number of functions on which payments were claimed under the FGF scheme (note that primary and secondary hearings claimed under F5 have been shown separately). Second, Figures 7b and 8b show the mean FGF payments per function claimed (note that there were very few applications for injunctive relief (F2) in public law cases, which explains the volatility in the mean payment on this function).

4.3 Public law (category 2) cases

Inspection of Figures 7a and 7b together help explain the source of the rise in costs for public law cases during “scheme 2”. In fact, the main change seen during this period in Figure 7a is an evident increase in the number of secondary hearings for which payments were claimed, beginning just prior to November 2003. This, of course, would automatically increase the mean payment on F5 functions, as observed in Figure 7b. This, together with the increase in the proportion of cases where counsel was used (see Figure 2b), would seem to offer a full account of the pattern of cost inflation observed during this period. What caused the increase in claims for secondary hearings and the greater tendency to use counsel during this period needs further consideration, and the explanation must be capable of demonstrating why similar changes were observed in respect of solicitor payments for public law cases.

With respect to “scheme 3”, the only clear effect in relation to public law cases is the increase in the number of claims for conferences (F4) after February 2005. However, the mean payment per conference claim was quite small (under £200) so the effect of this on overall costs was minimal.

4.3 Private law (category 3) cases

Inspection of Figures 8a and 8b together helps explain the behaviour of overall payments on private law cases under the FGF scheme. Firstly, during “scheme 2”, there was a steady progressive substitution away from claims for the primary hearing towards claims for interim hearings and conferences. There was little change in the mean payments per function during this period, and the net effect on overall costs seems to have been roughly neutral.

After February 2005, the substitution towards conferences and interim hearings appears to have accelerated; however, during this period the main drivers behind the overall increase in costs are the increased mean payments per function observed for all functions apart from injunctive relief (F2). One obvious explanation for this would be the restructuring of the range of SIPs applicable for private law cases after February 2005 (see Table 1).

Figure 7a: Mean numbers of functions per case; public law cases

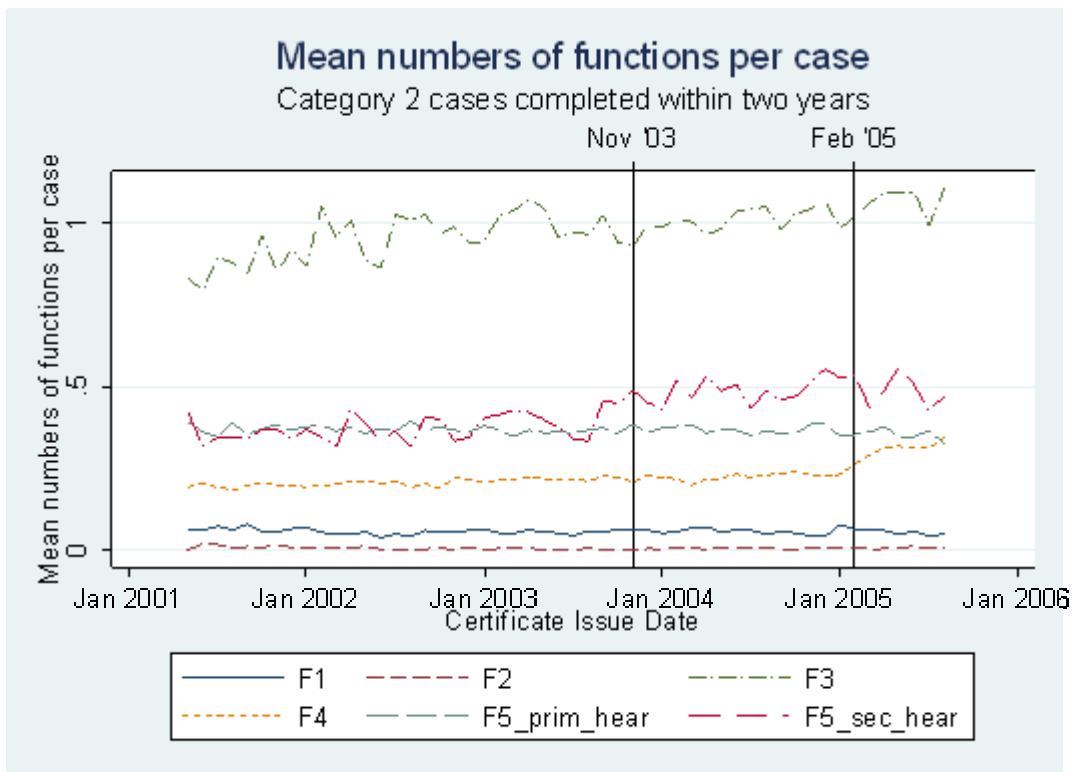


Figure 7b: Mean FGF payments per function; public law cases

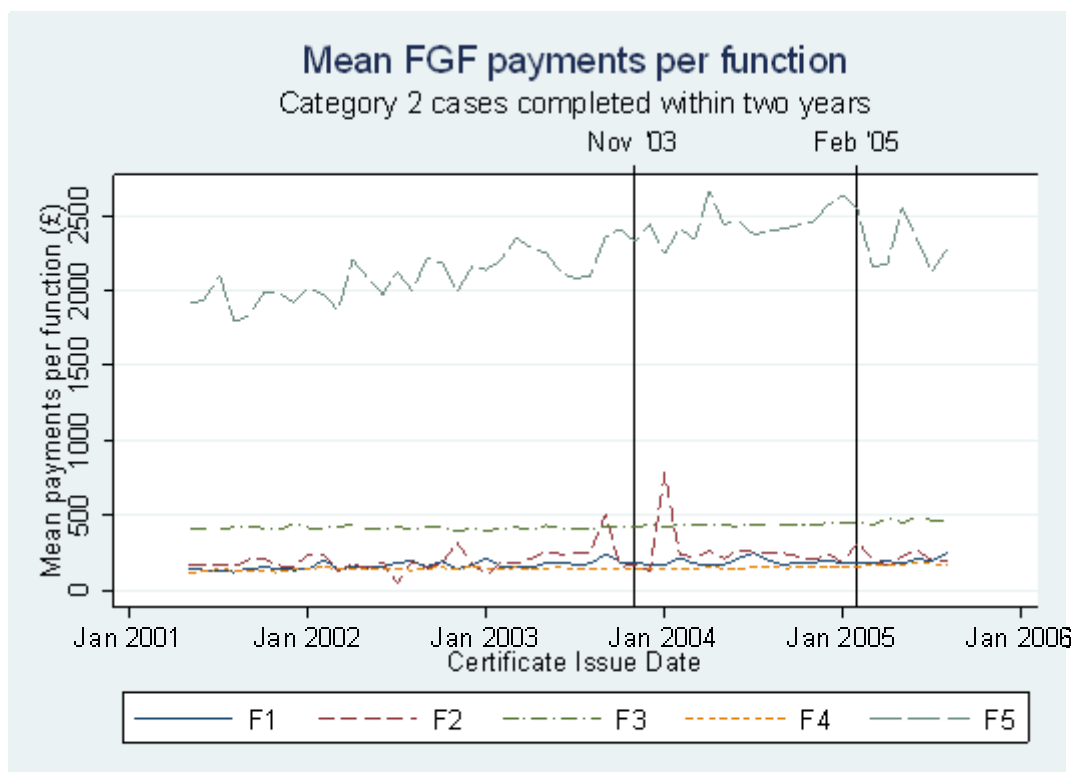


Figure 8a: Mean numbers of functions per case; private law cases

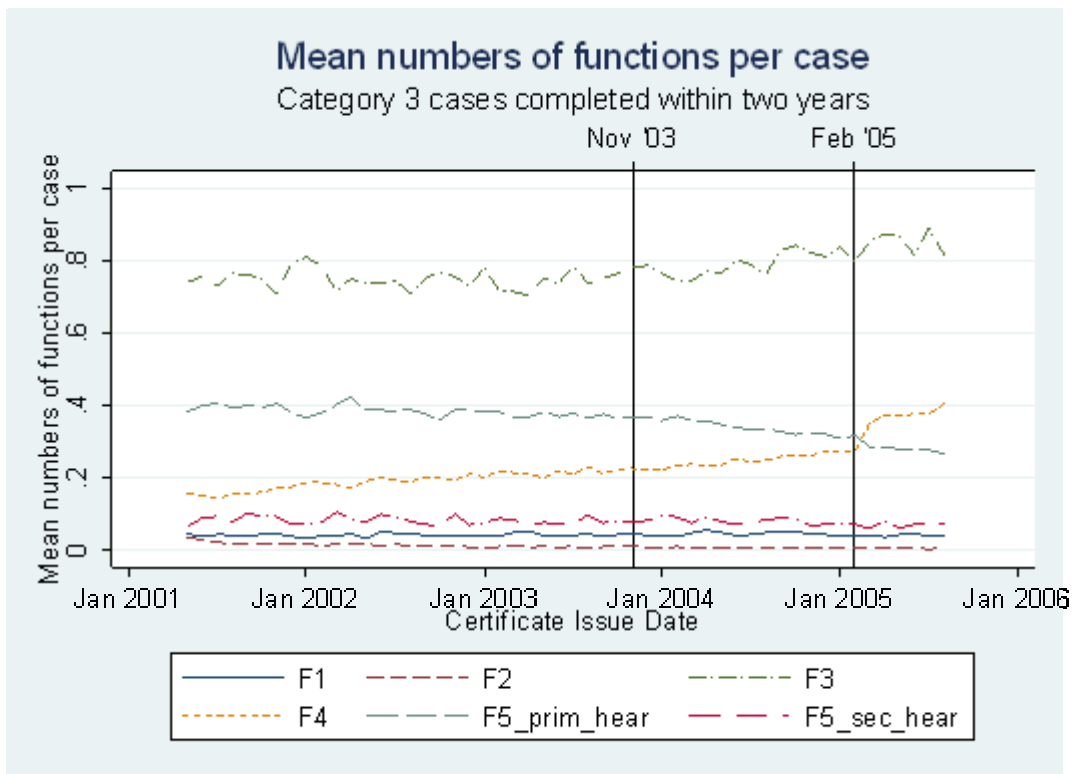
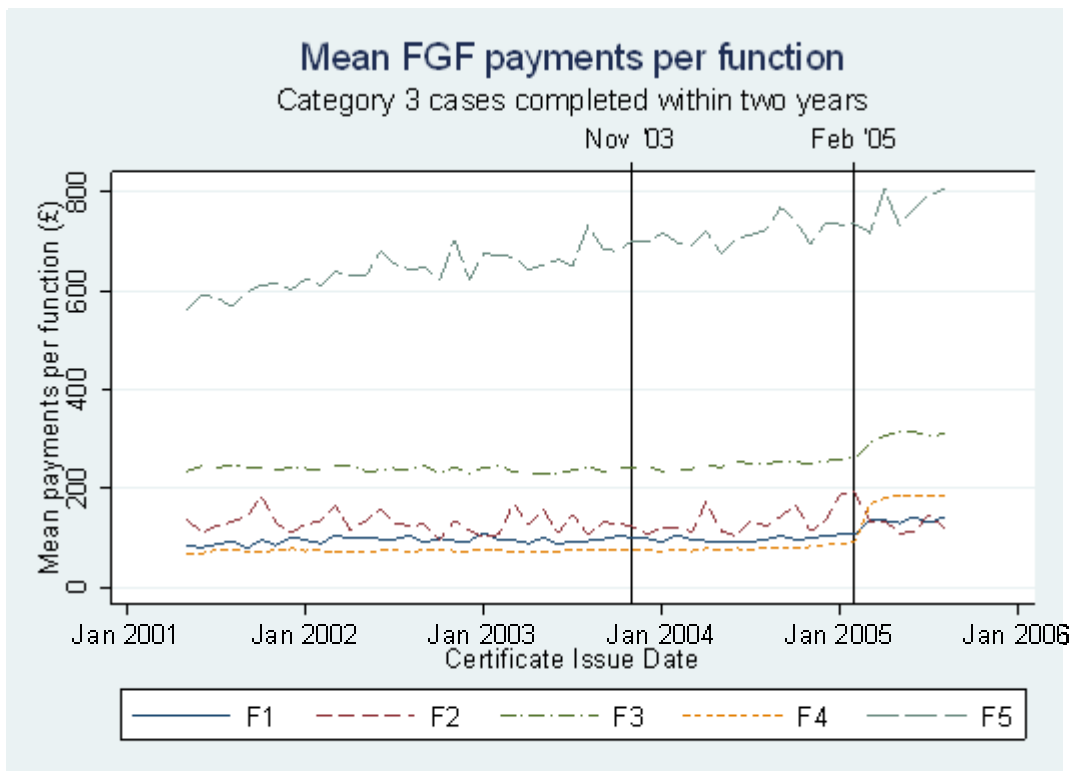


Figure 8b: Mean FGF payments per function; private law cases



5 Summary and conclusions

Expenditure on counsel fees under the FGF scheme has increased substantially since its inception in May 2001. At the same time there has been significant growth in overall legal aid expenditure on the profit costs paid to solicitors for work on family law cases, both on their own advocacy and in conjunction with counsel. However, this report has been concerned mainly with the explanation behind the increase in payments to counsel, and for this reason a detailed breakdown of FGF transactions was undertaken using a methodology which allows for the comparison over time of cases matched in terms of caselength.

One possible objection to this method is that it depends on an assumption that the caselength distribution has remained reasonably stable over time. If, for example, the case management protocol introduced in November 2003 resulted in a significant reduction in delay between the issue and closure of public family law cases, then this could have resulted in an increase in the number of such cases completed within two years even where the total volume of cases issued was unchanged. This could of course have influenced my findings based on the payments to cases closed within two years. For this reason I obtained supplementary data on all public law cases issued since May 2001 including those not yet closed (Figure 9), and for each of these cases I established whether they had been completed within the subsequent two year period (Figure 10). There does not seem to be a noticeable change in the proportion of public law cases completed within two years over the period, and for this reason I am satisfied that the method adopted to ensure comparability over time is appropriate and free of significant bias.

Figure 9: Volume of new public law cases issued per month

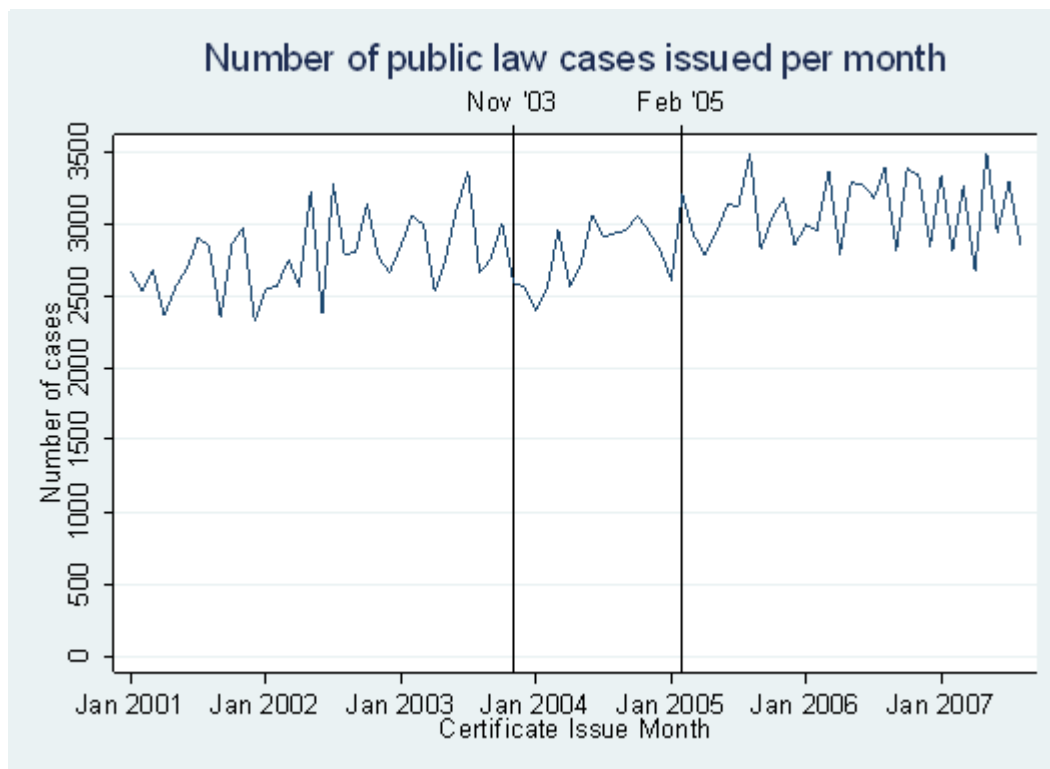
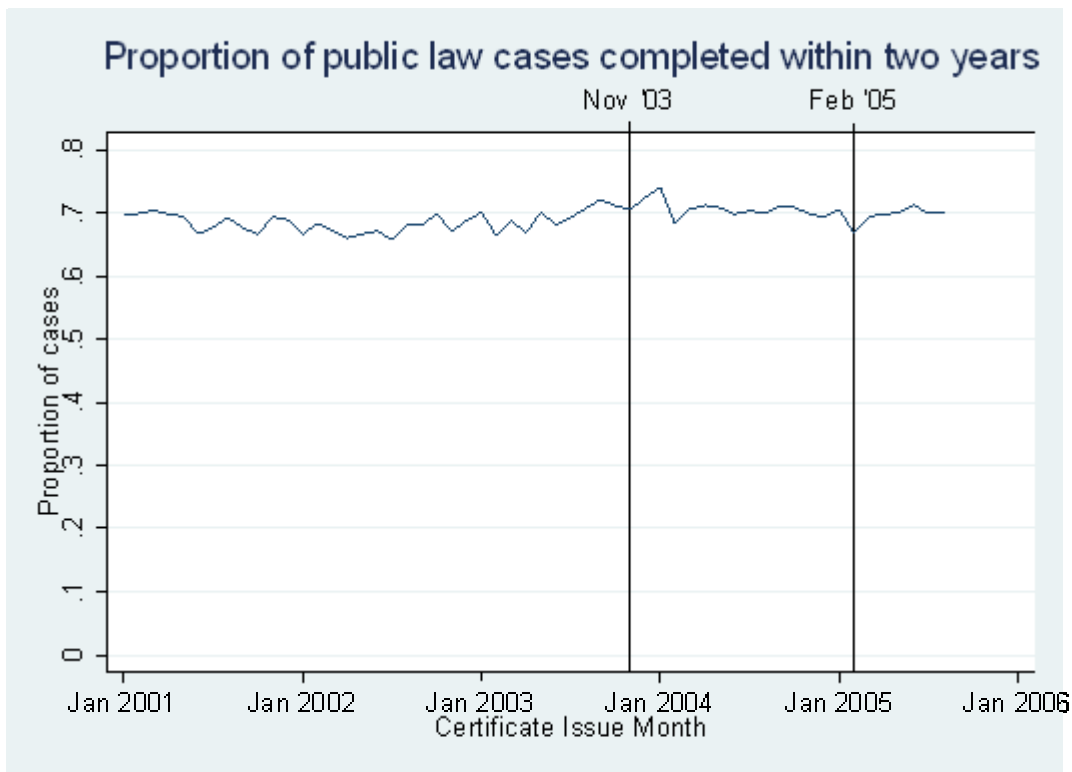


Figure 10: Proportion of new public law cases completed within two years



The main findings can therefore be summarized as follows:

1. Expenditure on counsel fees for **public family law** cases completed within two years increased by approximately 24% between mid-2003 and mid-2004. Part of this increase was due to a higher volume of public family law cases where counsel was involved. The mean payment per case also increased over the same period, and the evidence suggests that this was due to an increase in the number of secondary hearings for which claims were paid. These changes in FGF payments to barristers were matched by similar increases in the level of profit costs and disbursements paid to solicitors. The increase in payments appears to begin before November 2003. Consideration needs to be given therefore to the possibility that cases issued before that date could be transferred to the case management protocol subsequently. If so the protocol would seem to represent the most likely explanation for these changes.
2. After February 2005, a shift in the composition of FGF payments was observed for **private family law** cases. This shift involved a reduction in the numbers of main hearings (function 5 payments) and an increase in the number of interim hearings and case conferences. At the same time the average cost per function claimed increased for most functions, presumably reflecting an increase in the number of SIPs claimed. The overall impact of this change in the composition and average cost of functions was to increase overall FGF expenditure on private family law cases by approximately 20% between February 2005 and September 2005.

Appendix

Figure 11a: Mean numbers of functions per case; family injunctions

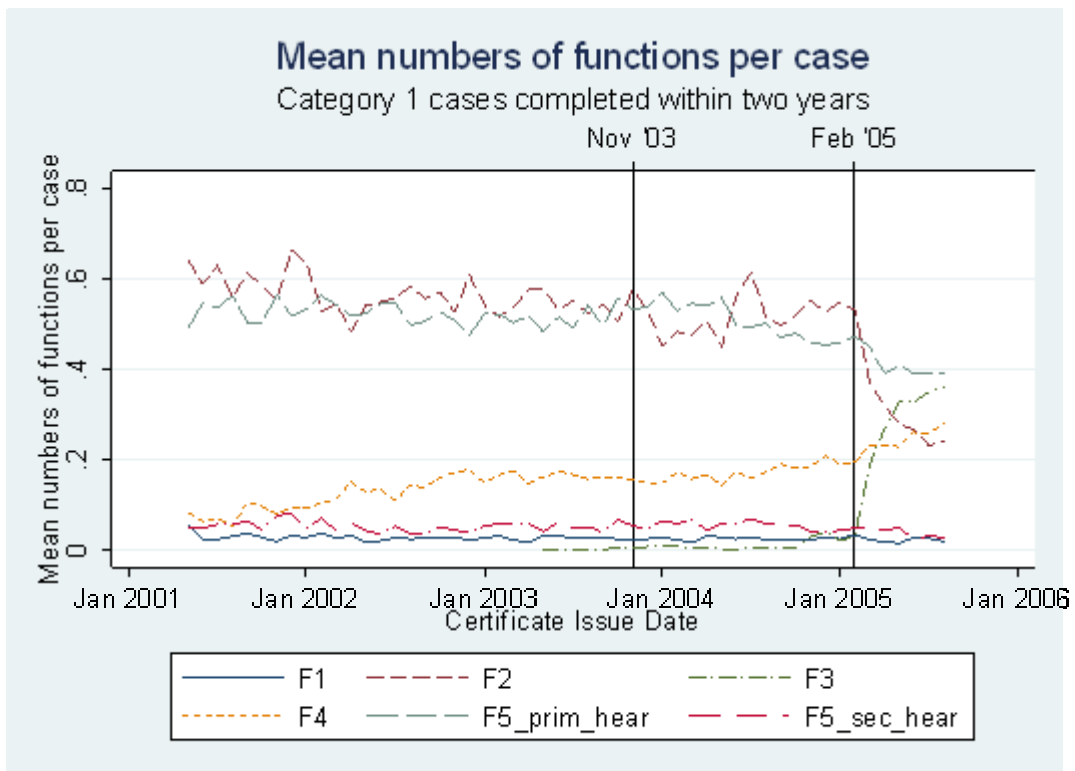


Figure 11b: Mean FGF payments per function; family injunctions

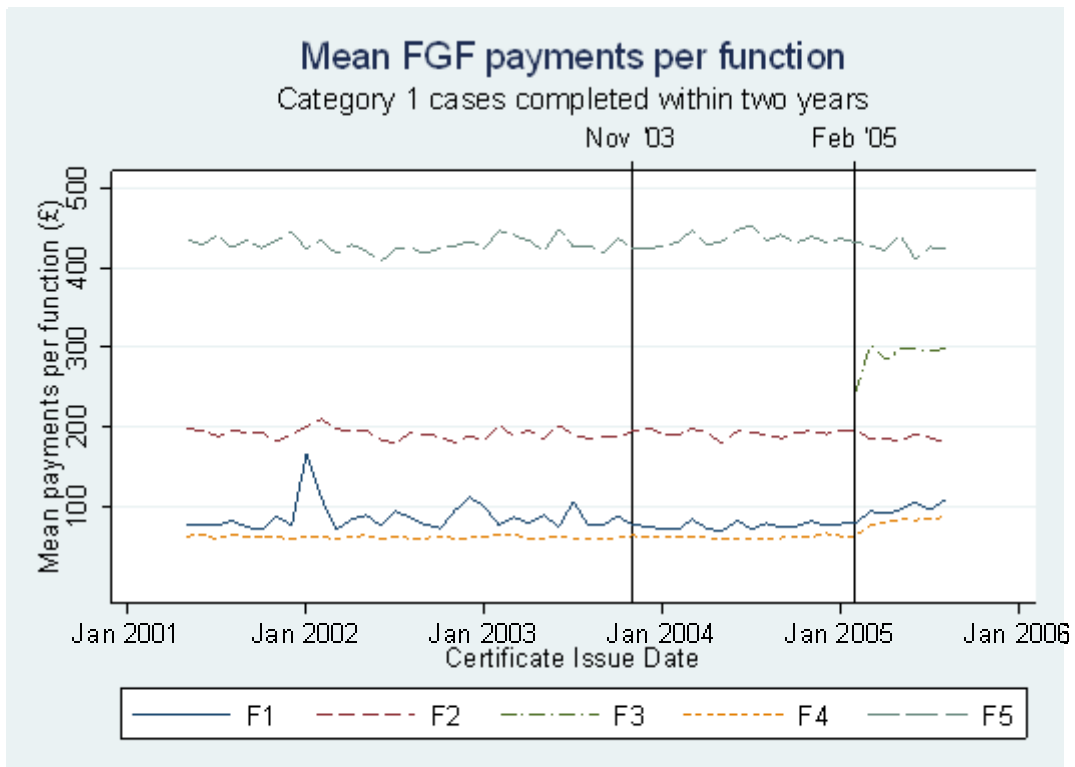


Figure 12a: Mean numbers of functions per case; other family law cases

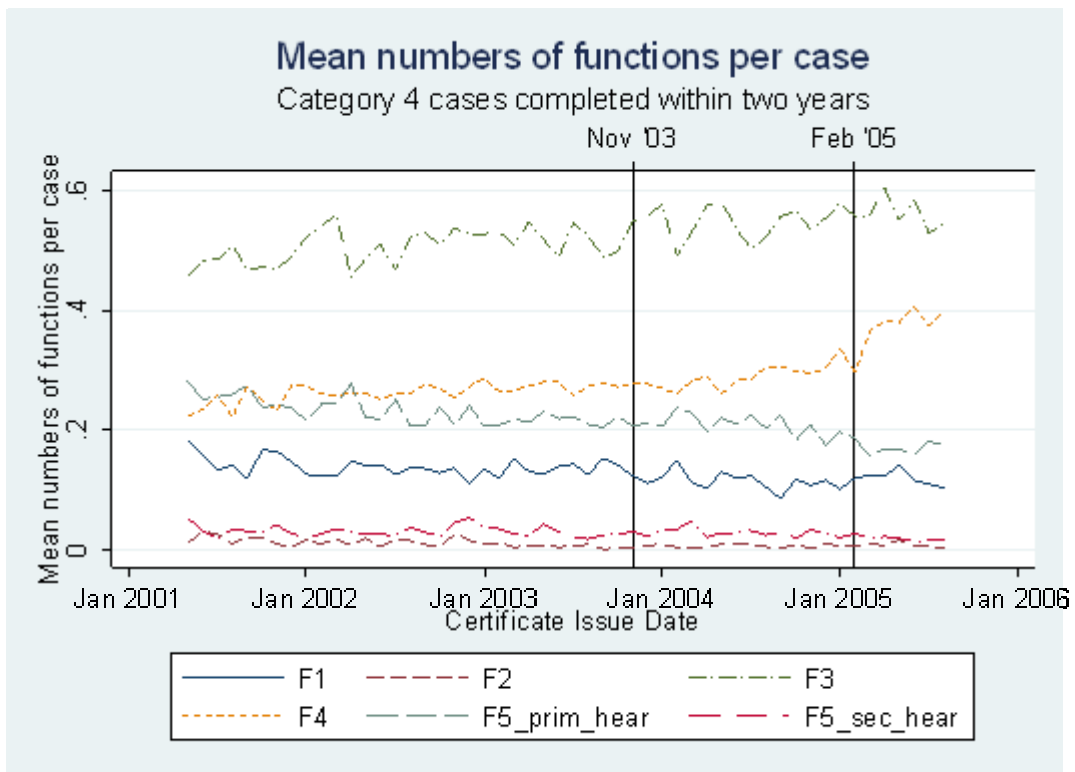


Figure 12b: Mean FGF payments per function; other family law cases

