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Criminal Legal Assistance Market

The criminal legal assistance market has experienced a downward trend of available business as Scotland reaps the benefit of a reducing crime rate. Although the market has contracted – the number of supplier firms has not reduced to the extent that we might expect and nor have we seen a clear trend towards consolidation of firms. Close to half (47%) of all firms registered to provide criminal legal assistance have only one registered criminal practitioner in the firm. Forty-one per cent of registered firms did not receive any payment for civil work in 2015/16.

There are aspects of the legal aid system and the Law Society of Scotland's regulatory requirements which encourage a criminal legal assistance market which has so many micro businesses specialising in criminal legal assistance only. A firm which restricts its services to criminal law only pays a reduced insurance premium and does not need to operate client accounts. They are not subject to audit from the Law Society of Scotland as are firms providing civil legal services. Different quality assurance schemes for both civil and criminal law add to this binary approach to the delivery of publicly funded legal assistance.

This encourages the formation of criminal only practices that rely wholly or largely on criminal legal assistance as an income stream. As the market contracts further, firms will either have to accept reduced profitability or adopt one or more of a number of strategies to maintain profitability.

Strategies to maintain or improve profitability

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|-----------------------------|---|---|
| Grow share of market | 1 | Clearly, not all firms within even a stable market can increase their share of that market: for every firm that increases its market share, another has to lose market share. In a shrinking market, the effect of losing market share is accentuated. |
| Cost reduction | 2 | Staff costs, premises costs and the cost of insurance (for those offering a criminal and civil legal service). The logical endpoint of a cost reduction strategy is smaller firms, operating from shared premises (or from home) offering criminal only services. |
| Maximise fee income | 3 | The opportunity to do this is linked to share of private criminal business or maximizing fee income in legal aid cases.

Fee income in legal aid cases: as a consequence of the fixed fee regime in Summary, the opportunity is in solemn cases. Fee income can be maximized by undertaking activity which is remunerated but |

is arguably not essential for the proper progress of cases. This is not only an efficient use of provider capacity (in that the same number of people could be used to help more clients if only necessary work was undertaken) but also in turn produces more work for SLAB assessment staff and may also give rise to strategies that run counter to Ministers' objectives for the justice system. For example, early resolution of a solemn case effectively reduces the fee potential of the case. This is particularly so when full preparation of the case for a trial that may not in fact proceed is likely to require perusal of a significant volume of Crown productions.

Private criminal business: it is possible for criminal firms to increase their non-legal aid criminal business. In part, this may be as simple as suggesting to clients who are in employment but may nevertheless qualify for legal aid that they pay privately, thereby avoiding the need to provide detailed information about their finances to SLAB. This may suit some clients especially those with contributions to pay for ABWOR.

Solicitors with insufficient business are unlikely however to risk losing a client by insisting they pay privately. There is however it would appear a growing private market, for example subscription-based road traffic work (particularly for company or commercial drivers), and, given the growth in prosecution of domestic abuse cases, straightforward private fee paying clients.

Improving cash flow

4 Improving cash flow may be an outcome from increasing private feeing work, but within the legal aid system, the opportunities to improve cash flow are constrained by the efficient operation of the courts and the Crown. One area of business which does deliver improved cash flow is police station advice. A new system of block fees might prove particularly attractive for those businesses which are able to make resource available to deliver services which contribute positive cash flow.

Diversification into other markets

5 The structural factors noted above (reduced insurance costs etc.) also militate against criminal firms moving into non-criminal areas of work. But this would not prevent a move into other areas of work which rely on the skills used in criminal legal assistance work: health and safety or other corporate prosecution work, and prosecution of education for local authorities.

Some of these coping strategies will be unachievable for some firms. For others, the cost reduction strategy risks leading towards a dead end, where all cost savings have been made and capacity to regrow the business has been lost. To the extent that the cost-saving route is the only strategy which can be implemented by practically all firms (other than those who have pared their costs to the minimum already) the impact on the ability of the market as a whole to service emerging needs such as those associated with police station advice becomes problematic.

Apart from sustainability considerations, there are other negative consequences of a market dominated by criminal specialists. Criminal only firms are unable to deal with civil orders which sometimes follow on from criminal proceedings: this is not a good service model for the public or the public purse. For example, an accused is represented by a criminal only firm in a sexual offences case. Following a not guilty finding the police seek a Risk of Sexual Harm Order which is a civil order. The solicitor who knows the client's case does not accept instructions as he is in a criminal only firm. A civil solicitor is instructed – so there is additional cost and discontinuity of service. Should there be a breach, that breach is a criminal matter and will be prosecuted in the criminal courts – and so may be dealt with by the original criminal solicitor. This issue will become more problematic as legislation is implemented which includes civil responses following on from or contemporaneous to criminal proceedings.

The legal aid system can also act to encourage micro firms and splintering of firms which makes the formation of larger firms with appropriate gearing to improve profitability more unlikely. The legal assistance system is constructed around the nominated solicitor, not firm.

Criminal legal assistance is granted by or to a nominated solicitor. That solicitor will be associated with a firm, but the grant runs in the solicitor's name and payment is due to the solicitor who will mandate payment to the firm.

The traditional business model in the legal sector is partnership, with gearing within the partnership both in earnings and fee rates: more experienced solicitors attracting a higher fee rate than less experienced solicitors. Legal aid pays the same rate to solicitors regardless of their experience or expertise. Therefore businesses which specialise in criminal legal aid work are not able to distinguish between experienced and less experienced solicitors solely on the basis of chargeable rates and income generation, although it is clear that as solicitors gain experience they are likely to be able to work more proficiently and more efficiently than an inexperienced solicitor.

Experienced employed solicitors may see little distinction between their value to the business and a partners' value to the business. They may be less inclined to remain employees, rather than owners, unless there are clear advantages in the employment relationship or the owner(s)-solicitor(s) are contributing expertise, access to high profile interesting work, or capital to fund a business's infrastructure.

Nominated solicitors, on moving from one firm to another, or on leaving a firm to start a new firm can mandate payment to the new firm, although in doing so they may then receive payment for work in progress belonging to their previous employer/partners.

There are therefore incentives within the current system for solicitors, disgruntled with their employment status or partnership arrangements, to form new partnerships (or LLPs or companies) or establish themselves as sole practitioners, sometimes taking work in progress with them. They can register on the SLAB's Register of Criminal Practitioners with relative ease and on completion of the registration process have immediate access to the Fund. Funding from the Legal Aid Fund, administered by the SLAB, can be drawn down by any firm on our Register to fund services provided to eligible clients.

Both the incentive to and relative ease with which an employed solicitor can set up in competition to their former employer have consequences for the way in which both individual firms and the market as a whole operates. For firms with assistants, it can lead to pressure to bring them into the partnership to avoid the risk of them departing, thus depleting per partner profits. For firms without assistants, it can be a disincentive to taking any on, which places a limit on any growth potential for the firm. This dual effect encourages a tendency towards top heavy structures, or sole practitioner status. So some of what we observe in the criminal legal assistance market can be understood as a response by businesses to aspects of the legal aid system and the regulatory system.

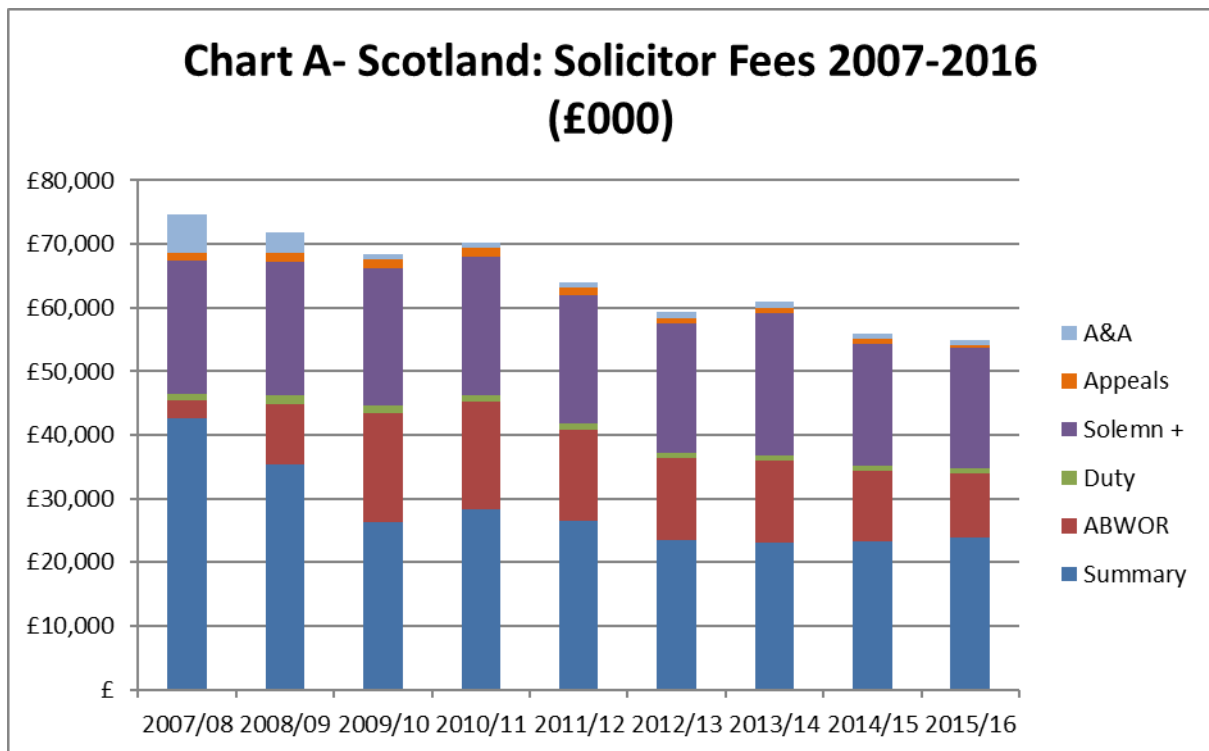
In strategic terms, the shape of the supplier market has an impact on the capacity of firms to offer a full, quality assured criminal legal assistance service to clients at the fee levels the public purse can afford. The shape of the market also has an impact on the ability of firms to respond to changes in criminal legal practice: the most pressing change is the extension of rights in the police station afforded by the Criminal Justice (Scotland) Act 2016. Other Scottish Government led change which will pose further challenges for solicitors are the type of change which might flow from the Evidence & Procedure Review.

The reduction in available business and fees able to be earned from criminal business contributes to an upward pressure on fee levels as the profession and Law Society of Scotland react to reductions in business by focussing on fee rates to the exclusion of other determinants of profitability such as business structures, cost profiles and market share. Although the number of firms delivering Criminal Legal Assistance (CLA) has reduced by 15% from 2007- 2016, the business available has reduced by 46% (2007-15) (measured in grants of criminal legal assistance). (Appendix 1, Chart 1)

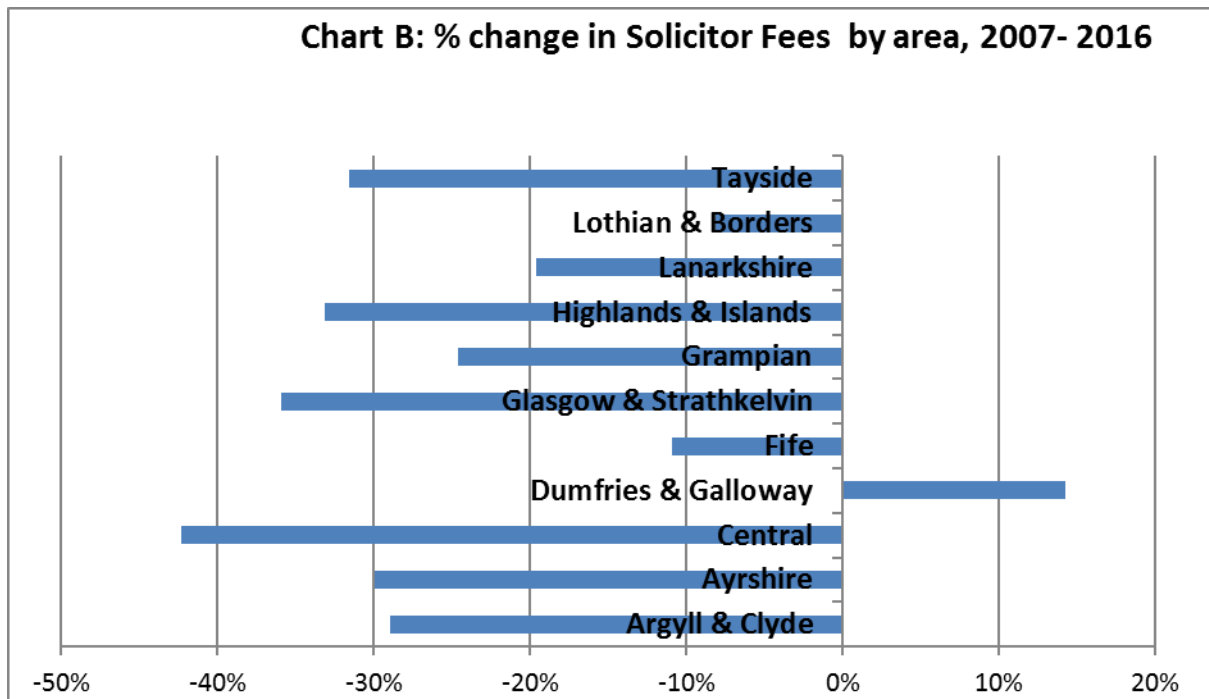
The consequence is that, as total fee income has reduced, the national average solicitor fee income from CLA per firm has reduced from £126k to £109k, having peaked at just over £130k as recently as 2010/11 (Appendix 1, Chart 2). The average business has either become smaller or less profitable, or both. Competition between businesses can be expected to have intensified as a consequence of these shifts: earnings data suggests that

despite this fall in average fee income, some firms have grown i.e. others will have lost even more ground than the fall in average income suggests.

The reductions in overall expenditure and fees paid per firm are not evenly distributed amongst firms or type of business. Chart A shows the relative and changing total fees value of different types of business. A main point of interest from this is the change in both Summary and ABWOR (Assistance by Way of Representation) since 2008 and the implementation of Summary Justice Reform.



There are significant variations in fees earned in different geographies and in the market response to changing income levels. For ease of analysis we have grouped sheriff court areas in the Local Community Justice Board areas, although the Boards themselves are no longer operational. The geographical link between fees and work in a particular court is difficult to plot across all work types. For the purposes of this analysis all CLA fees have been assigned to the geographical location of the main branch office of the firm. So it is the fees earned by firms in those locations although some fees earned may be related to courts situated elsewhere. See Chart B.

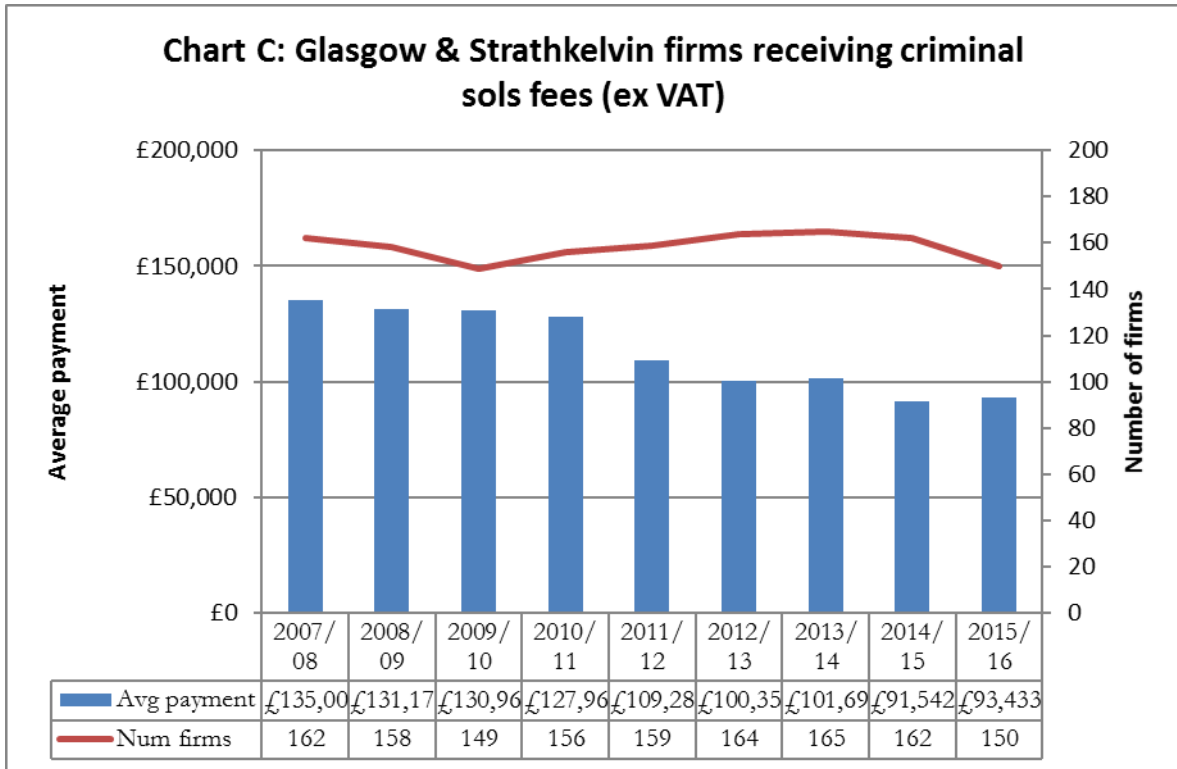


The overall percentage fee reduction 2007-16 was -26%. Chart B reflects the impact of that by LCBJ area.

We can see that there has been an unequal distribution of fee reduction (following on from the reduction in recorded crime). Looking more closely at the number of firms we can discern that some markets have reacted to the reduction in business and others have remained fairly static.

Appendix 2 contains charts for each area showing the change in the number of firms receiving a payment for solicitors' fees each year plotted with the average payment of CLA solicitors' fees.

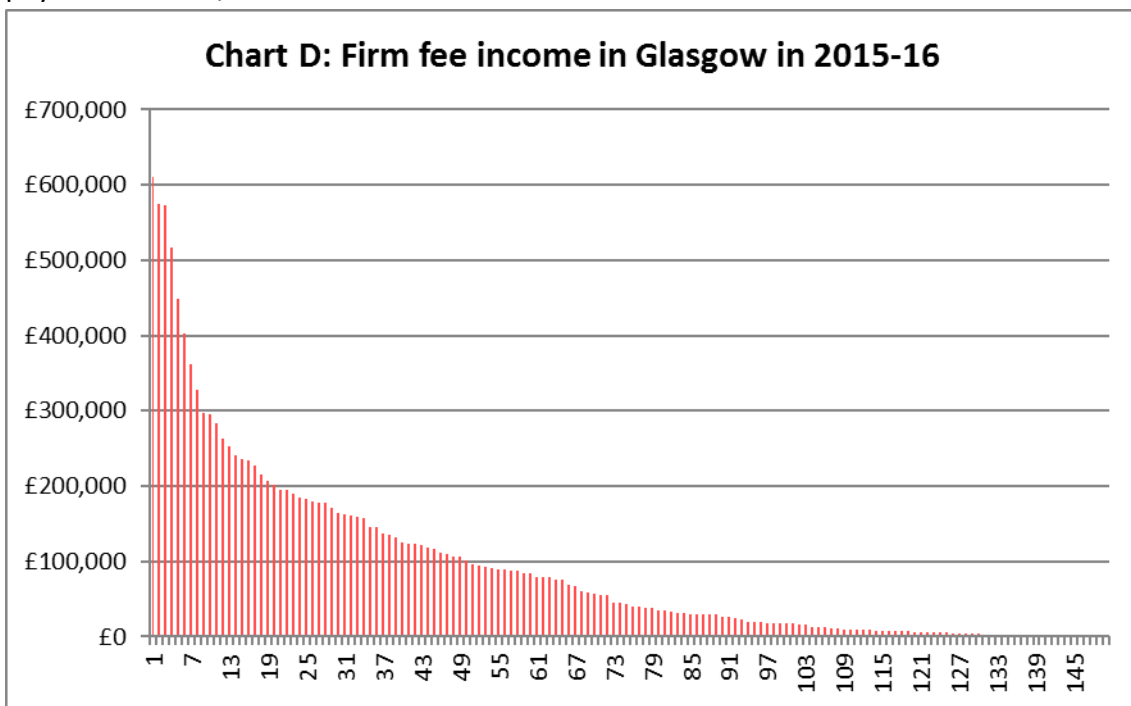
Glasgow & Strathkelvin comprises Glasgow Sheriff and Justice of the Peace Court. It has the biggest supply base and greatest volume of criminal legal assistance business. It is however a crowded market. The business reduction, expressed as fees, in the Glasgow & Strathkelvin area over the period 2007-16 was -36%. It is the second greatest reduction. In Glasgow the average fee income per firm has dropped from £135,000 to £93,433. The number of firms has fluctuated but we have not seen as big a drop in the number of active firms as might be expected given the reduction in business available. See Chart C.



Looking more closely at the firms based in Glasgow who received a payment for CLA:

- 55% of firms also received a payment for civil legal assistance in 2015/16
- 41% of firms had only one registered criminal practitioner
- 14% were no longer on the register by June 2016
- 13% received a payment greater than £200,000.

Chart D shows the distribution of CLA fees in Glasgow across 150 firms which received a payment in 2015/16.

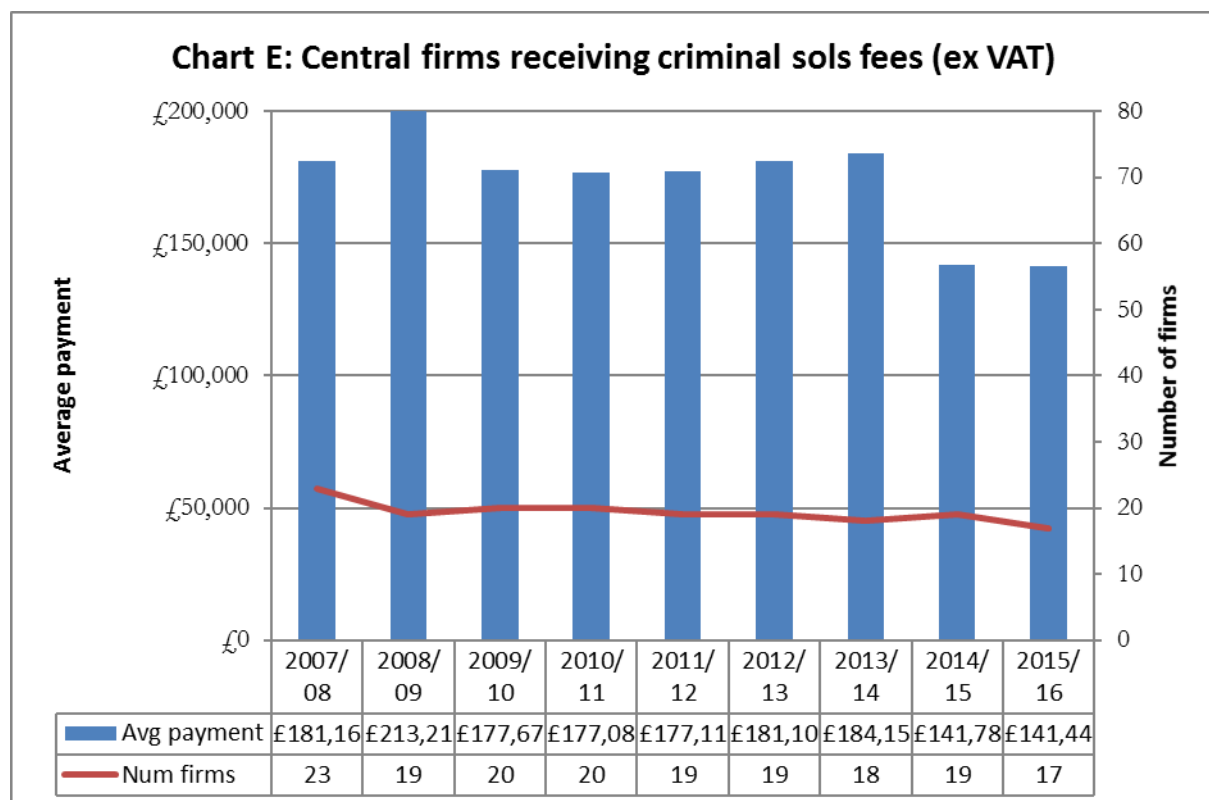


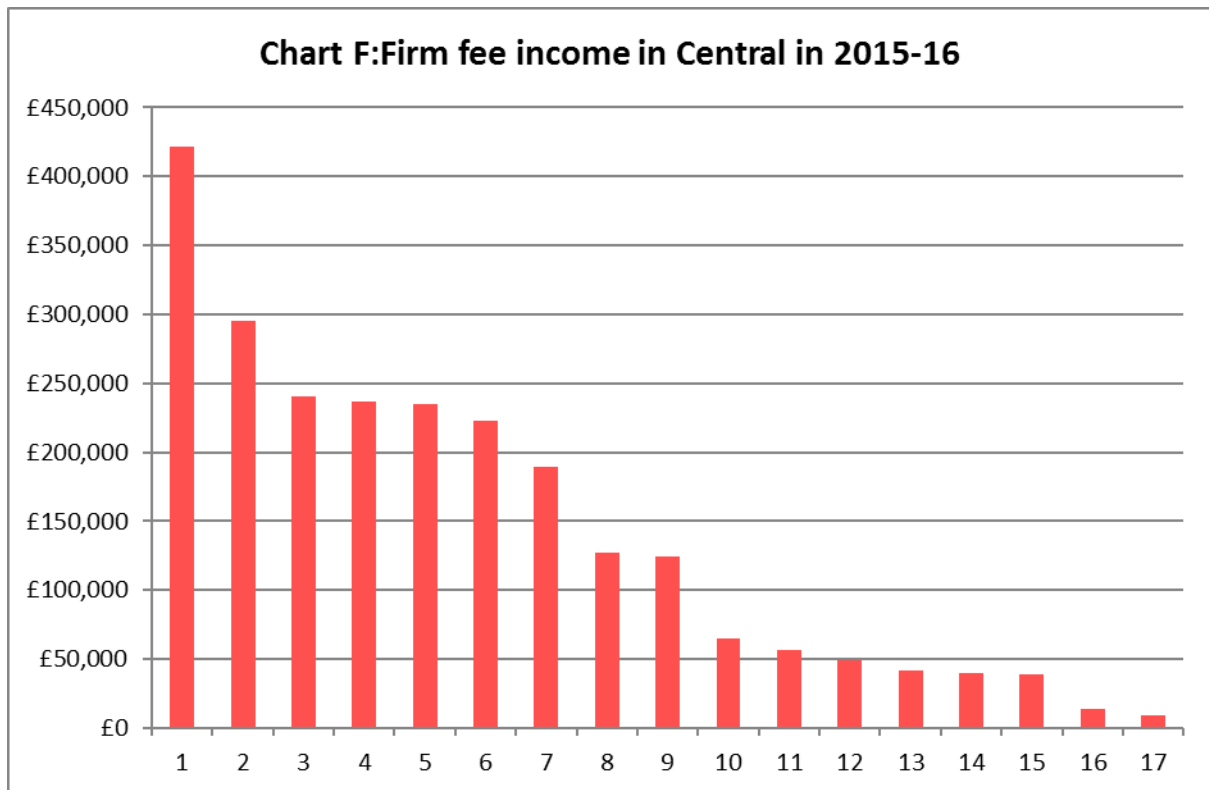
Glasgow is clearly a very competitive market with a broad range of businesses competing for work. This is an issue for the SLAB and the Scottish Government as it produces an upward pressure on fee rates which cannot be met and contributes to additional stress on the duty schemes.

The Glasgow duty scheme covers four different courts and all Glasgow police stations with custody suites. Around 130 firms participate in the court scheme but closer to 90 participate in the police station duty scheme. One third of those on the police station duty scheme are sole practitioners which given the scope of the scheme creates a pressure, although even the larger firms in the area have difficulty in meeting the obligations under the duty scheme - if all available capacity is fully committed then additional ad hoc demands are hard to meet.

Central LCJB area has suffered the greatest decrease in fees since 2007. Central LCBJ comprises the courts in Alloa, Falkirk and Stirling. Business generated in those courts has reduced by 42% since 2007/08. Although a smaller market than Glasgow, the average fee income per firm from solicitor’s CLA fees is greater than in Glasgow. Of the 17 firms which received a payment for CLA in 2015/16:

- 82% also received a payment for civil legal assistance in 2015/16
- 12% had only one registered criminal practitioner
- 12% were no longer on the register by June 2016
- 35% received payment greater than £200,000.





Eighteen firms are on the various court duty schemes in the area, and 12 firms are on the police station scheme. Only one firm on the police station duty scheme is the sole criminal practitioner in the firm. The largest firm in Central does not participate in the police station Duty Plan. A dominant firm in its local court, the strength of their market position means that they are able to continue to attract business without participation in the scheme as a means to acquire new business.

Appendix 1

Chart 1:

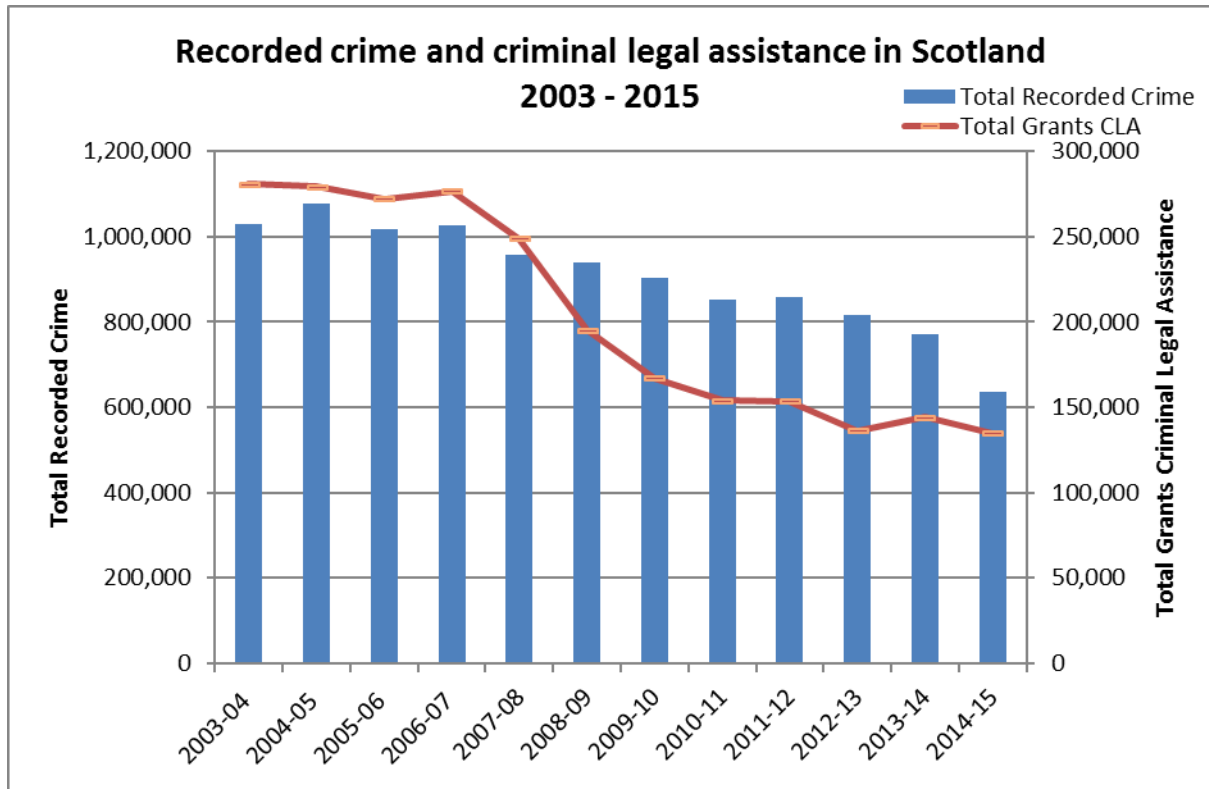
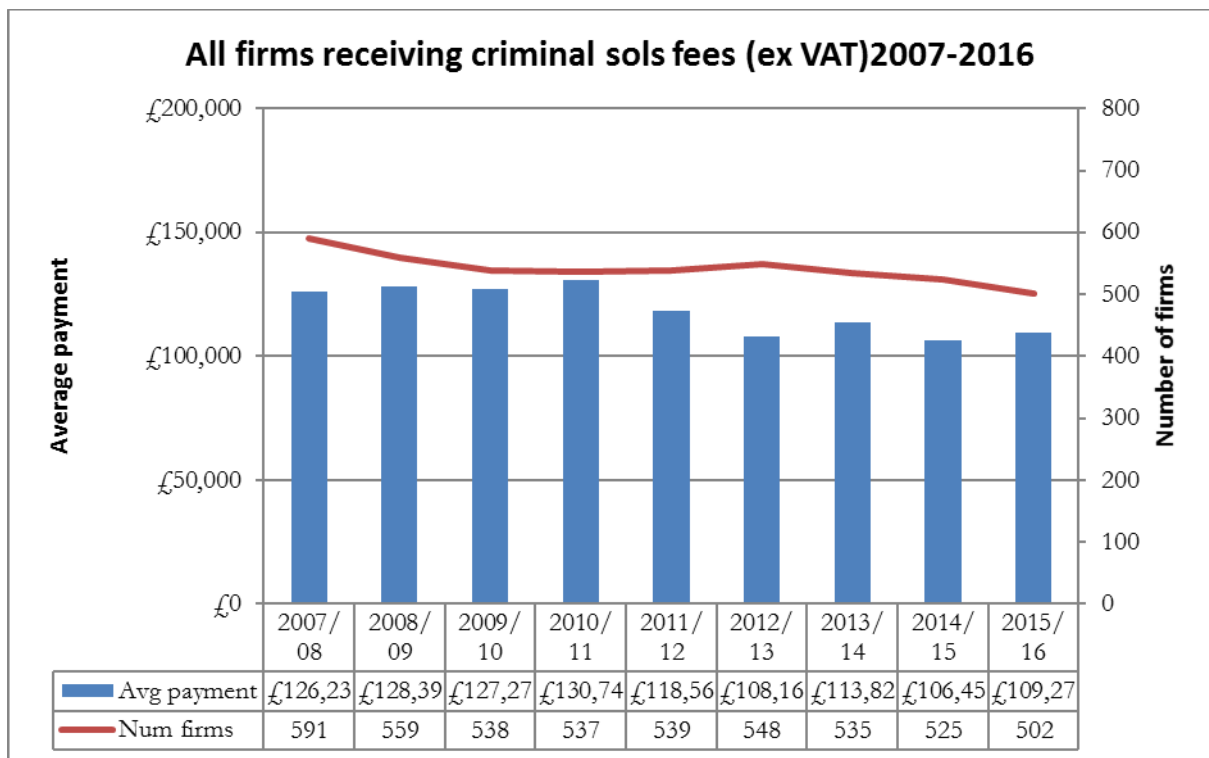
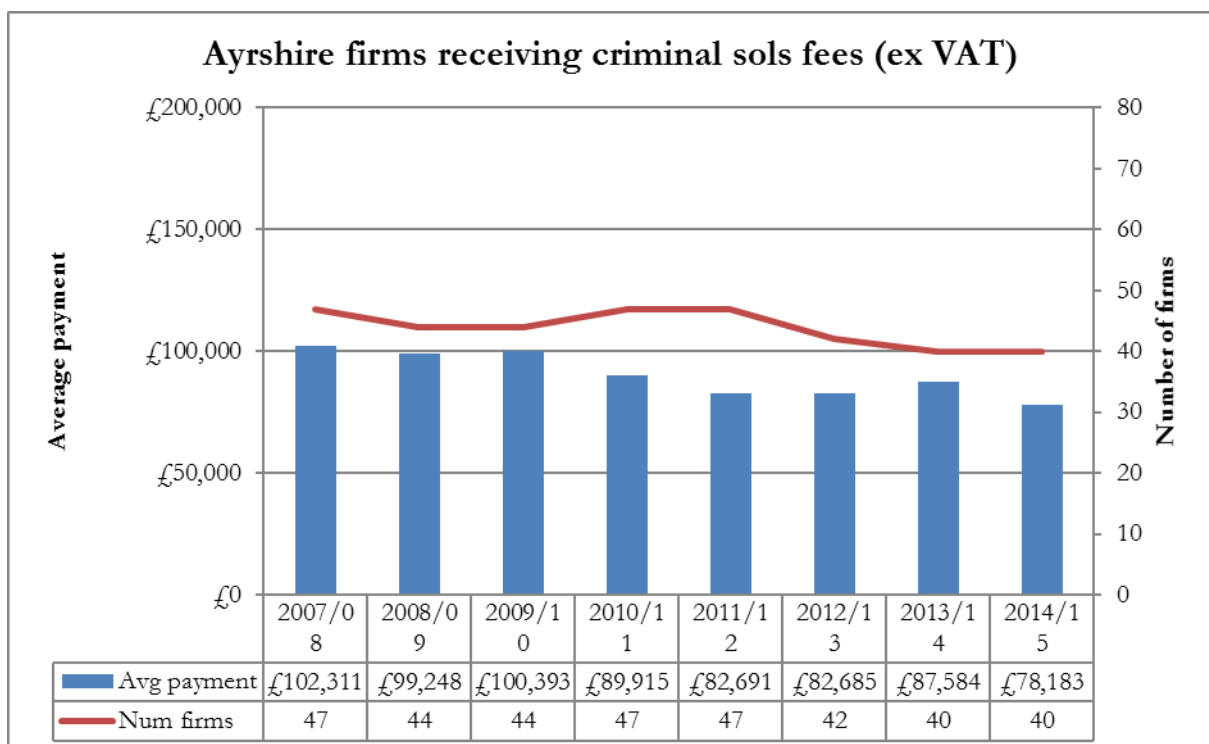
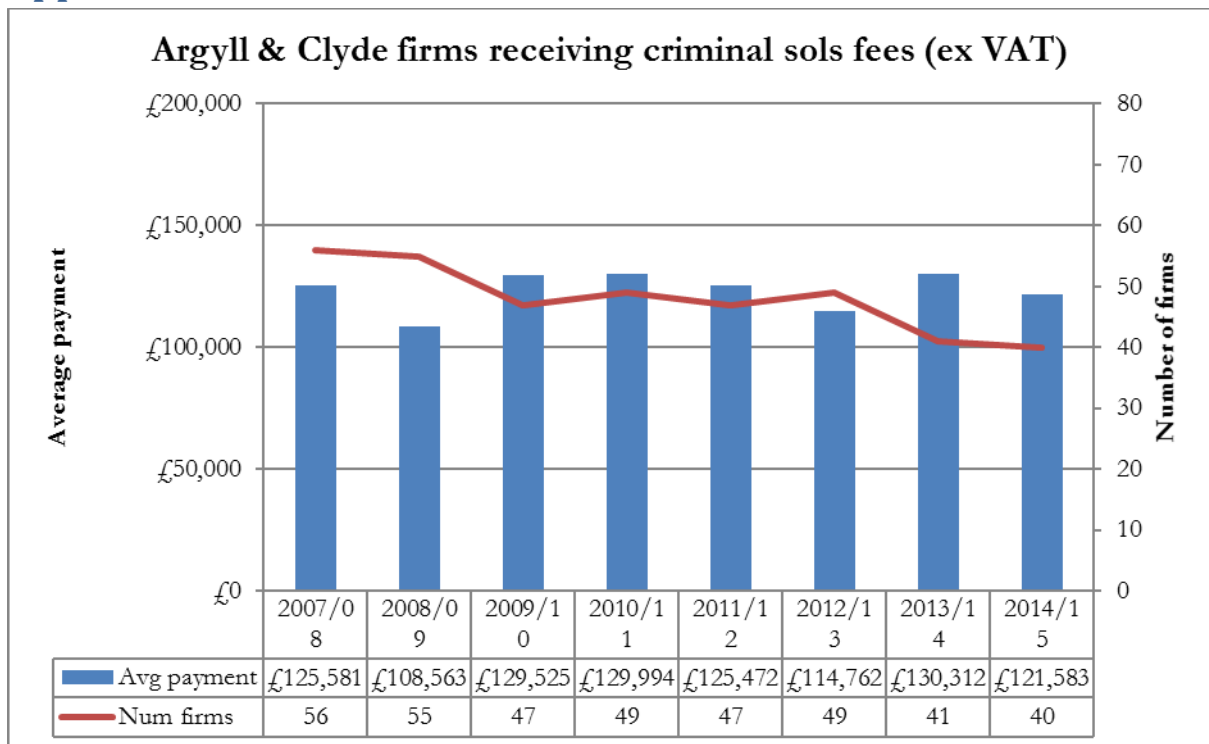


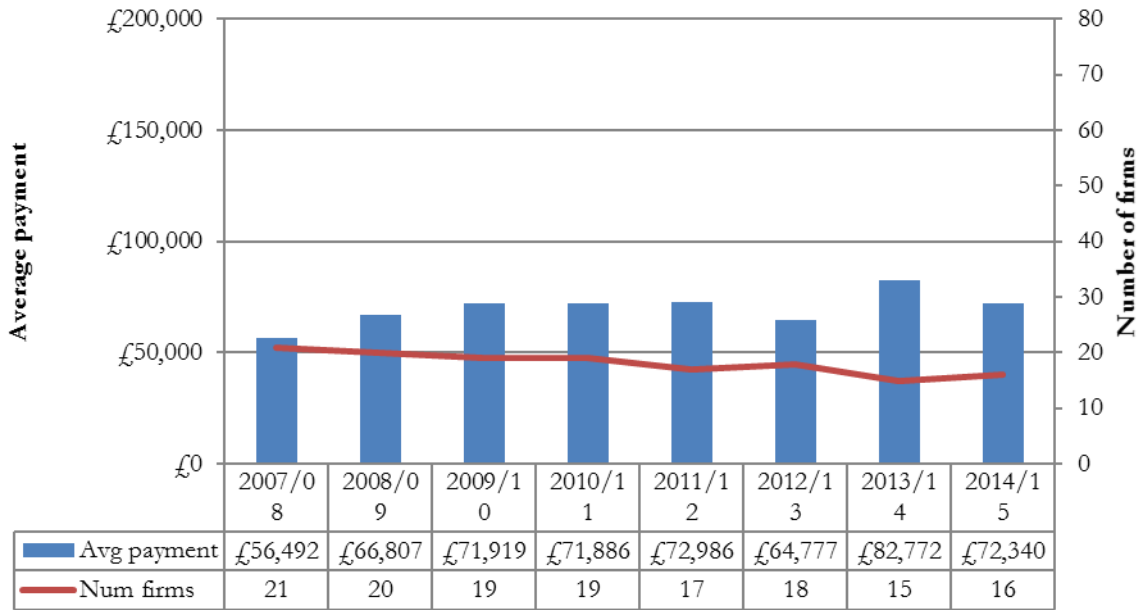
Chart 2:



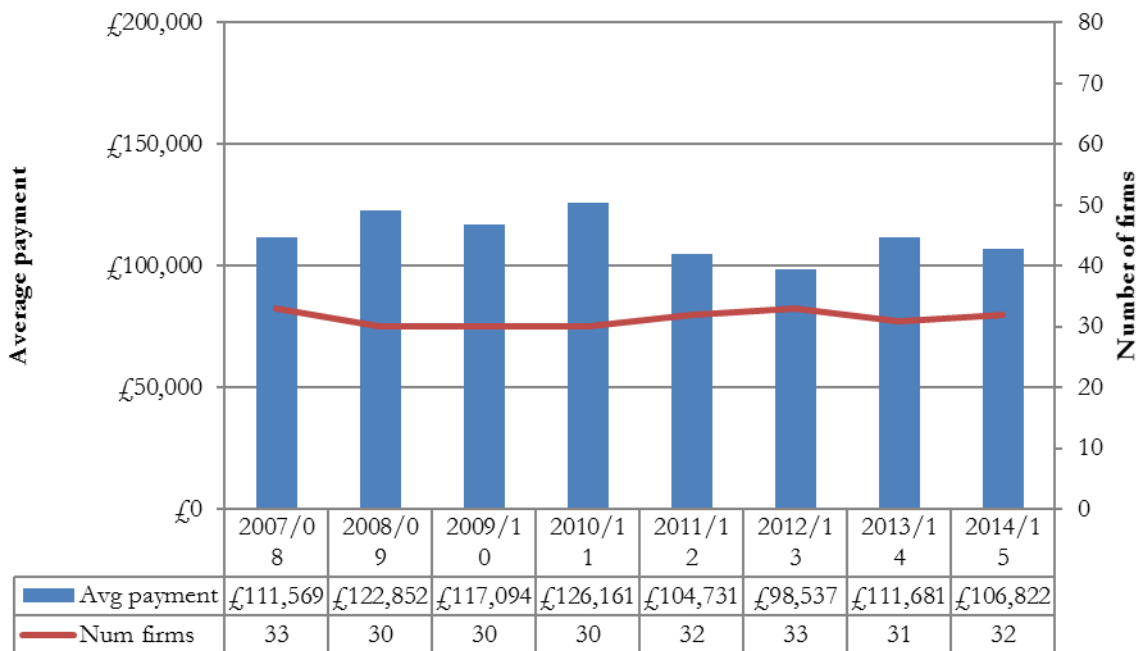
Appendix 2



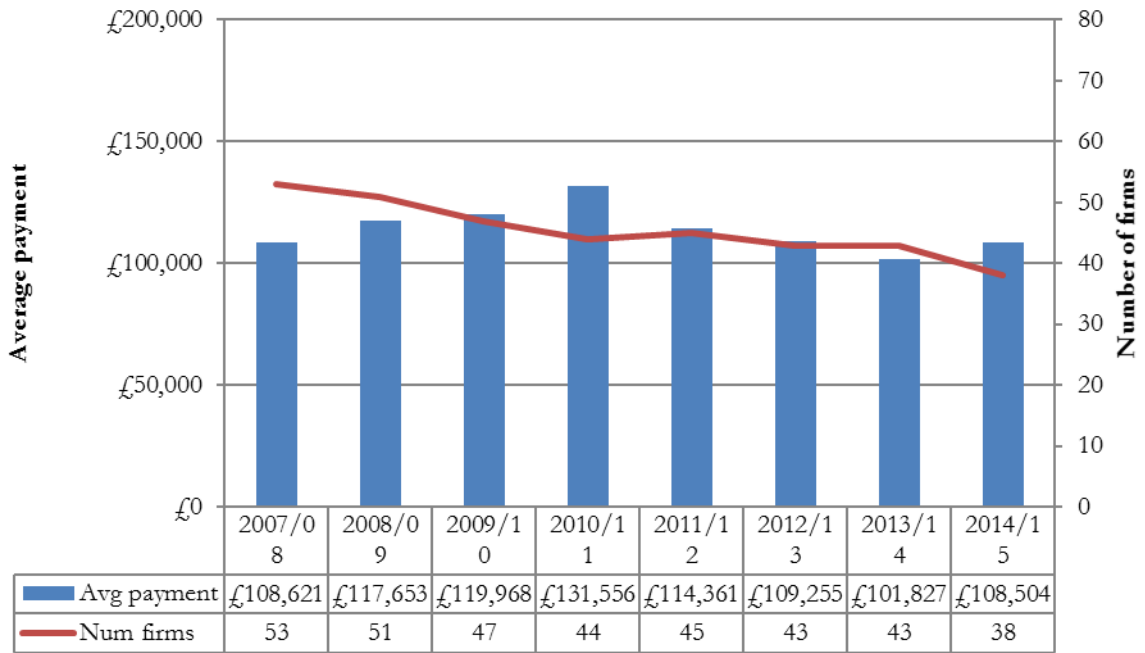
Dumfries & Galloway firms receiving criminal sols fees (ex VAT)



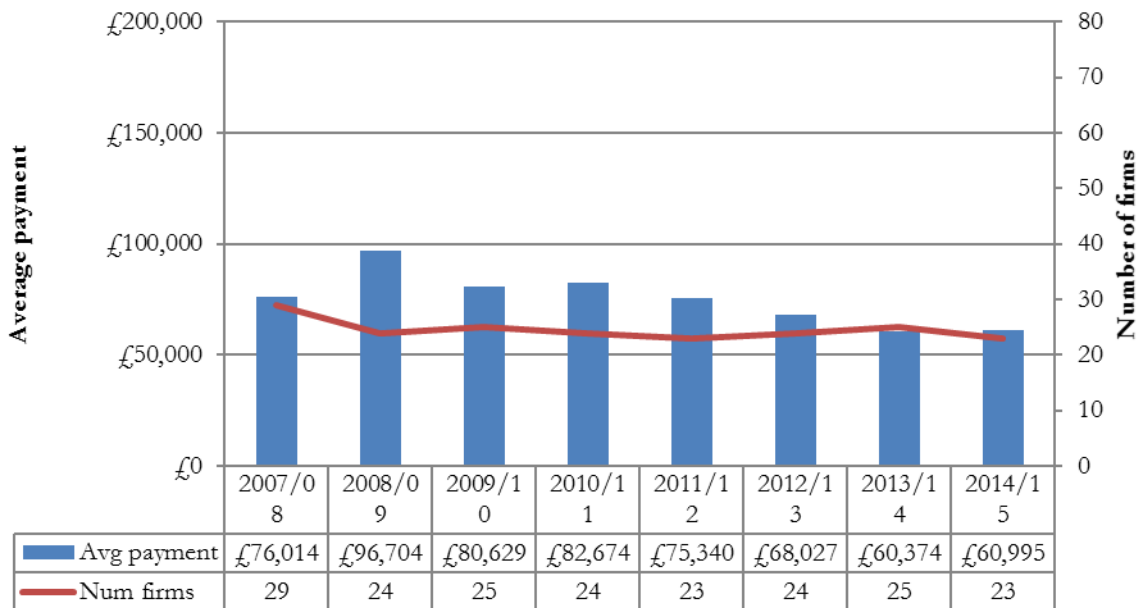
Fife firms receiving criminal sols fees (ex VAT)



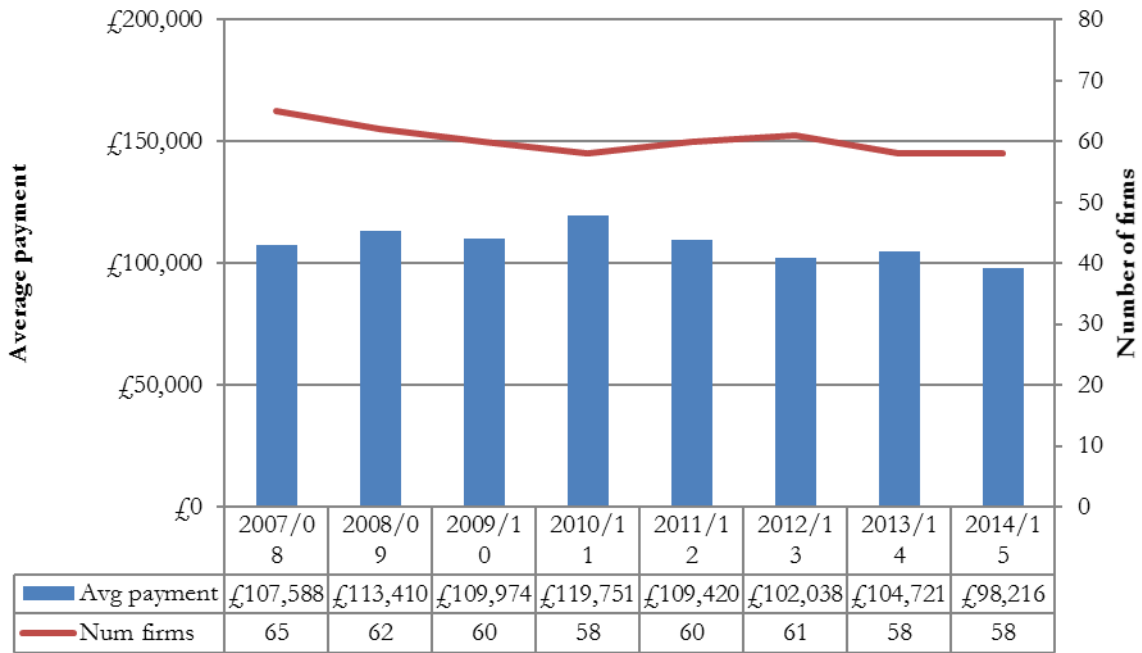
Grampian firms receiving criminal sols fees (ex VAT)



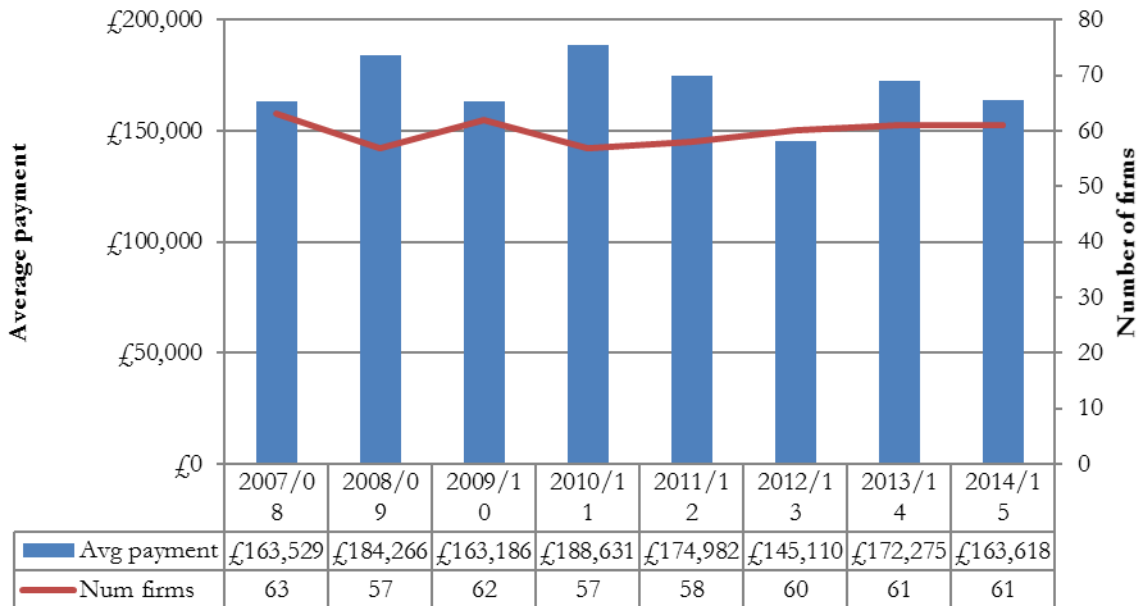
Highlands & Islands firms receiving criminal sols fees (ex VAT)



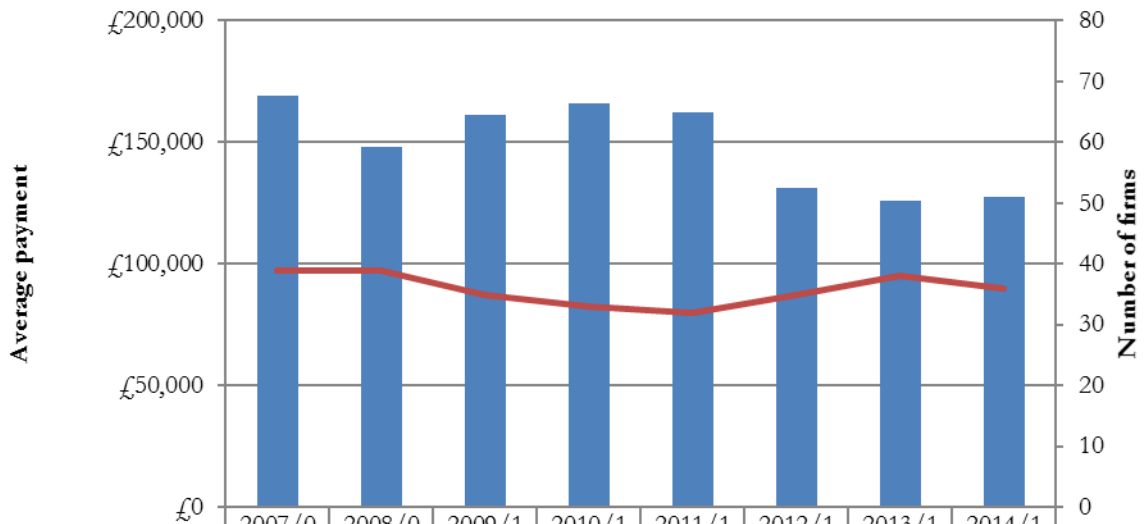
Lanarkshire firms receiving criminal sols fees (ex VAT)



Lothian & Borders firms receiving criminal sols fees (ex VAT)



Tayside firms receiving criminal sols fees (ex VAT)



■ Avg payment	£169,290	£148,199	£161,494	£166,270	£162,380	£131,489	£125,818	£127,637
— Num firms	39	39	35	33	32	35	38	36