

# PAYMENT FRAMEWORK OF PUBLICLY FUNDED LEGAL ASSISTANCE

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# Benefits of review

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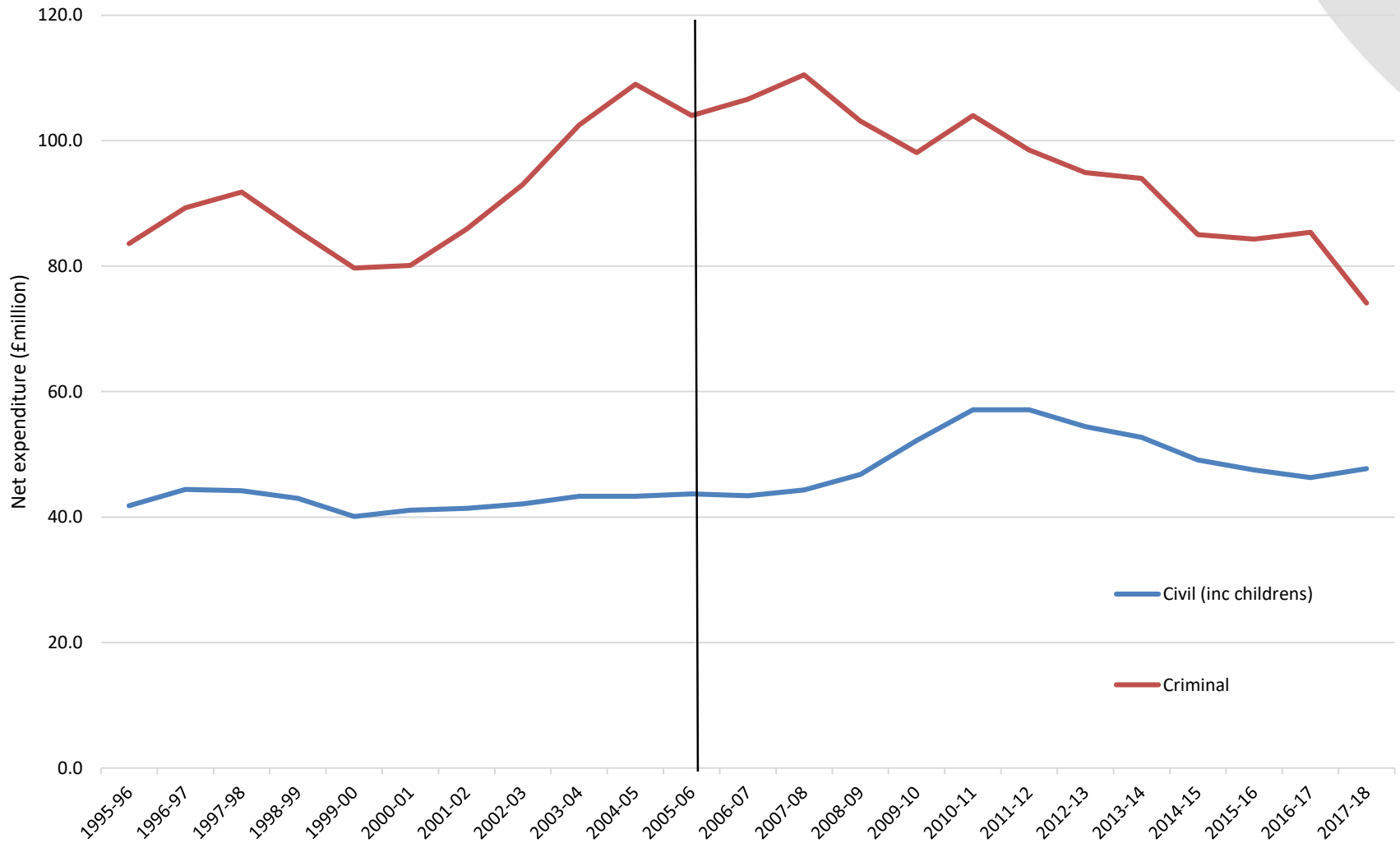
- SLAB fully supports the review and sees a real need for change
- Fees have dominated public debate on legal aid and relationships between SG, SLAB and the profession for decades
- Review is a real opportunity to reset these relationships and enable a debate about how best to deliver the outcomes supported by legal aid

# Purpose of presentation

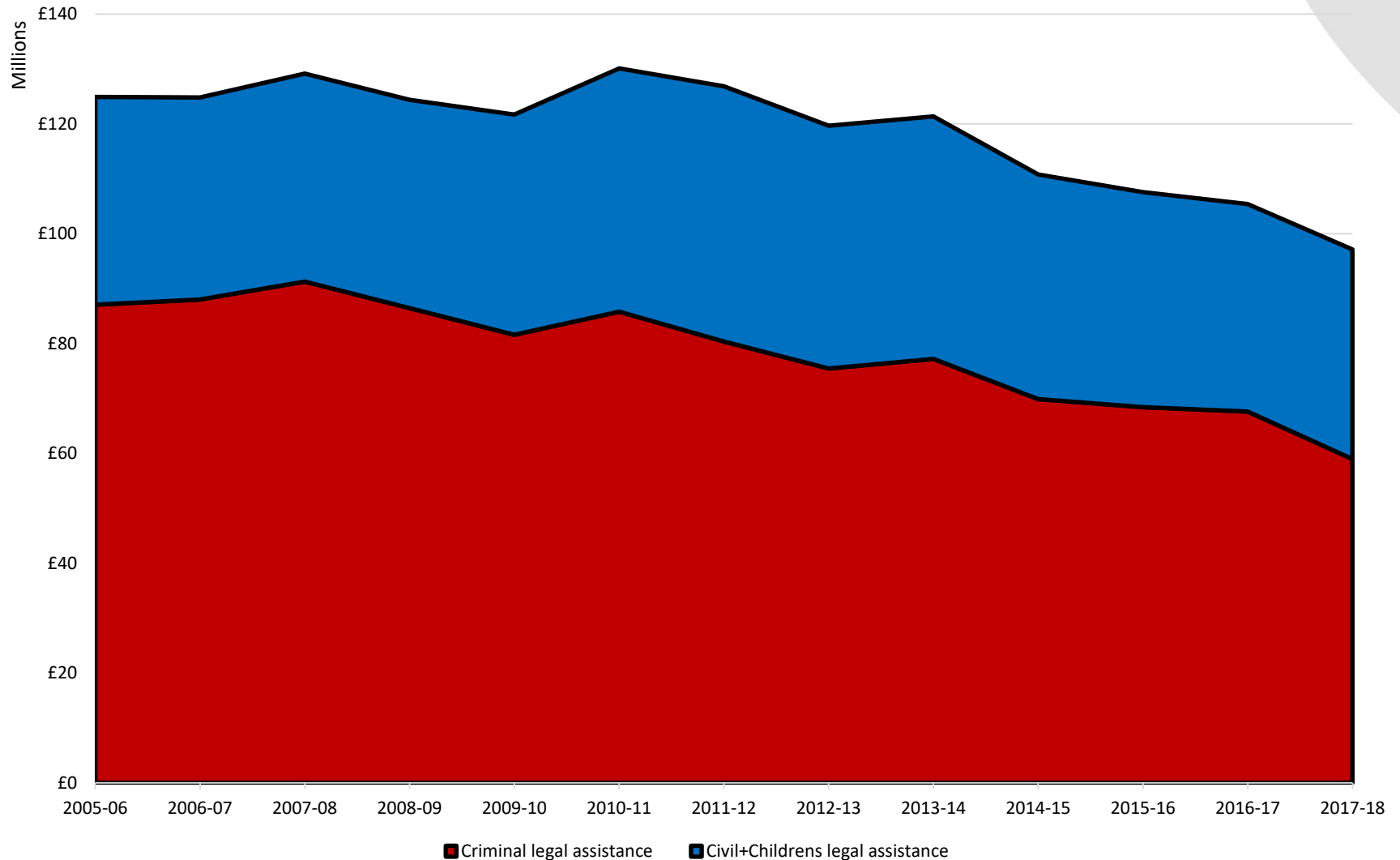
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- To give the Panel background information on how the current payment arrangements in the various legal assistance schemes operate.
- To place these arrangements in context in terms of trends in volumes, values and distribution of payments
- To highlight some of the strengths and weaknesses of the current system
- To assist the panel in identifying issues for further consideration and any gaps in evidence

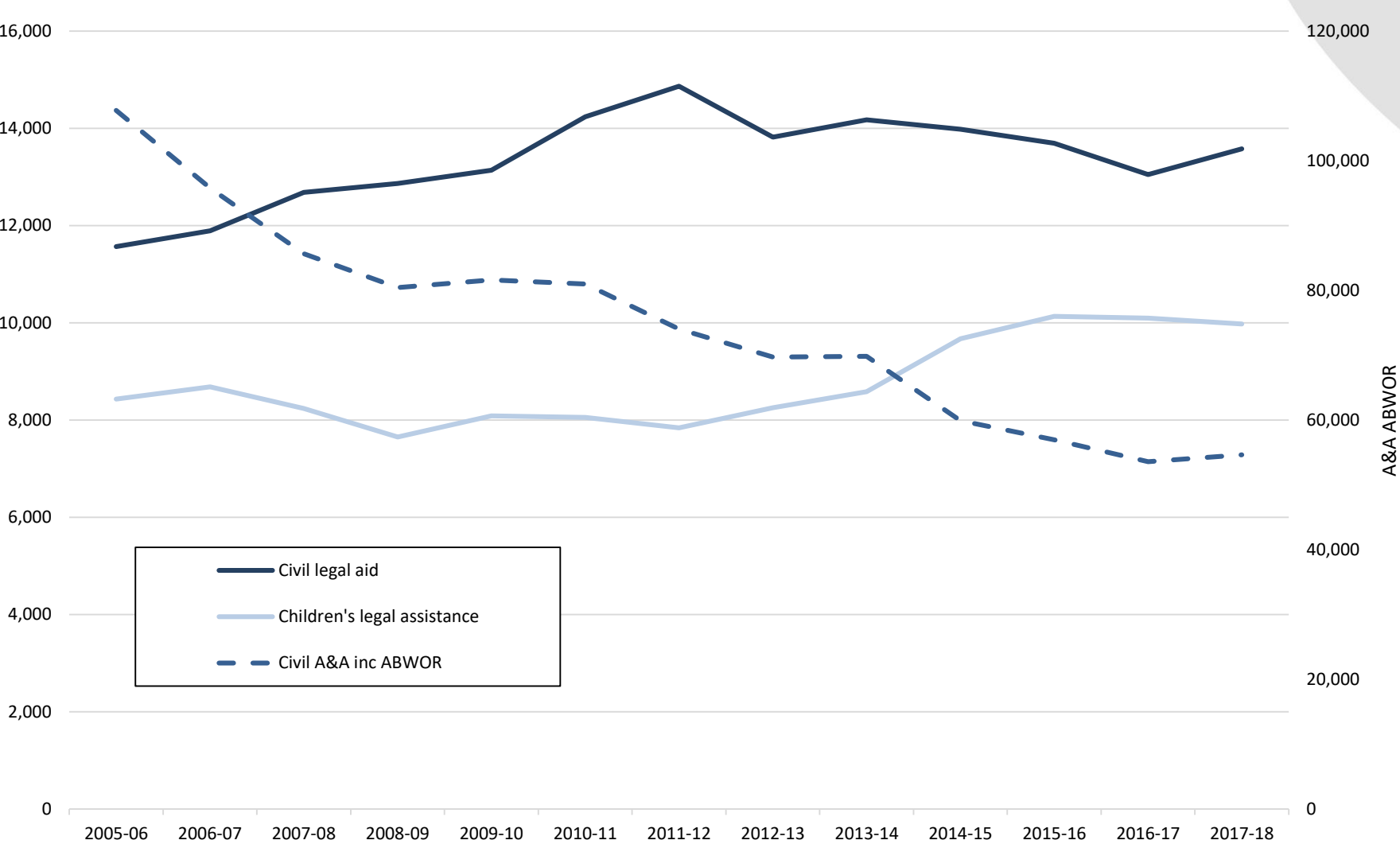
# Trends in legal aid expenditure



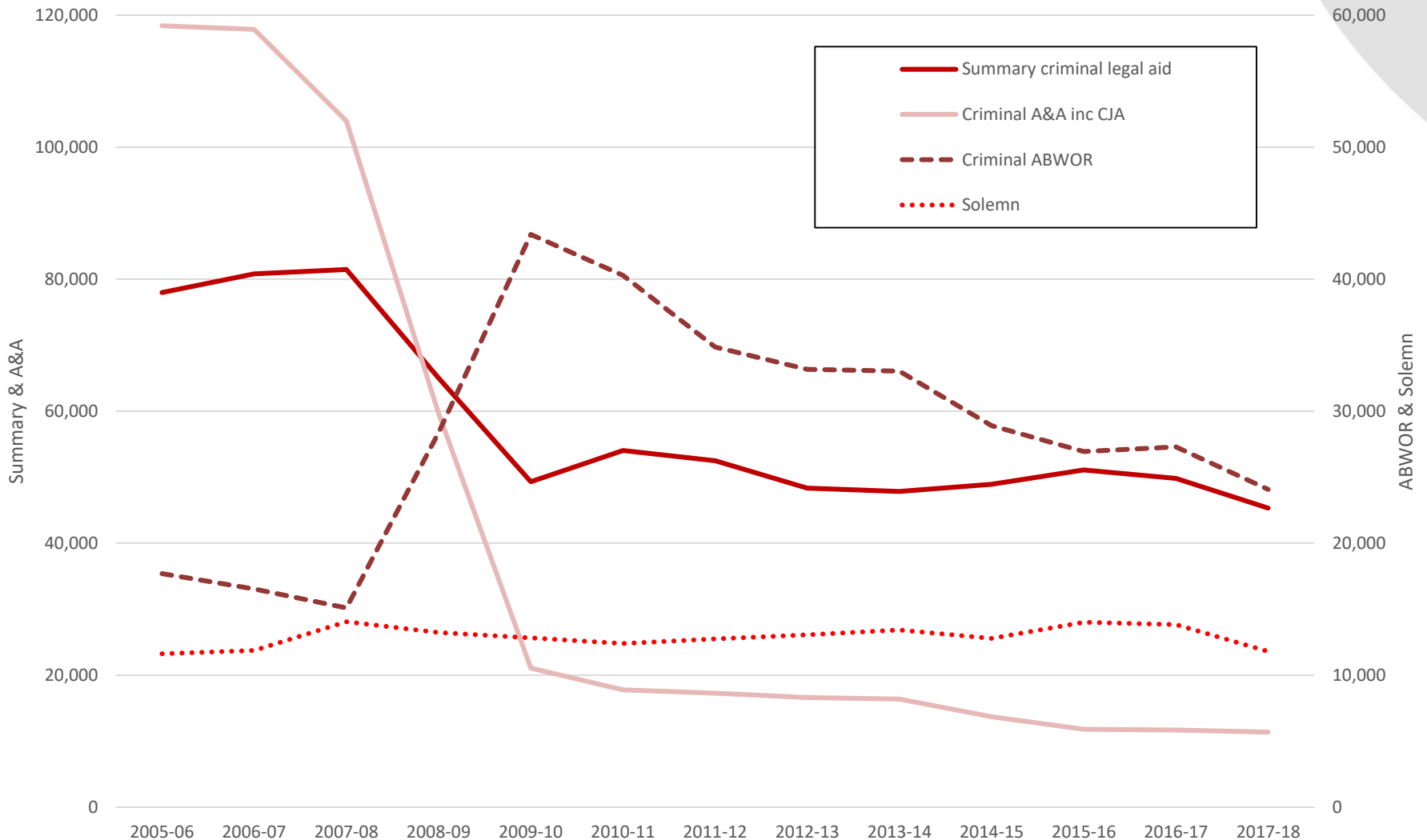
# Trend in firm payments



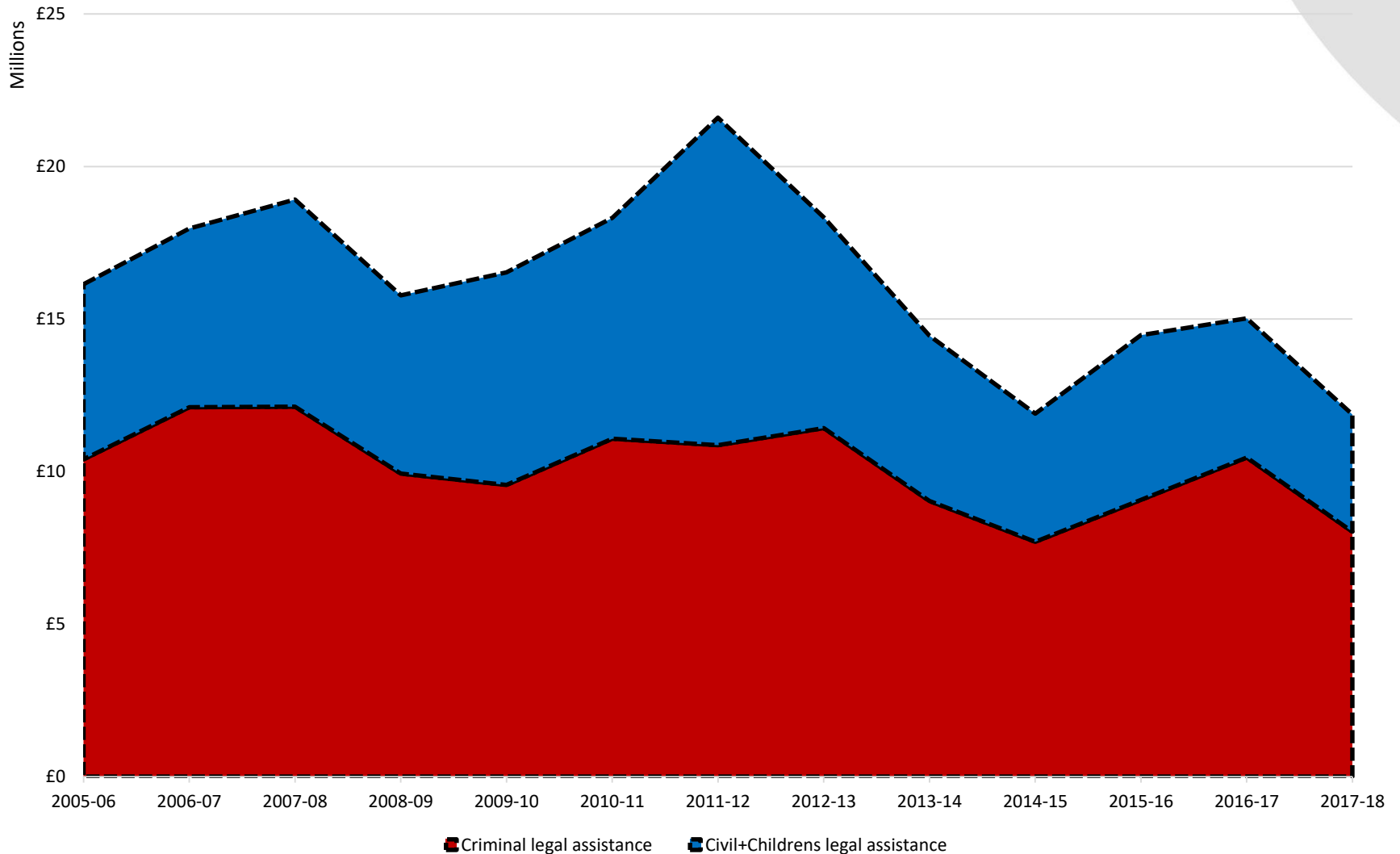
# Trend in cases paid - civil/children's



# Trend in cases paid - criminal

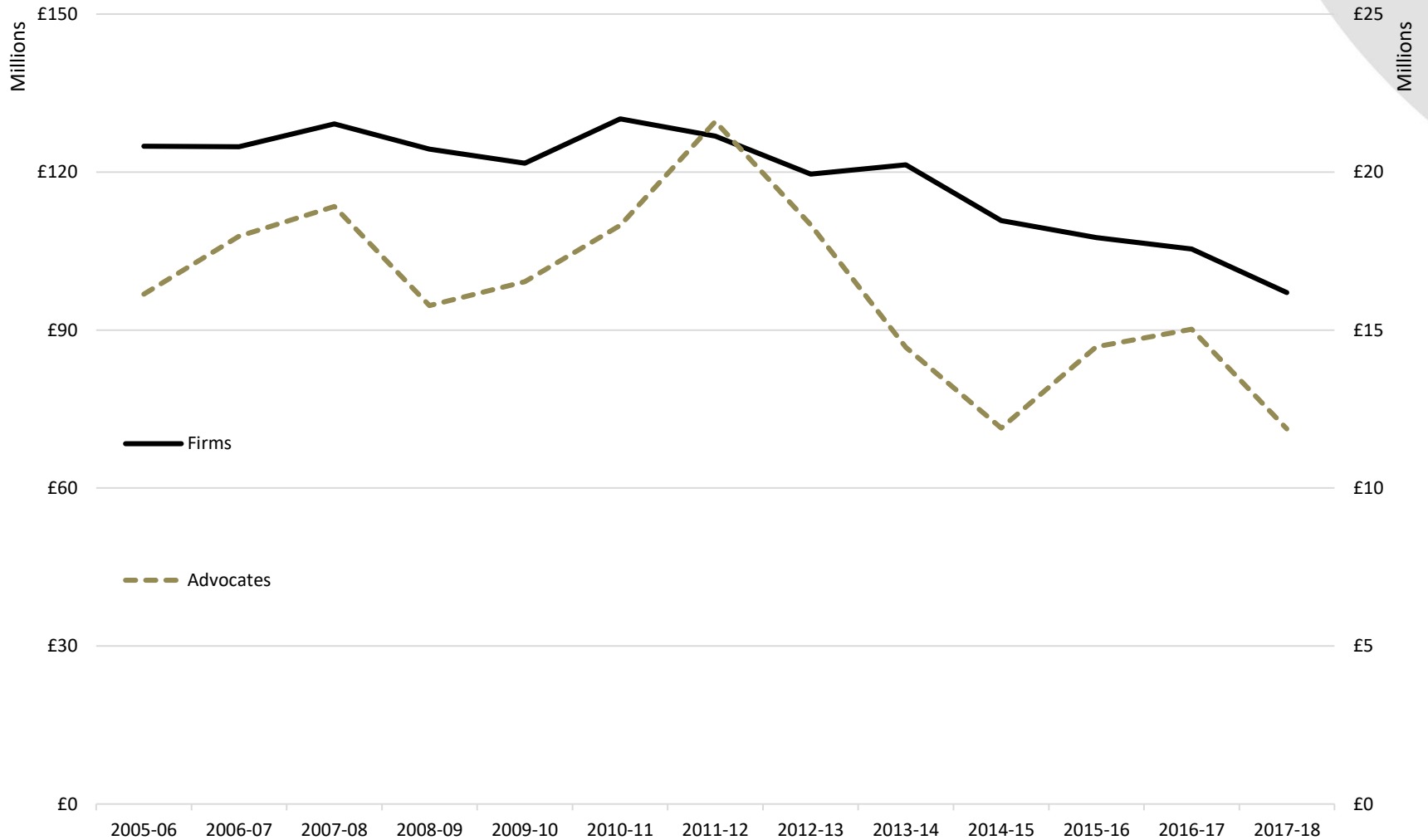


# Trend in advocate payments





# Trends in firm & advocate payments



# Firm earnings distribution in 2017/18

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Firm earnings (£000)	Number of firms	%	Sum of earnings (£million)	% of earnings	Avg firm earnings
<= 5	140	18%	£0.24	0%	£1,725
5 to 25	170	22%	£2.41	3%	£14,184
25 to 75	184	23%	£8.47	10%	£46,008
75 to 175	144	18%	£17.11	21%	£118,806
Above 175	151	19%	£53.14	65%	£351,951
<b>Total</b>	<b>789</b>	<b>100%</b>	<b>£81.37</b>	<b>100.0%</b>	<b>£103,132</b>

# Change in firm earnings

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<b>Firm earnings (£000)</b>	<b>2005-06</b>	<b>2017-18</b>	<b>% change</b>
<b>&lt;= 5</b>	205	140	-32%
<b>5 to 25</b>	170	170	0%
<b>25 to 75</b>	212	184	-13%
<b>75 to 175</b>	166	144	-13%
<b>Above 175</b>	184	151	-18%
<b>Total</b>	937	789	-16%
<b>Avg earnings 17-18 real terms</b>	143	103	-28%

# Advocate earnings

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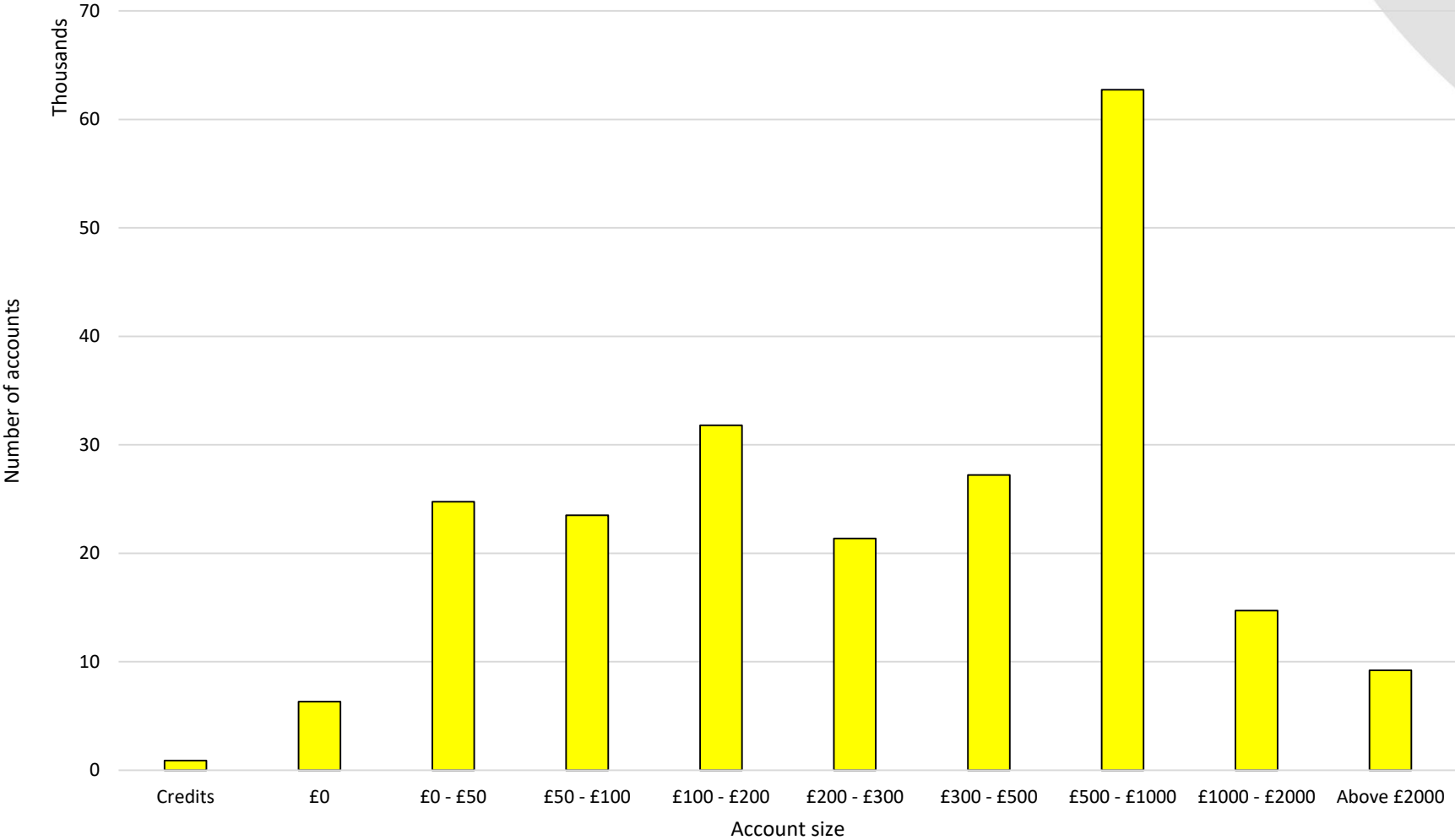
Advocate earnings (£000)	Count	%	Sum of fees (£ million)	% of fees	Avg per advocate
<= 5	128	45%	0.20	2%	£1,553
5 to 25	64	23%	0.80	9%	£12,488
25 to 75	55	19%	2.74	31%	£49,767
75 to 175	27	10%	2.92	33%	£108,161
Above 175	9	3%	2.16	25%	£239,526
<b>Total</b>	<b>283</b>	<b>100%</b>	<b>8.81</b>	<b>100%</b>	<b>£31,135</b>
Paid via sol			2.30		

# Payments system

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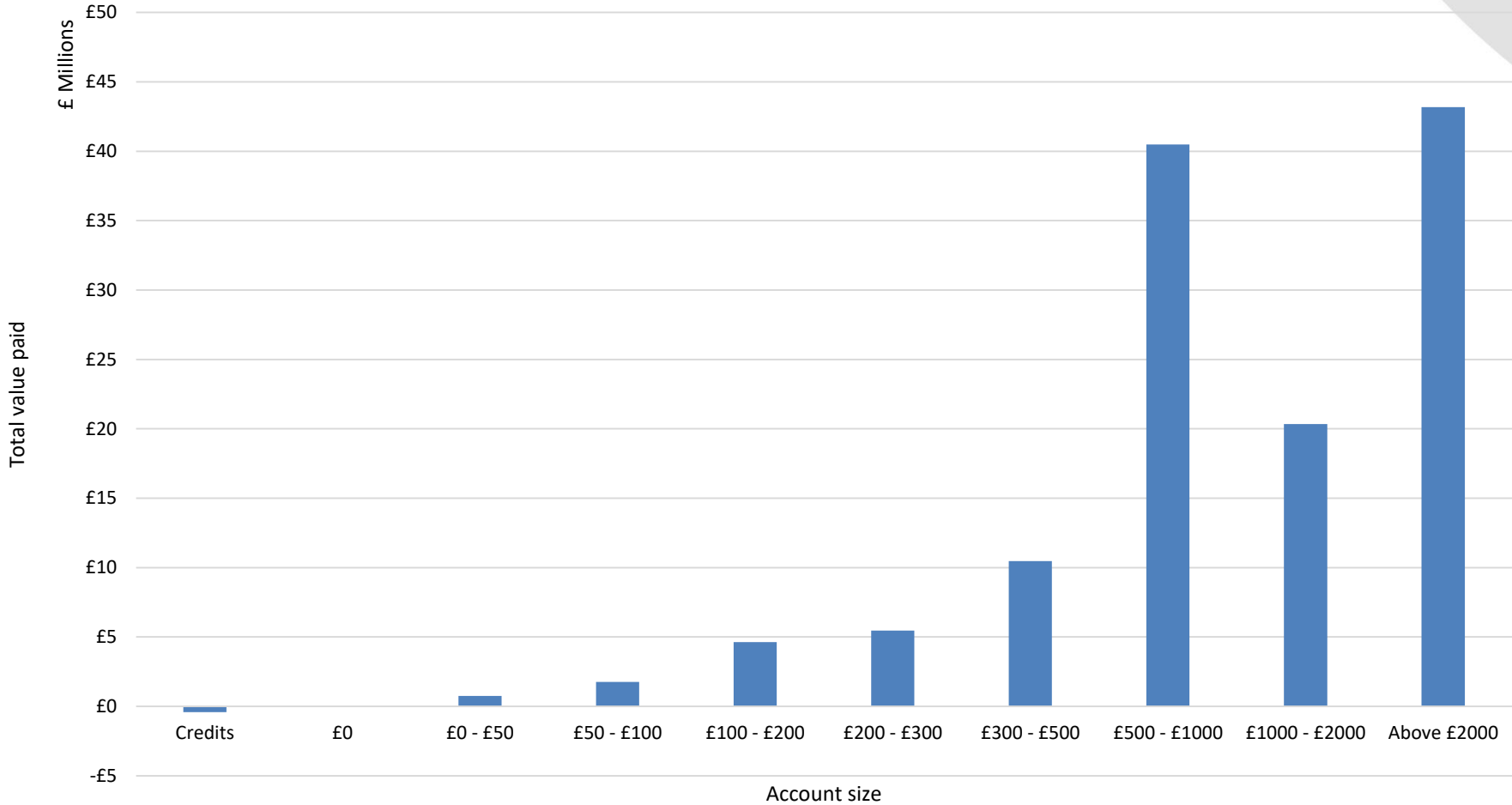
- Just over 200,000 grants of legal assistance in 2017/18
- Following grants we sent 252,000 messages regarding approvals
- And we sent 462,000 account-level messages regarding accounts or payments
- We paid 223,000 accounts
- Estimated work items 3,500,000

# Volume of accounts paid 17/18



# Value of accounts paid 17/18

Total value paid by size of account



# Procedure for Assessment of Accounts

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- Circa 38 staff employed in the assessment of all types of legal aid and advice and assistance accounts.
- Teams specialise in the assessment of a single aid type - dedicated teams deal with solicitors' accounts and a small team are responsible for the assessment of all counsels' fees and high value solicitors accounts.
- A number of assessment staff specialise on a particular category of case within an aid type (e.g. mental health proceedings, immigration and asylum, etc.).
- SLAB are obliged by statute in terms of the Legal Aid (Scotland) Act and Regulations to make payment of fees and outlays which are "properly incurred".
- Each entry in an account requires to be assessed



# Procedure for Assessment of Accounts

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- Solicitors accounts for the vast majority of cases can be submitted online. Where possible, automated rules have been integrated into the system that allow for some payments to be determined by system rules.
- Where accounts cannot be paid at the amount claimed they will be paid on offer at the sum which has been assessed by SLAB. We have a statutory obligation to both restrict and increase fees or outlays where a claim appears to have been over/understated based on the information available.
- If the solicitor/counsel do not accept the sum paid on offer further information requires to be provided in support of the restricted elements of the claim. Where appropriate, further sums will be paid until final agreement is reached.
- In the highly unlikely event that SLAB are unable to reach agreement on the level of fees (or outlays) payable to a solicitor or counsel the matter can be referred to the Auditor of Court for 'Taxation'.
- Taxation is the process where an independent determination of fees is carried out by the Auditor. The auditors decision is binding on the parties and may only be overturned after consideration by the Court.

# Legal Aid Payment Structures

## Solicitors Accounts

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- **Fixed payments:** a fixed payment is a single fee payable for the majority of work undertaken in that case e.g. conduct of a summary criminal case; a limited number of ‘add-on’ fixed payments for additional work may be payable.
- **Block/Inclusive fees:** a prescribed fee for all work done in connection with a defined stage in the proceedings. An account will normally consist of multiple block fees.
- **‘Time and line’ fees:** a detailed, or time and line, fee is based on a itemised break-down of each item of work done in the proceedings, which may be time or task-based.

# Counsel/Solicitor Advocates Accounts

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- Standard fees: Prescribed fees for an item of work (e.g. attendance at a diet of proof or trial, consultations, drafting of documents, etc.).
- A small number of fees are payable within a relatively narrow range.
- Civil Proceedings: In certain courts, there is no legal aid table of fees and counsel is entitled to 90 per cent of the amount of fees which would be allowed for that work on a taxation of expenses between solicitor and client, third party paying, if the work done were not legal aid.

# Judicial Expenses

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In legal aid cases where there is an award of expenses made in favour of the assisted person, the legal representatives can elect to accept those sums recovered in lieu of the legal aid payment which would have been due.

This election is one that is regularly taken up by solicitors and counsel particularly in proceedings for reparation, medical negligence, judicial review, etc.

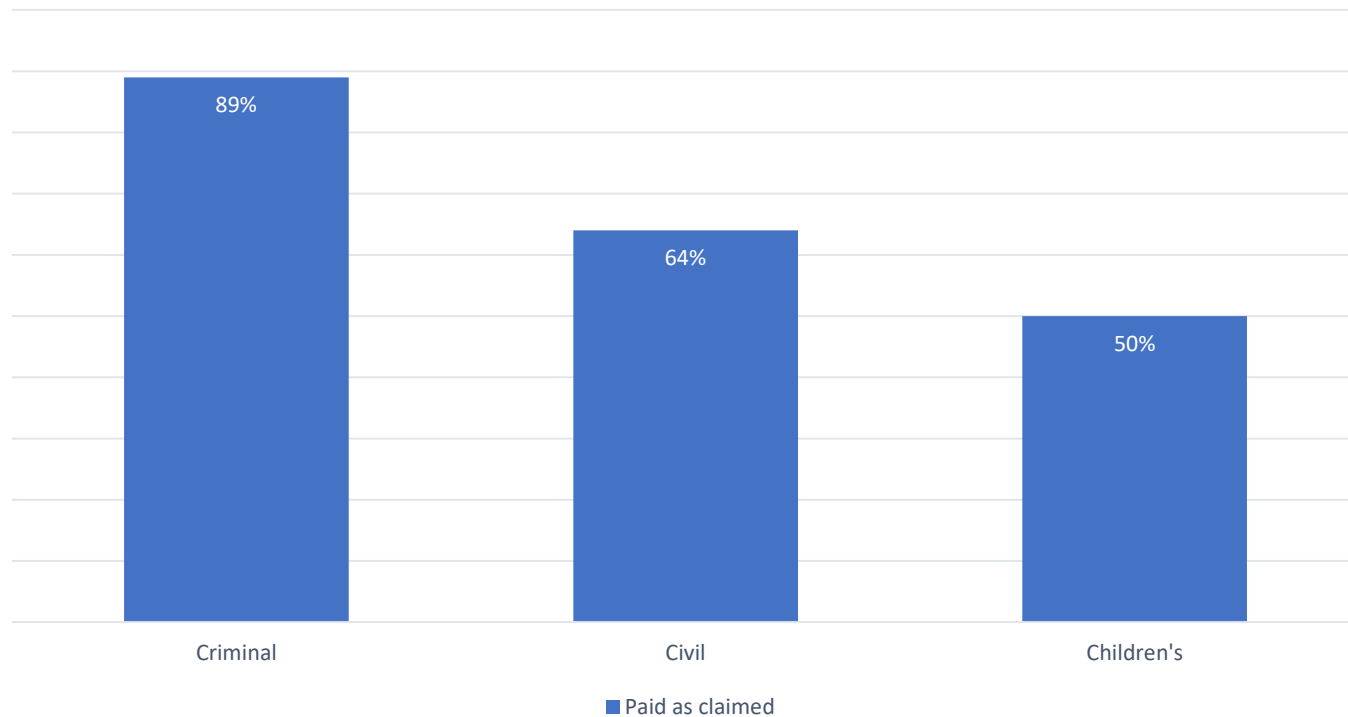
The judicial expenses recoverable in the case are frequently higher than what would be payable under legal aid.

# % of accounts paid as claimed after initial assessment

(based on volume of accounts received)

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Accounts paid after initial assessment



# Payments to Account

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- There is provision to make payment to solicitors' to account for fees, prior to the conclusion of proceedings.
- Similar provisions are available for the recovery of solicitors' outlays subject to certain criteria being met.
- Broadly similar arrangements are available for counsel where certain criteria is met.

# Assessment of Accounts

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- ***“The quantification and payment of lawyers' fees has been the source of regular and unremitting anxiety, grief, frustration and even anger, for generations. This case seems to be no exception”***
- [Lady Smith Hearing on a Note of Objections to the Auditor's Report in Petitions of Aberdeenshire Council for an Order freeing the children A, B and C for Adoption 31st January 2006]
- This dispute did not involve any legally assisted party.
- Disputes arise frequently in the assessment of solicitors and counsels fees and it is important to recognise that they are not unique to legal aid cases.
- Legal aid taxations represent a tiny percentage of an Auditor of Courts work.
- In legal aid cases references to the auditor are extremely unusual. In a typical year there will be fewer than 10 taxations per year in comparison to the circa 223,000 accounts SLAB will assess (less than 0.005%).

# Detailed Accounts - Challenges & Benefits

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- Accounts, even for small value claims, still consist of multiple entries all of which require to be individually assessed. This is labour intensive.
- High value claims very time consuming to assess.
- Accounts often extend to 100's of pages. Time consuming to negotiate.
- For example, resources required to assess accounts:
  - o 8.5 assessment officers for 12,500 criminal 'time and line' (detailed) accounts;
  - o 2.5 staff required for 61,000 fixed payment and police station advice inclusive fees.
- Detailed amounts allow a very flexible payment regime but also gives rise to the greatest number of disputes.



# Detailed Accounts - Challenges & Benefits

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- The time actually taken by a solicitor/counsel is not necessarily the time to be paid. Only the time ‘reasonably’ taken is to be paid.
- Widely differing views are entertained as to what is ‘reasonable’.
- Quite different business models are developed by solicitors in the way a case is conducted. Can and does lead to significant cost differences for similar types of proceedings.
- Lacks the same level of controls that other types of payment models offer.
- Disputes can arise for a variety of reasons e.g.
  - frequency and duration of meetings,
  - length of letters or statements,
  - time taken to consider documentation, etc.
- Disputes often involve low value items.

# Detailed Accounts - Challenges & Benefits

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- An auditor of court's decision is not binding on any other auditor. SLAB have had quite different decisions from Auditors of Court in relation to the same type of work activity.
- Different payments are allowed in different sheriffdoms for doing the exact same work.
- It is hoped that The Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018 should improve the transparency and consistency of decision making by auditors of court.

# Fixed/Block/Inclusive Fees - Challenges & Benefits

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- Disputes tend to relate to technical/legal arguments (e.g. can a fee be charged at all).
- Provides far greater certainty as to the level of payment.
- Less need to micro manage the assessment/payment process.
- Significantly fewer abatements and the need for post assessment correspondence is substantially reduced.
- Quicker payments.

# Fixed/Block/Inclusive Fees - Challenges & Benefits

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- Criticisms around the lack of flexibility or failure to accommodate justice system changes quickly enough.
- Solicitor can “opt out” of the respective fixed/block fee regime and charge on a ‘time and line’ basis in certain circumstances.

# Standard Fees (Counsel/Solicitor Advocates) - Challenges & Benefits

- More closely aligned to the fixed/block/inclusive fee system with similar benefits.
- Detailed rules as to how a fee requires to be determined and calculated reduces disputes arising.
  1. No prescribed fee for an item of work in the Tables of Fees in civil and children's legal aid proceedings.
  2. This causes confusion
  3. The fee then requires to be determined by SLAB or the auditor.
- Criticisms around lack of flexibility (e.g. failure to enhance a fee where work requires to be taken as a matter of urgency, is novel or very complex) or failure to accommodate justice system changes quickly enough.

# Fee Reforms

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Extend the scope for payments of streamlined payment models which could:

- Facilitate and reward, the early resolution of cases;
- Remove complexities of the traditional models, resulting in faster and more certain payments;
- Minimise the risk of perverse incentives and the payment for unnecessary or excessive items of work;
- Reduce the need for costly preparation of accounts and the need to review and re-negotiate solicitor accounts;
- Complement and support the submission of electronic accounts;
- Reduce administrative costs to the profession and SLAB.

Prescribe clear rules on when a fee is and is not payable.

A commitment to regularly review the payment structures to ensure that they reflect all aspects of modern court practice and take account of technological advances.



# Reflections

# Complexity, detail and transaction costs

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- Current fees vary between fee for a case, fee for a stage of work or fee for an individual task or item
- These carry variable transaction costs, which can look disproportionate, as well as other risks associated with complex rules and requirements
- Fee reforms could reduce complexity and transaction costs and increase predictability—potential for increased profitability



# Fees <> remuneration

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Individual lawyer remuneration depends on

- Volume of work (supply and demand side factors)
- Mix of work (civil/criminal, generalist/specialist etc)
- Approach to the work (maximise efficiency/income)
- Solicitor status (partner, employed, self-employed)
- Structure of firm (gearing, fee earner ratios)
- Cost base (share of income paid to salaried staff, overheads etc)
- Fee structures (transaction costs, distortions)
- Fee levels

# Payment <> fees

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- ‘Payment’ need not mean fees as currently conceived
- Other forms of payment exist
  - In legal aid in Scotland
  - In legal aid in other jurisdictions
  - In other public services
- Grants (full cost recovery, block subsidy), funded salaried posts (public, private or third sectors)
- Different forms of accountability and control – tend to focus more on outputs or outcomes than (micro) inputs
- Different approaches for different circumstances?