

New Developments in Criminal Defence Services

Ed Cape charts the latest changes to the Legal Services Commission.

April 2001 marked the beginning of a major restructuring of the funding and provision of criminal defence services in England and Wales. The Legal Services Commission (LSC) was divided into the Community Legal Service, responsible for what had been civil legal aid, and the Criminal Defence Service (CDS), responsible for criminal legal aid. At the same time, contracting was introduced, replacing all criminal legal aid other than that for the Crown Court, so that only solicitors with a contract with the LSC are able to do criminal legal aid work. In addition to contracting, the Criminal Defence Service also has responsibility for the pilot Public Defender Service (PDS), the first offices of which opened in May. A system of contracting was also introduced in April covering very high cost criminal cases, and in the same month the Law Society and the LSC jointly introduced a major new accreditation scheme for duty solicitors. One of the striking features of these changes is that they mostly originated not with the current Labour government, but with its Conservative predecessor. Contracting of criminal defence services was originally proposed in the Conservative government's white paper, *Striking the Balance*, and was subsequently enthusiastically adopted by the Labour government as a 'flexible, modern way of procuring services' (*Modernising Justice*, 1998). It was seen as a way of ending the demand-led system of funding criminal services (according to the government there was an increase in spending of over 40 per cent in the five years to 1998), encouraging efficiency, and enabling the planning of services. It was also argued that contracting would be used as a mechanism for improving quality. Even the proposal for the creation of a public defender service was not Labour's own - Scotland's pilot Public Defender Solicitors' Office, set up in Edinburgh in 1998, started life as an initiative of the previous Conservative government.

Restructuring criminal defence services

During the 1990s the Legal Aid Board (forerunner of the LSC) gradually introduced a quality assurance scheme, somewhat inappropriately known as franchising, for both civil and criminal legal aid providers. Using limited financial and other incentives, solicitors' firms were encouraged to become franchised, requiring them to meet and maintain a range of business management standards. The franchising project had relatively little impact on criminal defence firms because, since the incentives were minor and the scheme was effectively voluntary, only a minority of firms

thought franchising worthwhile. However, there was continued concern about standards, (The Royal Commission on Criminal Justice, 1993; McConville et al, 1994), and successive governments believed that defence lawyers were prolonging cases as a result of perverse economic incentives. The introduction of standard fee payments for most magistrates' court cases did not allay such fears. Shortly before the demise of the last Conservative government a three-year pilot of criminal contracting commenced, although crucially it was limited to legal aid for advice and assistance (including police station advice) and court duty solicitor services, excluding the far more costly areas of magistrates' court and Crown Court legal aid. Furthermore, it was limited to solicitors - so far barristers have avoided criminal contracting altogether. Research on the pilot contracts (Bridges et al 2000; Bridges and Abubaker, 2000) recommended a rationalisation of the complex remuneration rates for criminal legal aid and the incorporation of quality targets and standards into contracts.

General criminal contract

Many of these feature in the general criminal contract that was introduced, to the consternation of many criminal defence lawyers, in April 2001. Their concern was centred on the belief that contracts would require a far greater level of management sophistication, and therefore time and resources, for less money. Although the LSC and the government were not proposing to reduce the overall criminal legal aid budget, changing the payment structure inevitably meant that there would be a differential effect on criminal defence firms, and many of them simply did not have the management information to enable them to accurately cost the effects of contracting on them. Underlying this was the concern that contracting would give the LSC, and therefore the government, much greater power over what criminal defence lawyers do. At the same time that contracting was imposed on the profession, a pilot Public Defender Service (PDS) was introduced, fuelling the fears of many private criminal defence lawyers that the government was bent on putting them out of business. *Modernising Justice* suggests that whilst the government believes that public defenders may be more cost-effective and provide a better service than private solicitors, in the longer term a mixed system is preferred. The four-year pilot has resulted in four public defender offices being established in Swansea, Middlesbrough, Liverpool and Birmingham, with two further offices planned in the near future. Unlike the Scottish public



defender pilot, no one is directed to use the public defender, so the PDS will have to compete for clients with the local private profession. Research on the Scottish experiment found that public defender cases were more likely to be resolved earlier, and were more likely to result in conviction than private cases, and the English and Welsh pilot is bound to be subjected to close scrutiny in this respect. (Scottish Executive, 2001). Whether the PDS will experiment with different ways of delivering criminal defence services remains to be seen.

The criminal justice context

These structural changes come on top of more than a decade of constant change in criminal law and criminal procedure. Although (or, perhaps, because) there has largely been a bi-partisan approach to criminal justice, it has occupied a high political profile throughout this period. As long ago as twenty years it was suggested by McConville and Baldwin that the most important sites of the criminal process were shifting from the court room to the police station, and the cost of police station advice has risen to well over £100 million per year. This trend has been reinforced by other changes, including the right to silence provisions of the *Criminal Justice and Public Order Act 1984* and the disclosure provisions of the *Criminal Procedure and Investigations Act 1996*, both representing a significant shift in the relationship between the individual and the state. It was further reinforced by the 'Narey procedures', requiring the police to identify likely guilty pleas and then fast-track them through the system. The police station, and pre-trial processes, have increasingly come to determine guilt or innocence, the courts merely processing and sentencing the vast majority of defendants. One of the few changes in recent years to benefit defendants has been the abolition of the means test for legal aid in the courts, with only those found guilty in the Crown Court liable to pay a contribution at the end of the case.

Areas of concern

The introduction of contracting led to more than a 50 per cent reduction in 'service providers', although it was largely small players that dropped out of providing legally-aided criminal defence services. Nevertheless, access to and choice of lawyer will be significant issues, particularly in small towns and rural areas. Quality of criminal defence services is also at risk. During the last decade both the Law Society and the Legal Aid Board have worked to improve standards, and there is evidence that this

has led to higher quality legal services (see for example, Bridges and Choongh, 1998). To an extent, it has also come to be recognised that defence lawyers should not simply advise their clients, but should actively defend them. But this improvement is now at risk from the financial pressures on contracted defence lawyers, and the failure to establish mechanisms for properly establishing and costing appropriate quality standards. (Bridges *et al* 2000 proposed the creation of a quality standards advisory group, but there

is no sign that this will be adopted.) Perhaps the biggest risk is to the viability of the criminal defence profession itself. Relatively poor financial rewards, long hours, lack of an attractive career structure and uncertainty about the future are apparently leading to significant numbers of young lawyers moving into other areas of work, leaving behind an ageing profile of criminal defence lawyers.

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