# Will defendants survive changes to criminal legal aid?

## **Anthony Edwards** analyses cuts-led reforms and their implications

For much of New Labour's first term in government, public expenditure on legal aid, in the region of £2.1billion per year, was almost equally divided between civil and criminal work. Thereafter, the spending on criminal legal aid increased as a proportion of the whole so that in 2004/2005 when, at £2.4 billion, legal aid expenditure was at its highest, nearly 57 per cent went on criminal work. Whereas, at the beginning of the millennium, the spending on 'crime lower' (police station and magistrates' court work) was almost the same as on Crown Court work, by the end of the New Labour government the proportion spent on the latter had increased to 61 per cent. Of this, about one quarter was spent on just 12 cases per year, mostly involving fraud (Constitutional Affairs Committee, 2004).

The legal aid spending per capita in England and Wales has always been very significantly greater than in other parts of the world. Only Northern Ireland and Scotland spend at anything approaching the same level, with most of the world spending less than one third. However, as the government knows, legal aid spending cannot be directly compared with that in many jurisdictions, particularly those with a different procedural tradition. In countries that do not have an adversarial tradition, much greater costs are expended on the administration of the courts, prosecution and investigative processes (Bowles and Perry, 2009). Even those with a similar, common law tradition may not be comparable since many have lower levels of crime and take a different approach to the criminalisation and treatment of 'anti-social' behaviour.

### The legacy of New Labour

The greatest difficulty in the administration of the legal aid budget has always been that spending on criminal legal aid is largely dependent on agencies and decisions outside the control of the Ministry of Justice (Cape and Moorhead, 2005). Many cases end up in the (more expensive) Crown Court because of the charge decisions made by the police and Crown Prosecution Service and the trial venue decisions primarily of magistrates and less so of individual defendants. Since 2006, during a period when crime levels have been broadly static, there has been a 30 per cent increase in cases received for trial at the Crown Court – 18 per cent more indictable-only cases (which must go to the Crown Court), and 38 per cent more triable either way cases (in which there is a choice of venue). Targets imposed on the police by the government drove up arrest rates. Concentration on particular types of crime, driven in part by the creation of special units dealing with child pornography and initiatives such as those concerning domestic violence, also increased the number of arrests. Other initiatives such as those designed to improve victim protection and the greater use of 'special measures' for vulnerable witnesses, as well as the much greater use of hearsay and bad character resulting from the *Criminal Justice Act 2003*, increased pressure on the criminal legal aid budget.

To its credit, the New Labour government encouraged a number of initiatives designed to improve the quality of criminal defence work. The most significant was the introduction of peer review of the work of legal aid lawyers. The Public Defender initiative, although largely discontinued, made available valuable information showing that private practice could deliver a quality service at a lower cost than a publicly run defence service.

Yet, in common with its predecessors, the New Labour government failed to give effective recognition to the factors that were driving up the criminal legal aid bill. In response to research demonstrating the link, the Ministry of Justice introduced a legal aid impact assessment in 2005, but this failed to take account of the most important cost drivers and was largely ineffective in forcing other government departments to factor in legal aid costs. Thus when, in the last years of the Labour government, there was considerable pressure to increase the number of fraud prosecutions, additional funds were made available to all investigation and prosecution agencies, but not to the legal aid fund.

### Ministry of Justice under the Coalition

The Ministry of Justice under Ken Clarke has given every indication that the only consideration in its legal aid policy is the reduction of expenditure. The previous government had aimed to limit criminal legal aid spending so that more would be available for social welfare work. The Coalition government has abandoned that and has started the attack on legal aid costs by reducing spending on civil legal aid by one third. The criminal legal aid bill, at least for now, is to be tackled by trying to contain and reduce spending on criminal defence lawyers. The Ministry of Justice has resurrected New Labour's idea of introducing competitive tendering for criminal defence solicitors, although a consultation paper has not yet been issued. The primary problem in a move to a market-based legal aid economy is that there is no rational market. Most solicitors' firms are poorly managed, with minimal financial planning and little understanding of their own



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profitability, and the Legal Services Commission does not have the 'information necessary to understand the supplier base' (National Audit Office, 2009). The greatest danger of competitive tendering is that firms that do not understand their own finances will bid at unrealistic prices, forcing the better managed firms out of the market.

## Guilty pleas and fixed fees

Even though the plan to increase the sentence discount for early guilty pleas to 50 per cent has now been abandoned, the Ministry of Justice intends to introduce a number of schemes that impose strong incentives on solicitors to persuade clients to plead guilty when the evidence is not there and that impose significant financial penalties on those who thoroughly prepare for trial. This comes on top of fixed fees that, as demonstrated by research in Scotland, affect what lawyers do for their clients and the standard to which they carry it out (Tata, 2007). Whereas solicitors advising clients at police stations used to attend identification procedures to ensure they were properly carried out, this is now a rarity. A decision to attend when a client is charged is as much driven by the need to collect a fixed fee as the individual needs of any particular client – attendance is less likely if the fixed fee has already been earned. Few firms in more serious cases will advise a client to plead guilty in the magistrates' court, which will be followed by a committal to the Crown Court for sentence, because the remuneration for the work in the Crown Court is so poor that they cannot do what is required. As a result, defendants have to make a decision between a possible loss of sentence discount by electing trial in the Crown Court and the inability of the solicitor to fully prepare their mitigation if they are committed for sentence. Preparation for appeals from magistrates' courts is now rudimentary, and few solicitors will take on an appeal against conviction or sentence where they did not act in the magistrates' court because the work is simply un-remunerative.

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## Pressures

There is no doubt that police officers have become aware of the pressures of the fixed fee scheme and of the fact that waiting time at the police station is not remunerated. They use this knowledge to put pressure on solicitors to co-operate. Judges are using the fact of fixed fees to 'discipline' lawyers who put the interests of their clients before the convenience and efficiency of the court process. It is common to see cases being put at the end of the hearing list as a way of putting pressure on lawyers who stand up for their client's rights. Coalition cuts will increase the scope for these kinds of pressures.

The Ministry of Justice has little informed understanding of the profession that, in effect, it seeks to manage. Peer review, which is expensive to operate, is to be used primarily as an audit device rather than as a means of improving quality. Client choice, which can be an effective way of ensuring appropriate standards, is to be reduced. The use by many firms in larger cities of freelance agents, who have little or no continuing responsibility for the advice that they give or the way in which they deal with a case, is likely to increase. Effective systems of supervision in law firms, which have been encouraged and developed by the Legal Services Commission since the turn of the century, may well not feature in any competitive tendering scheme. Similarly there is no suggestion that anything more than minimal continuing professional

development requirements, or a duty to train a future generation of criminal defence lawyers, will feature as a bid requirement.

## Looking ahead

The Coalition has announced its cuts programme, and more is to come. There is an ageing profile of criminal defence lawyers, and whilst many will retire in the near future, few law firms have the resources or incentives to train the future profession. Many of those who have spent their professional lives dedicated to acting as legal aid lawyers are disillusioned and recruitment of quality staff is very difficult. The independence of the criminal defence profession will increasingly be threatened by the restrictions imposed by tendering and payment mechanisms, and by controls on their work by schemes such as the Defence Solicitor Call Centre and Criminal Defence Service Direct.

Planning for the future, it seems, will continue to take place without any proper understanding of the criminal defence 'market' or of the defence perspective – with disapproval of those who actively defend their clients and further financial restrictions imposed to save money elsewhere in the criminal justice system. Video-linked courts – popular with government but questionable as an effective way of dealing with cases justly – will mean that solicitors will often not be able to meet with their clients before representing them.

The promised consultation on future market pricing could restore a degree of confidence in the future, but it will need to demonstrate an interest in quality and the realities of legal aid overheads that has so far been entirely lacking. There is an urgent need for a well-researched review that identifies the options and costs involved, considering different practice models against the essential needs of clients. Whether this will happen has to be open to serious question. ■

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## References

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