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Recent Developments in Criminal Legal Aid in England and Wales - Contracting, Quality and the Public Defender Experiment

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Recent Developments in Criminal Legal Aid

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Contracting, Quality and the Public Defender Experiment

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This paper attempts to provide participants at the International Legal Aid Group conference with background to, and a summary of current developments in the provision of criminal legal aid in England and Wales. The key developments are:

(i) Following a major pilot project, the introduction of a national system of contracts with private solicitors' firms for the delivery of most criminal legal aid services, from April 2001;

(ii) Within the development of contracting and other programmes, the introduction of various initiatives to improve the quality of criminal legal aid services;

(iii) The launch, in May 2001, of an experimental, salaried public defender service to complement the delivery of criminal legal aid under contracts.

The Scope of Criminal Legal Aid in England and Wales

These developments need to be set against the background of a major expansion, dating back to the late 1960s, in both the scope and costs of criminal legal aid in England and Wales. To illustrate this point, we can look at the services and expenditure covered by the new system of contracts for criminal legal aid introduced in April this year. The contracts include:

(i) **The provision of advice and representation to suspects arrested or otherwise attending police stations for the purposes of criminal investigations and interrogations**.
Under the Police and Criminal Evidence Act (PACE) 1984, any such person is entitled to free legal representation whilst in police custody,[1] and in 1986 a national system was brought into effect to ensure both that solicitors in private practice would be remunerated for undertaking such police station advice and that suspects without lawyers would have ready access to a network of 'duty solicitors' on a 24-hour basis. Currently, an estimated 40% to 50% of all suspects arrested request and

[1] This covers pre-interrogation advice, attendance by the adviser at interrogations, post-interrogation representations to the police and, where the police wish to detain the suspect for questioning beyond 36 hours, representation of the suspect at the magistrates' hearings required to authorise such detentions.

receive custodial legal advice, in some cases only over the telephone but in the great majority by the legal adviser attending in person. This amounts to nearly 800,000 cases per annum, at an overall cost of around £110m. Not all those undertaking such work are qualified solicitors, however, and one of the key quality issues in criminal legal aid in England and Wales during the past 15 years has been the status, training and professionalism of those providing advice in police stations.

(ii) **Legal advice and representation at initial or preliminary hearings at magistrates' courts of persons charged/summonsed for criminal offences**
This facility has been available free-of-charge under legal aid since the early 1980s, operating through a network of magistrates' court duty solicitor schemes. These are schemes under which solicitors in private practice take it in turn to make themselves available to assist defendants who are otherwise unrepresented in relation to pleas, making applications to the court for full legal aid, bail applications, and pleas in mitigation following guilty plea. Where solicitors are acting as part of duty solicitor schemes, they are remunerated for their service under legal aid.

More recently, legal aid payment for initial representation of defendants at magistrates' courts has been extended to other solicitors acting for their own clients, as well as duty solicitors. This has been introduced to facilitate the introduction of other measures to reduce delay in the criminal justice process, in particular provision to bring all persons charged with criminal offences (and not just those held in custody) before a magistrates' court immediately for the purposes of plea and possible early sentencing.[2] These new arrangements have led to a dramatic increase in legal aid expenditure on providing advice and representation to criminal defendants at early court hearings. Previously the cost of court duty solicitor schemes was about £16m per annum, but the payments now available to clients' own solicitors for providing such assistance have increased these costs three-fold, to over £50m per annum.

(iii) **The provision, beyond initial court appearances, of full legal representation for defendants being tried at magistrates' courts**

The availability of legal aid for such representation is subject to a merits or "interest of justice" test administered by the courts and, until recently, to a potential financial contribution from the defendant. However, under the Access to Justice Act 1999, defendants' financial contributions to criminal legal aid in magistrates' courts have been abolished.

The modern system of criminal legal aid in magistrates' courts dates from the mid-1960s, when only a small minority of defendants charged even with the more serious, indictable either way offences[3] were deemed eligible to receive it under the

[2] This replaced the previous practice in cases in which the police released the person charged on bail pending his or her court appearance, of listing the matter several weeks ahead for the first court appearance.

[3] Offenders in England and Wales are divided into three categories: *indictable only* offences which must be tried at the Crown Court; *either way* offences which are also eligible for trial on indictment at Crown Court but where the defendant may consent to be tried summarily before magistrates instead; and *summary only* offences which can only be tried before magistrates. There are approximately 25,000-30,000 indictable only cases per annum, around 500,000 either way cases (with 70,000-80,000 of these being tried at Crown Court), and around 800,000 summary only cases.

"interest of justice" test. Between 1970 and 1990 there was an unrelenting expansion both in the numbers of criminal defendants appearing in magistrates' courts and in the proportions of them who receive legal aid. I have argued elsewhere[4] that these two facts are probably closely related, with courts finding the granting of legal aid for professional representation a means of better managing a greatly increased caseload. This has also been part of a wider "professionalisation" of summary criminal justice in England and Wales, coinciding in particular with the transfer of criminal prosecutions from individual police forces to the national Crown Prosecution Service in the mid-1980s.

As a result, today there are around 500,000 cases in which criminal legal aid is granted to defendants in magistrates' courts. This includes a large majority of defendants charged with the more serious, indictable (including either way) offences, as well as a smaller proportion of those appearing on summary only matters. The total cost of such legal aid is £250m per annum, at an average cost of just over £500 per case. Since the early 1990s, payment for such representation has been by way of a graduated system of standard and non-standard fees, with nine different levels of payments (six of them fixed fees) being made depending on the type of proceedings (guilty pleas, trials, committals to Crown Court) and the amount of time and expense devoted to the case.

(iv) A fourth form of legal aid in criminal cases is that provided under the general Legal Advice and Assistance scheme, whereby solicitors can provide limited help (not including representation) on any question of English law to a person meeting a fairly strict financial means test. The scheme is limited in the first instance to two hour's assistance, although this can be extended in certain circumstances. This scheme was originally intended primarily for civil matters, but is available for assisting suspects outside the police station and defendants for preparing cases for court prior to obtaining, or in lieu of, full legal aid. The cost of such advice and assistance in criminal cases is currently running at just under £30m per annum.

(v) The new criminal contracts also cover legal aid for assisting defendants in relation to appeals and preparing cases of alleged miscarriages of justice for the new Criminal Cases Review Commission, assisting and representing prisoners in prison discipline and parole hearings, and for certain civil proceedings arising from criminal matters such as judicial reviews, Human Rights Act cases, and habeas corpus.

There is one further form of criminal legal aid that is not yet covered by the new contractual regime, although it is due to be incorporated within it in 2003. This is criminal legal aid for Crown Court cases. Virtually all defendants tried in the Crown Court are legally-aided, and this has become an area of considerable political controversy due to the length and very high costs of some proceedings; the fact that some defendants appear to have considerable means of their own; and the large, so-called "fat cat" fees paid under legal aid to some criminal barristers. Under the Access to Justice Act, those found guilty at the end of Crown Court proceedings will continue to be open to assessment for paying a contribution toward their legal costs, and the Government is in the process of negotiating/imposing stricter limits on the fees that can be paid to criminal barristers in Crown Court cases. It is also planned that

[4] L. Bridges, 'The professionalisation of criminal justice' *Legal Action*, April 1993.

all 'high cost' cases will be subject to individual case contracts in future. The total cost of criminal legal aid in the Crown Court is around £400m per annum.

Adding all these components together, criminal legal aid in England and Wales currently involves an expenditure of well over £800m a year and encompasses what is probably the most comprehensive system of state-funded legal assistance to criminal suspects and defendants in the world. It provides coverage, in terms of legal assistance and representation, from the point of arrest and interrogation in the police station, through various forms of court proceedings and criminal trials, to appeals, prison discipline and investigations of miscarriages of justice. Moreover, for the most part this state-funded assistance is available free of charge and, at crucial points, on a universal basis. Indeed, it is only in respect of advice and assistance outside the police station or court, and under the "interest of justice" test applied to applications for representation in magistrates' court criminal proceedings, that some form of limit on eligibility for criminal legal aid is applied, and the trend has been toward an increasingly liberal interpretation of the latter test.

Indeed, the pattern has been for the "right" to criminal legal aid to become more firmly entrenched and institutionalised, even as the other rights of criminal suspects and defendants have been eroded. A good example of this is the right to legal advice in police stations. As noted, this was first given statutory backing in the Police and Criminal Evidence Act 1984, the primary purpose of which was to codify and extend police powers. Ten years on, following a Royal Commission on Criminal Justice, restrictions were placed on suspects' right to silence when being interrogated by the police. However, these restrictions have reinforced the right to legal representation in the police station, as both domestic and European courts have ruled that without such legal assistance suspects would be denied fair treatment given the complexities of the legal limitations on the right to silence. Interestingly, in all the "law and order" rhetoric of recent political debates in Britain, including some defence lawyer-bashing by prominent politicians such as the Home Secretary, no-one has suggested removing the right of suspects to legal advice in police stations or limiting state funding for this. Similarly, more recent reforms to speed up the processing of criminal cases and to encourage more early guilty pleas have actually been predicated on extensions to legal aid for representation at initial court hearings.

Is the introduction of contracts for criminal legal aid, and the start of an experimental public defender service in England, the first signs of a reversal of this process of entrenchment of the right to criminal legal aid? Certainly, to read the representations of some of the legal profession – in particular, the Bar – on this subject, one might well be led to this conclusion. But to answer the question more objectively it is necessary to examine the nature of criminal legal aid contracts and the pilot public defender offices more carefully.

Criminal Legal Aid Contracting

Government policy in Britain in favour of contracting for legal aid services dates back to before the current Labour administration, to the Conservative government's 1996 White Paper, *Striking the Balance – the Future of Legal Aid in England and Wales*. This document had noted that criminal legal aid in particular

> is highly fragmented, because the arrangements have grown up over time in response to specific needs. Someone who is arrested or prosecuted may be entitled to help under several of the different schemes covering the early stages of investigation and prosecution. Work may be done more than once by

different solicitors, and it is possible to claim more than one payment for doing the same thing.[5]

This White Paper envisaged a system of criminal legal aid contracts that would "specify a single price and the type of service concerned".[6]

When the Labour government took office in 1997, it commissioned a review of the previous administrations plans for legal aid from a businessman, Sir Peter Middleton, whose report ended up also endorsing the concept of contracting. This was on the basis that contracting would "allow the Legal Aid Board to use its purchasing power and become a proactive purchaser of services"; would reduce financial uncertainty and bureaucracy both for the Legal Aid Board and providers; would introduce an "element of competition" and economies of scale; and promote efficiency through contract incentives.[7]

A pilot scheme for contracting criminal legal aid was run from 1997 onwards, with the pilot contracts themselves starting in June 1998.[8] This involved just over 70 solicitors' offices in London, Manchester, Blackburn, Portsmouth, Reading and Shrewsbury/Telford. All the firms invited to participate in the pilot would have been approved under the Legal Aid Board's earlier franchising programme, and the pilot contract incorporated a number of additional quality requirements. On the other hand, unlike the later introduction of 'exclusive contracting', no firm was required to enter into a contract under the pilot and could drop out of it at any time. The pilot contract also did not impose any limits on the volume of work that could be undertaken, and allowed fairly generous and flexible costings for this. Contracts were based on levels of existing criminal legal aid work and their costs, but firms were able to negotiate both of these upwards as their 'price' for 'volunteering' for the pilot. The result was that the final value of work under the pilot contracts was 46% higher than that claimed by the participating firms beforehand, including a 31% increase in the volume of work and a 11% increase in its price. Finally, the pilot contracts covered only criminal legal advice and assistance, including police station advice and duty solicitor work, but not representation under full legal aid at magistrates' courts or in the Crown Court.

In these respects the pilot might be said to have been unrealistic, but it did allow experimentation with new ways of specifying and structuring criminal legal aid work. For example, prior to the pilot, solicitors might claim payment for police station advice under 24 different rates of remuneration depending on the location of the police station, the time of day advice was given, whether this was by a duty or 'own' solicitor, and the type of activity involved (telephone advice, travel, waiting, and attending on the client). Under the pilot contract, a single hourly rate was negotiated with each firm to cover all their time on travelling, waiting and attending on clients at police stations. This also enabled more systematic information to be collected on the overall time spent on different aspects of cases by different solicitors' firms.

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[5] Cm 33-5 Lord Chancellor's Department, *Striking the Balance – The Future of Legal Aid in England and Wales*, London, HMSO, 1996, p.37.

[6] *Ibid*., p.38.

[7] *A Review of Civil Justice and Legal Aid: Report to the Lord Chancellor by Sir Peter Middleton GCB*, London, Lord Chancellor's Department, 1997, pp.37-43.

[8] It is possible here only to provide a brief summary of the criminal contracting pilot and the findings and recommendations arising from it. There are fully reported in two volumes: L. Bridges and A. Abubaker, *Work Patterns and Costs under Criminal Contracting* and L. Bridges, E. Cape, A. Abubaker and C. Bennett, *Quality in Criminal Defence Services*, both published by the Legal Services Commission, London, 2000.

The pilot revealed very significant variations, as between different geographical areas and between individual firms in each area, in the amounts and patterns of work performed on behalf of criminal clients. For example, the average time spent on police station advice in London was 275 minutes, more than twice the amount spent on such work by solicitors in Shrewsbury working under the pilot contract. Firms also varied in the extent to which they made use of the different forms of legal aid (i.e. police station advice, advice and assistance outside the police stations) and in their deployment of different types of staff (solicitors, accredited police station representatives, other non-solicitor staff) in conducting contract work. All of these factors led to the conclusion that it would be difficult in the short term to specify a single price for each type of service, as envisaged in the 1996 White Paper, and that even in the medium term it would be necessary to adopt a system of variable, graduated standard and non-standard fees in order to cater for area variations in the patterns of conduct of criminal defence work.[9]

The system of contracting introduced on a national basis in April this year therefore does not attempt to impose a fixed price either on the contract as a whole, on cases, or even on particular elements of service to clients (e.g. police station advice, magistrates' court representation). Instead, the contract allows solicitors to continue to claim for work under the previous system of variable hourly rates and fixed fees for certain items of work (e.g. telephone calls), with even the rationalisation of some of these rates adopted in the pilot being abandoned. Under the contract, each firm will be paid a monthly sum estimated mainly on its previous year's work, with this sum subsequently being offset and adjusted against the value of work actually completed. Similarly, unlike the contracts for civil legal aid now operating in Britain, no limit is placed under the criminal contracts on the number of cases or overall volume of work that can be taken on by solicitors. If firms undertake more cases or complete more work than is allowed for by the initial contract price, this will be adjusted upward to take account of this fact.

Given the nature of the contracts that have been introduced, it might be asked to what extent the initial objectives laid down for contracting in criminal legal aid have been achieved. Although only limited rationalisation of payment rates has so far been implemented, the fragmentation of the system has been addressed by re-organising and re-specifying the different types of criminal legal aid work that may be undertaken on a case. Thus, solicitors will be required under the contract to report all work undertaken on behalf of a particular client/case in two stages, covering 'criminal investigations' and 'criminal proceedings', with the point of charge being the cut-off point between them. Moreover, where a single client receives assistance under more than one form of legal aid at the 'criminal proceedings' stage (e.g. assistance from a court duty solicitor or 'duty solicitor of choice', legal advice and assistance outside court, or representation under a full legal aid order), all work done on the case will be required to be consolidated within the legal aid order and will be subject to the

[9] The one exception to this was telephone advice to suspects in police stations, which is paid on the basis of fixed fees for each 'routine' and 'advice' call made. The pilot found that although solicitors varied widely in the number of such calls claimed for each case, and therefore in the amount of money they were paid, the actual amount of time spent on such telephone advice was fairly consistent. It was therefore proposed that this was one area in which a form of standard fee per case would be justified. However, proposals to reform the payments for telephone advice proved highly contentious in the negotiations leading up to the introduction of the national system of contracts this year, and in the end these were temporarily set aside to be re-negotiated at a later stage.

existing system of graduated standard and non-standard fees.[10] In this sense, the new system of contracts has begun to lay the basis for future rationalisation of the pricing structure for criminal legal aid and extension of the standard fee system, although it is not clear that a system of contracting was necessary in order to introduce such price reforms.

The government and Legal Services Commission would undoubtedly argue that contracting, with its monthly payments and much simplified systems for reporting work actually done on cases, has also reduced bureaucracy for both the LSC and for solicitors. Ironically, however, contracting will mean that the LSC will receive much less routine information on the conduct of cases under legal aid than previously, a fact which may well undermine its efforts at further rationalisation of remuneration rates under contracts.

Has criminal contracting introduced on "element of competition" or "economies of scale". In most areas of England and Wales, competition between criminal defence solicitors was already fairly intense, although this competition revolves around the capture and retention of criminal clients and market share of criminal work rather than around price. One possibility canvassed at the time of the 1996 White Paper was that the legal aid authorities might use the allocation of market share to particular firms, through its control of 'slots' on duty solicitor schemes covering police station legal advice and initial representation at magistrates' courts, as a basis for contracting with firms and bargaining over the price paid for criminal legal aid work. However, only a minority of criminal suspects or defendants choose to make use of duty solicitors, with most relying on a 'solicitor of choice' who will also be paid under legal aid. In this sense, the legal aid authorities do not 'control' the market for criminal defence services (even though they may pay for them) to a sufficient extent to be able to use this as a basis for allocating work under contracts. Moreover, without curtailing client choice of solicitor, it is difficult to see how such control of the market could be achieved, and the government in England and Wales has so far shown no inclination to move in this direction.[11]

One of the key findings arising from the criminal contracting pilot was that firms with smaller value contract tended to operate less 'efficiently' in various respects. Such firms tended to make less use of non-solicitor staff, to have lower values of contract work completed per member of staff, and not to score so highly on various measures in respect of the quality of their work. In this respect, it is interesting to note that the major impact of the introduction of contracts on a national basis has been to reduce the number of solicitors' offices offering criminal legal aid services by half, from over 6,000 throughout the country to around 3,000. However, it is estimated that the 50% of solicitors' offices who have dropped out of criminal legal aid accounted for only about 10 per cent on the work done. In other words, it has been primarily the smaller firms, or those who otherwise undertake criminal legal aid work only occasionally, who have failed to sign up for contracting. While there has been some rhetorical lamenting of this fact from the Law Society, blaming contracting and its bureaucratic demands on smaller firms for the loss of what is claimed to be the provision of a

[10] The actual amounts paid under these standard fees have been adjusted to take account of this new system for claiming for work following the point of charge.

[11] This contrasts with the situation in Scotland, where the introduction of an experimental public defender office in Edinburgh was accompanied by a system of assigning clients by birthday to the public defender to receive criminal legal aid services. This system not only proved unpopular with many solicitors and their clients but also probably did not serve to enhance the reputation of the public defender, and it was eventually abandoned. By contrast, the Access to Justice Act 1999 provides statutory guarantees of a criminal legal aid client's right to choose his or her solicitor, and the public defender offices in England and Wales will have to compete for clients on the open market with other solicitors operating under contracts.

wholly personalised, professional service offered within smaller firms, many informed commentators would argue that only firms of a certain size are able to offer a fully comprehensive criminal defence to clients. Moreover, this is due as much to the range of services now expected to be offered to criminal clients as it is to the administrative requirements of contracting. Certainly, it is difficult to see how a small firm consisting of only one or two solicitors could be expected to be able to attend on their clients in police stations on a 24-hour a day basis and still perform adequately their more traditional function of representing defendants in court (a task which, again with recent reforms, may itself involve attending court on short notice to represent a client charged and bailed to court the next day).

By contrast, larger firms, often through the adoption of more sophisticated case management systems (as encouraged under legal aid franchising) and the routine delegation of tasks such as police station advice work to non-solicitor staff, have been better able to exploit the funding opportunities available to them under the various forms of legal aid. Hence the higher value of work performed under the pilot contract per member of staff. If this represents 'economies of scale', it is certainly not obvious, under the previous payment system or that adopted under contracting, that the economic benefits of this fall in any way to the legal aid system itself. Rather, they accrue to the firms themselves through higher levels of legal aid payment per case. Of course, these firms – and perhaps the Legal Services Commission itself – would argue that they provide a more comprehensive and better quality service than their smaller, and perhaps less costly competitors. To the extent that this could be measured in the pilot research, there did appear to be a general correlation between larger size of firm, higher costs, and better adherence to the types of quality assurance standards imposed under legal aid franchising.[12]

Having said this, the findings of the pilot in respect of quality were disturbing, in that they revealed widely varying compliance with franchise and pilot contract quality requirements even among the larger firms. This is particularly disappointing when it is recognised that only firms already approved for quality compliance by the legal aid authorities, and subject to their official quality audits, were allowed to participate in the pilot. Given that the introduction of national contracting has involved a more than doubling of the firms approved for quality purposes by the Legal Services Commission within the past year, serious questions must be raised as to whether adequate standards of quality are as yet being enforced through these systems. Certainly, the pilot researchers recommended several extensions to the quality standards so far adopted for criminal defence work, including greater involvement of the Legal Services Commission in specifying standards at least for the recording of different aspects of criminal case work and the establishment of a Criminal Quality Standards Advisory Group for these purposes. It was also proposed that under national contracting, while the information routinely collected on case conduct for financial monitoring purposes might be reduced, this should be accompanied by a more systematic sampling of case files for quality assessment purposes. So far, none of these recommendations have been acted upon.

In summary, one may note a certain irony, that the move toward contracting criminal legal aid may lead to the Legal Services Commission being increasingly dependant on the larger, higher cost providers of criminal defence services. Of course, with still over 3,000 solicitors'

[12] Some would argue that the latter finding merely reflects the fact that larger firms are better organised and therefore adept at recording the types of information about cases which legal aid quality auditors (and researchers) tend to rely on as measures of 'quality'.

offices operating under contracts (and continuing fierce competition between them in many areas), this is far from the type of oligopolistic market situation which might cause the government concern. Perhaps a more disturbing feature of contracting is that it is likely to result in the Legal Services Commission – and through it the government – receiving less information about the operation of its providers and the market in which they operate. It is in this context that the introduction of a salaried, public defender service takes on added significance. But before addressing this latest development in criminal defence services in Britain, some wider reflections on issue of quality may be in order.

Quality in Criminal Defence Services

One feature of the reform of legal aid in Britain has been the pivotal role played by issues of quality. The normal expectation in such situations is that the legal professional bodies would take the lead on quality, using this as a defence against attempts by the government and legal aid authorities to impose price and administrative reforms on the system. It is therefore significant that in Britain it has been the Legal Aid Board and its successor, the Legal Services Commission, that have seized the initiative on quality, and some would argue used it as a Trojan horse through which to bring about a wider rationalisation in systems for delivery and paying for public legal services. However, in some respect criminal defence services have been an exception to this general trend, in that they have been subject to a much wider range of quality initiatives, a number of which predate legal aid franchising. Indeed, I would contend that it has been the expansion in the scope of criminal defence services over the past 15 to 20 years that has exposed many of the inadequacies of traditional ways of operating in this field and subsequently led to a radical transformation in the quality, and underlying culture, of criminal defence in Britain.

The general expansion of criminal legal aid outlined earlier took place on a largely unplanned basis throughout the 1970s. During this period various local law societies, co-ordinated by the Law Society nationally, set up duty solicitor schemes on a voluntary basis to provide advice and assistance to unrepresentative defendants. This way not a wholly altruistic measure by local professions, since duty solicitor schemes were seen as a means both of expanding and re-organising the market for criminal representation as funded under legal aid. There was little in the way of quality control attached to these early duty solicitor schemes, in the sense that solicitors nominated to act in this capacity were those who allowed their names to go forward. Indeed, at the time the main concern among local solicitors was over the number of duty solicitors who could be nominated by any one firm, rather than their quality, as this was seen as pivotal to the way that criminal work would be distributed through these schemes.

Magistrates' court duty solicitor schemes were effectively nationalised and a statutory system of payment for them introduced under the Legal Aid Act 1982. In this sense, the state was for the first time not only paying for the services of defence lawyers but also putting forward particular solicitors as competent to represent defendants who, by definition, did not already have a solicitor of their own choice. This placed some responsibility on the government, through the Law Society that was then responsible for administering legal aid, to ensure that solicitors acting as duty solicitors were competent to do so. To this end, a network of over 300 local duty solicitor committees was established to select duty solicitors according to minimum criteria laid down nationally. These related to minimum previous experience of magistrates' court criminal work and requirements of being based in a local office, as well as

providing the possibility of candidates being interviewed by the local committee. This was a fairly weak system of quality assurance and suffered from two different types of problem. The first was the risk that local solicitors might operate duty solicitor selection as a 'closed shop', using it to prevent new competitors entering local markets. The second was that duty solicitor selection could operate as an 'old boys' network, with relatively lax standards being applied to members of the established local profession. Often, both types of problems were to be found operating together within the same scheme.

The weaknesses of peer review as a means of quality control were further exposed when the same network of local duty solicitor schemes was used as a basis for the extension of legal advice to suspects in police stations from the mid-1980s onwards. But police station advice posed a much more fundamental challenge to the traditional culture and modes of operation of criminal defence solicitors.[13] It was one thing to require duty solicitors to assist unrepresented defendants in magistrates' courts, which after all was the normal place of business for most criminal defence solicitors. It was another to require them to be available day or night to attend at police stations to assist clients previously unknown to them. If anything, this extension of duty solicitors to police stations had the immediate effect of lowering standards of entry onto local schemes, since the greater the number of solicitors available to perform this unpleasant task, the less often each individual would be required to undertake it. This in turn raised another problem with local peer selection as a means of quality control. Once you allowed a solicitor onto a scheme as a duty solicitor, did he or she hold this status for life? Eventually this problem was addressed by bringing in some minimal requirements for periodic re-selection of duty solicitors.

But the more important issue of quality control raised by the introduction of police station legal advice was the widespread use of non-solicitor staff to undertake this work. This applied both to duty solicitors and to what are called 'own solicitors', in other words, those chosen directly by the client. At the time, no real thought was given to restricting state funding for police station legal advice solely to duty solicitors who had been selected under the arrangements just outlined. To do so would have been seen as violating the principle of client choice, and in any event the real worry at the time was whether there would be enough duty solicitors even to cope with the amount of suspects who did not already have their own solicitor or know of one in the locality. So, legal aid was made available to pay for legal advice given in police stations by any solicitor, whether acting as a duty solicitor or as an 'own solicitor'.

Two further assumptions were made at the time about the capacity of solicitors to extend their services to suspects in police stations. One was that they would be able to integrate the service easily into their existing practices, which were concentrated very much around providing representation to defendants in magistrates' courts. The second was that solicitors would not require additional training to undertake police station legal advice. After all, they were well used to representing defendants at court and it was not thought that representing the same persons in police stations would be that different. Both of these assumptions were to prove optimistic, to say the least.

[13] The Bar in England and Wales has not been so profoundly affected by the developments described here and, in fact, has gone out of its way to isolate its members from them. Some years ago the Bar Council adopted a professional conduct rule that prevents its members from providing advice in police stations, ostensibly on the ground that to provide such a service might undermine the independence of the barrister in providing advocacy at subsequent criminal trials.

If administrators and policy makers had, up to that time, largely ignored issues of quality in this field, the same could be said of researchers. Most research on criminal legal aid up to this time was concerned with identifying 'gaps' in provision of legal representation, with the assumption that such representation was an unqualified 'good thing'. However, the extension of legal aid to cover police station advice set in train a series of research projects looking at this new service (as part of a wider programme of research on the implementation of the Police and Criminal Evidence Act 1984).[14] A number of these research projects were based on direct observation of the work of legal advisers in police stations and began to raise serious questions as to how well solicitors were performing this new task. Thus, the research showed that in many cases legal advice was being given to suspects in police stations solely over the telephone, which raised questions about how confidential or effective such advice could be in protecting suspects' interests. Where there was an attendance at the police station by the legal adviser, this was often someone who was not a solicitor, who could be anyone ranging from an experienced law clerk to retired police officers, trainee solicitors just at the beginning of their training contracts, or even the office secretary. Advisers attending police stations might not remain there while suspects were being interviewed by the police, or if they did, they would make little effort to obtain information from the police or to advise their clients prior to the police interview. Finally, advisers were found in most cases to sit passively through police interviews with their clients, acting almost as neutral observers rather than intervening, for example, to protect them from oppressive questioning. All of these failings were found to be common to solicitors as well as non-solicitor advisers in police stations.

This type of research based on direct observation of solicitors' work settings was subsequently extended to other aspects of criminal defence work, most notably in a major study conducted out of the University of Warwick.[15] This study involved researchers spending periods ranging between two and eight weeks with about 50 solicitors' firms in different parts of the country and observing their staff not only in police stations but in taking instructions from clients in their offices or at prisons, representing them in court, or in 'sitting behind' counsel in the Crown Court. It demonstrated that many of the failings found in solicitors' practices in police stations were common to their defence work as a whole. Again, there was widespread delegation to non-solicitor staff, who tended to work without close supervision; preparation and instructions from the client tended to be left until the last minute, often being done at court on the day of a hearing; there was little independent investigation or evidence-gathering done on behalf of the defence, as opposed to relying on 'picking holes' in the police and prosecution case once it was presented; and there was, in the view of the researchers, an entrenched 'guilty plea; culture in which routine case preparation was based on the assumption that most defendants would eventually plead guilty.

This research certainly proved to be controversial, and if nothing else it raised the issue of what constitutes good criminal defence practice. Many solicitors accused the various researchers of having applied ideal or unrealistic standards which failed to take account of the practicalities of practice. Nevertheless, this research was eventually fed into the Royal

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[14] The studies included A. Sander, L. Bridges, L. Mahoney and G. Crozier, *Advice and Assistance at Police Stations* and the 24 Hour Duty Solcitor Scheme, London: Lord Chancellor's Department, 1989; D. Brown, *PACE and the Right to Legal Advce*, London: Home Office Research Unit Bulletin 27, 1989; and M. McConville and J. Hodgson, *Custodial Legal Advice and the Right to Silence*, London: HMSO, Royal Commission on Criminal Justice Research Study No. 16, 1993.

[15] See M. McConville, et al., *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain*, Oxford: Clarendon Press, 1994.

Commission on Criminal Justice, which reported in 1993 and recommended that the Law Society and Legal Aid Board should take steps to ensure that those providing legal advice in police stations on behalf of solicitors were fit and proper persons to do so. This in turn led the Law Society and Legal Aid Board jointly to develop an accreditation scheme for non-solicitor police station advisers and to the requirement that only where non-solicitors advising in police stations were registered and accredited under this scheme would their employing solicitors receive legal aid payment for this work.

In setting up this accreditation scheme, an attempt was made to specify in considerable detail the standards required of defence advisers in police stations.[16] These standards covered three elements – *underpinning knowledge* including basic criminal law, procedure and such things as PACE and the PACE codes of practice; *underpinning skills* of communication, negotiation, interviewing and advising; and *standards of performance* required of advisers at each stage of the process of giving police station legal advice, including advising the client over the telephone, obtaining information from the police, consulting with the suspect prior to the police interview, and so on. For example, the training manual for the scheme sets out no less than twenty-six situations in which an adviser might consider intervening on behalf of the suspect during a police interview. These standards are supported by a three-stage accreditation process, in which the candidate must submit a *professional development portfolio* setting out how he or she has handled particular cases, followed by a *written examination* and a *critical incidence test*. The latter consists of a tape of various situations an adviser might confront at a police station, on which the candidate must record his or her responses. This scheme applied to all non-solicitors who advised in police stations, but not to solicitors.

However, it is arguable that the most important contribution of the accreditation scheme for non-solicitor police station advisers was to require the Law Society and defence solicitors themselves fundamentally to re-evaluate their own role, re-defining it in terms of providing not just passive advice and representation but more active defence to their clients, not only in police stations but throughout the criminal justice process.[17] Recently the Labour Home Secretary, Jack Straw, has attacked criminal defence lawyers, criticising them on the basis of being too close to their clients, saying that defence practices now bear little resemblance to those common when he himself was in practice many years ago. This is in part no more than political rhetoric, but it also has a grain of truth in that criminal defence today is much more adversarial in character than it was 20 or even 10 years ago. This is not to say that there are not continuing problems with the quality of criminal defence service. An evaluation of the police station accreditation scheme[18] showed that while standards of police station advice had improved significantly since before its introduction, there were still significant incidences of non-compliance with standards of performance among both solicitor and non-solicitors advisers. As noted earlier, similar variable quality standards were found among the solicitors' firms participating in the pilot for contracting criminal legal aid.

There have been further developments in quality assurance of criminal defence services to coincide with the introduction of contracting on a national basis. First, the network of local

[16] These are set out in E. Shepherd, *Police Station Skills for Legal Advisers*, London: The Law Society, 1995.

[17] A subsequent Law Society manual, extending the approach of underlying the accreditation scheme to other parts of criminal investigation and trial process, was in fact entitled *Active Defence*. See: Roger Ede and Eric Shepherd, *Active Defence*, Law Society, London, 1997.

[18] See L. Bridges and S. Choongh, *Improving Police Station Legal Advice*, London: Law Society and Legal Aid Board, 1998.

duty solicitor schemes (largely controlled by local solicitors) has been relieved of the function of selecting duty solicitors. Instead, a national accreditation scheme for solicitors, very much based on that for non-solicitor police station representatives, has now been introduced to cover those wishing to act as either police station or magistrates' court duty solicitors. This again has required the profession to specify in considerable detail what knowledge, skills and standards of performance should be required of solicitors providing initial representation to defendants in magistrates' courts. This has become all the more important with the pressure of recent reforms to speed up the processing of criminal cases and to 'encourage' early pleas. There is little doubt that these pressures from government will intensify in the second term of the Labour administration, and it will be interesting to observe how well both the profession and the Legal Services Commission will be able to defend the new culture of criminal defence that has evolved over recent years under these various quality initiatives.

The Public Defender Pilot

Interestingly, it is precisely in terms of performance in relation to the handling of guilty pleas that will be one of the main grounds on which the new public defender service, now being introduced on a pilot basis in England and Wales, is likely to be judged. Certainly, studies elsewhere have shown that public defenders perform differently in relation to guilty pleas than defence services based in private practice, in that they are more likely to offer pleas on behalf of their clients at an earlier stage. Of course, in systems where plea bargaining and sentence discounts are heavily institutionalised, such patterns of behavour can arguably be said to carry benefits for clients, as well as producing lower average case cost for public defender services. Whether a public defender service in the United Kingdom (including Scotland) that relied heavily on early guilty pleas would have the same relative advantages for clients in terms of sentencing is more debatable.

So far, the public defender is being introduced only on a very modest scale in England and Wales, with the plan to open offices in just six locations within the next year. The first four of these offices will be based in Birmingham, Liverpool, Middlesbrough and Swansea and were due to open in May of this year. As noted earlier, unlike in Scotland, there will be no compulson on criminal clients in England and Wales to use the public defender, and each office will therefore have to compete for clients on the open market with other criminal defence solicitors operating under contracts. The building up of a client base is therefore seen as a high priority among those operating the service, and for its part the government has allowed a fairly lengthy period for evaluation of the new service over four years.

One of the key questions to be addressed is what the basis of this evaluation should be. Naturally, the tendency will be to draw direct comparisons, either on grounds of cost, quality or outcome of service, between defence solicitors operating under contracts and the public defenders. Even setting aside for the moment the technical difficulties in mounting such comparisons – and, as noted earlier, only limited information will be available on the services provided by contracted providers – there is a risk that such a basis of evaluation could affect the way in which the public defender service develops. Certainly, that has been the evidence so far in the setting up of the initial four offices. All four will be headed-up by experienced solicitors drawn from private practice, and each has sought to establish an office structured in a very similar way to private practice, with a mixture of solicitor staff and accredited police station representatives. Yet, one possibility would have been to seek to set up the public defender offices on a different basis, for example with staff consisting largely of solicitors to

undertake the full range of pre- and post-charge representation of criminal suspects and defendants.

Interestingly, it is not government policy in Britain that the public defender, even if it should prove less costly or more effective (from whatever point of view this is judged), should displace private firms operating under contracts. Rather, the public defender is being presented as complementary to contracted services, which it is claimed are likely to remain the dominant form of provision. In this sense, the public defender is not so much intended to compete with contracted service as to provide a benchmark for them, enabling the Legal Services Commission to have direct access to information on cost components, conduct standards, and other aspects of criminal defence work that may be less forthcoming from firms operating 'at arms length' under contracts. Viewed in this way, the LSC and the government might wish to encourage the public defender to experiment with new ways of delivery of service and/or with new quality standards, even though this will make direct comparisons with private practice more difficult. Given that these different expectations of public defenders may have an important bearing on the way in which the service develops, it may be necessary to clarify the purposes of the public defender even at this early stage. In the context of the International Legal Aid Group conference, it would also be valuable to obtain comparative information on any other situations in which public defenders have been introduced as part of a 'mixed economy' and as essentially complementary to a system of contracted defence services.

30 May 2001