

AN EXCELLENT SERVICE AND A CATALYST FOR CHANGE?¹

THE FUTURE PROVISION OF CRIMINAL DEFENCE SERVICES IN NORTHERN IRELAND

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When first invited to write on “Criminal Legal Aid; the Future” it was suggested that I should examine the potential impact of criminal legal aid reforms now enshrined in the proposed draft Access to Justice (Northern Ireland) Order 2002. In particular it was suggested that I should examine the abolition of the Appropriate Authority,³ the extension of fixed standard fees, and the possible introduction of special contracts for complex cases and (perhaps) for different categories of criminal work. A further suggestion was made that, while setting the article in the context of the Criminal Justice Review and the Auld Report in England, I should look further afield to potential reforms presaged in the new draft Order, such as criminal defender systems.

This brief will be partly followed. The draft Order enables many things to be introduced, including salaried defence services. Understandably and sensibly the Government has decided to give as wide a scope as possible to the new Legal Services Commission for Northern Ireland in the manner in which it fulfils its duty to provide criminal advice and assistance and criminal representation here.

The Commission is empowered to enter into contracts, make payments, loans or grants to providers of services, and to employ persons to provide such services directly, subject to a code. There is, in addition, a power given to the Commission⁴ to establish separate bodies to provide any or all of these

¹ *Criminal Defence Service*, Consultation Paper June 2000, Lord Chancellor’s Department. The Lord Chancellor expects a salaried public defender service to “set an example of excellent service and be a catalyst for change within the wider criminal defence and legal services community”.

² County Court Judge for Antrim, Chair Lord Chancellor’s Legal Aid Advisory Committee for Northern Ireland.

³ The somewhat peculiarly named body responsible currently for assessing the level of criminal legal aid payments in Northern Ireland, appointed by the Lord Chancellor and composed of both senior members of the legal profession (in particular, eminent criminal practitioners) and lay members. The Authority sits as a committee composed of a solicitor, barrister and a layperson drawn from this body. It is established by the Criminal Proceedings (Costs) Rules (Northern Ireland) 1992.

⁴ Which, in April 2003, will take over those powers currently exercised by the Appropriate Authority and, as the Lord Chancellor’s agent, by the Legal Aid Department of the Law Society of Northern Ireland. The Order in Council is to be laid in November 2002. This being Northern Ireland and because of the ongoing process of devolution here the Lord Chancellor has embarked on a process of

services. Public defender services by salaried Commission employees can certainly be introduced here and, because of a specific provision that allows different areas (and different descriptions of cases) in Northern Ireland to be treated differently, pilot projects can be introduced⁵. It is, however, difficult to predict with any accuracy what the future intentions of the Government are in this area.

Whilst the Government may have its own, fairly well defined, objectives, these can at the moment only be the subject of, at best, intelligent guesses. The Order itself does not tie the Government down to any particular way of proceeding. Quite the contrary, it gives a very wide scope both as to the nature of criminal services (making formal provision for these to include detention proceedings⁶ and bringing the Police And Criminal Evidence Order (PACE) advice within the ambit of criminal defence services⁷) and also as to the ways in which such services should be provided and funded. Contracts are now widely used in England and Wales and are to be extended to proceedings in the Crown Court. However, there are a number of uncertainties. What is happening in England and Wales, whilst it is hard to assess exactly, may not prove a good exemplar for Northern Ireland. There is scope for treating Northern Ireland differently⁸. The existence of a local Assembly⁹ and, in some respects, our different culture both as regards the distribution of legal services in the small towns that comprise most of Northern Ireland and our sectarian problems may have implications for the availability not just of competent assistance but of a sufficient choice of representation¹⁰. It is arguable, at the very least, that this is in itself part of the concept of access to justice.

consultation on the Order that includes the Northern Ireland Assembly and the Northern Ireland Select Committee at Westminster (due to conclude towards the end of July 2002).

⁵ Article 23(4)(a) and (b) and Article 24(6)(a) and (b) of the draft Order.

⁶ Article 25(c).

⁷ Article 23 which provides for publicly funded advice of both arrested persons and “volunteers” at police stations. Such advice shall be as the Commission “considers appropriate”. To date in Northern Ireland such advice has been provided by a solicitor unlike the situation in England and Wales where a non-qualified person can attend to advise a suspect. It has predictably been a source of controversy that persons undertaking this difficult and non-social task have not been “up to the job”.

⁸ “Simply put the Government’s stated intention is to modernise the administration and provision of publicly funded legal services in Northern Ireland by delivering local solutions to local problems. As my Ministerial predecessors have stated, this is a listening Government”. David Lock, Parliamentary Secretary, Lord Chancellor’s Department, Foreword to *The Way Ahead – Legal Aid Reform in Northern Ireland* Cm 4849 (Belfast 2000), echoing the words of the Lord Chancellor addressing the Bar of Northern Ireland in 1999.

⁹ Scotland, although it has been experimenting in Edinburgh with a pilot salaried public defender project, has not gone down the route of contracting.

¹⁰ There is some rather anecdotal suggestion that there has been a contraction of choice in some towns in England as some firms forsake criminal work in favour of other more rewarding areas of work and those awarded contracts by the Commission are excluded from these due to vicissitudes extraneous to their criminal practices.

This article, because of the uncertainties referred to, is therefore something of a quick gallop through the main provisions of the Order and a more in depth examination of certain aspects of these using what I hope is an intelligent guess as to what the medium term future holds for us in Northern Ireland.

Fixed Fees and Quality Control?

The budget is not to be capped. Unlike the civil (and the family budget) it is to be “demand led”. Having established that, it has to be recognised that the structure of the Order and the definition of Remuneration Orders permits considerable scope for the Lord Chancellor, subject to consultation with the Lord Chief Justice and the principal professional bodies, to determine rates and the level of skills required to provide different categories of criminal services.¹¹ It is not hard to see that the Government contemplates the much wider use of fixed fees as a way of exerting financial control on an otherwise demand led budget. The scope for assessment of individual cases is going to be vastly reduced.

It remains to be seen whether this has the desired effect but there is scope not just for a retreat from the assessment of individual cases but also from fixed hourly rates (struck at different levels for different skills) to fixed fees. This in itself will have an effect that is, in part, easy to predict.¹² It will encourage specialisation and discourage those firms that are not substantially geared to criminal defence work. Of course a lot depends on the level at which fees are set. Swings can compensate for roundabouts. There may well be economies of scale.¹³ My own view is that this will have a largely beneficial effect but it is, as it is in many areas, a matter of balance.¹⁴ The degree of specialisation already present in Belfast together with the greater incentive to concentrate on criminal work provided by fixed fees may well suggest that a system of contracts could be, at least partially, introduced in the near future. It seems that the time scale will permit the Northern Ireland Court Service to

¹¹ Articles 24(3)(a) and 47 give the Lord Chancellor important and wide ranging powers to make Remuneration Orders.

¹² During 2001/2002 14,645 criminal cases appeared before Belfast Magistrates' Court and Belfast Youth Courts. 90% of these cases were dealt with by 15 solicitors' firms based in Belfast in the main but employing 100 solicitors and 150 other staff in 39 offices throughout Northern Ireland.

¹³ The rate of increase of legal aid expenditure in Northern Ireland has been most marked by the recent rises in criminal legal aid expenditure. See any recent *Legal Aid Annual Report* (London, the Stationary Office).

¹⁴ Expenditure on criminal legal aid per capita is still lower in Northern Ireland than in either England or Scotland (see *Legal Aid Annual Reports* *ibid* and accompanying reports of the Lord Chancellor's Legal Aid Advisory Committee for Northern Ireland) but there has been a very appreciable rise over the last number of years. In 1996/97 the bill was £14.3m and in 2000/01 £22.8m. The average solicitor's bill went up by 17.02% in the last two years and counsel's by 1.63% but this was after a massive rise in the previous year, largely as a result of the Appropriate Authority increasing fees to a level more in keeping with that in England and Wales.

assess what is happening both in Scotland and England before it takes any fundamental decision on the introduction of contracts of whatever kind.¹⁵

Interestingly the Order contains an enabling power for a separate body to administer criminal defence services¹⁶ but there appears to be little likelihood that this will happen in what is a comparatively small jurisdiction. If criminal defence services and civil expand along very different lines, however, the power is there.

The Law Society would probably say that quality control is best exercised by competition and, for that to operate properly, there must be, at the very least, some element of choice. A poor job will be punished by the client going elsewhere the next time if not immediately. The Government's position is not so sanguine. To an understandable extent the Government's thinking has been influenced by its experience in England. The Ministers ultimately responsible for the approval of policy are Westminster based. England and Wales is in the throes of completing a complex and radical reformation of publicly funded legal aid services. This has included the widespread introduction of contracts for the provision of criminal services, franchising and the implementation of a franchise model code. It also happens that most of the research has been conducted there (including significant research by and on behalf of the Lord Chancellor's Department (LCD) and Legal Services Commission research units). It is not surprising that English experience should be writ large over the Government's thinking.

There is provision for a code of conduct for employees, either of the Commission who are engaged in the provision of criminal defence services or employees of any body established by the Commission. It is clear that the new scheme will require solicitors wishing to do legal aid work to register and sign up to a code of practice.¹⁷ Where contracts are used for general or specialist criminal defence services clauses relating to quality standards will be contained in those contracts.¹⁸

Fixed fees were introduced in Scotland in April 1999 against the opposition of the Scottish Law Society (whose members perhaps do more of the representation of clients at Scottish lower courts than the members of the Faculty of Advocates do).¹⁹ The underlying rationale of the introduction of

¹⁵ In Scotland the average cost of a case fell to £906 in 2000/01 and overall expenditure from £44.9m to £40.4, a drop of 10%. This was "[L]ikely to be due to the introduction of fixed payments for the majority of summary cases, with the average summary case costing £652 compared with £769 in 1999/2000". See *Legal Studies Research Findings No 19*, Scottish Office. Interestingly Canadian research provides some evidence of strategic billing suggesting that private solicitors are more expensive because cases take longer and that they can be encouraged to spend longer on cases depending on how they are paid. (Manitoba and Alberta studies).

¹⁶ Art 5(1).

¹⁷ See the provisions of Art 37 relating to the register of persons providing services.

¹⁸ See *The Way Ahead – Legal Aid Reform in Northern Ireland*, Cm 4849 (Belfast, 2000). The Government decided to introduce a Registration Scheme and Code of Practice similar to the Scottish quality control system as opposed to the English and Welsh franchise model.

¹⁹ Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999. The Scottish Office was concerned that there had been a 65% rise over 10 years in real terms in

fixed fees was to reduce and control the criminal legal aid budget.²⁰ At least in part and so far, this has been achieved. As one Scottish solicitor put it in a private solicitor interview:

“As a matter of principle, I still object to it, but we could live with fixed fees, because I can now see that the swings and roundabouts argument probably does work.”²¹

Of course this scheme of fixed payments (£500 for Sheriff Court cases, for example) has the virtue of simplicity. Billing becomes much less complex and time consuming. It, however, still is designed to control and reduce the amount of public money going to solicitors who represent clients charged with a criminal offence. The initial result was a drop in the average cost of a summary case under the fixed payment regime from £820 to £769.²² In a year when, contrary to immediately past years, the total number of criminal legal aid applications in Scotland went up slightly, expenditure on criminal legal aid fell steeply. The picture was maintained in the following year when the average cost of a summary case fell to £652 and summary criminal legal aid expenditure fell by 10% to £40.4m.

It remains to be seen whether the intention underlying the introduction of fixed fees for summary cases will be achieved in the long term. There are always ways in which, quite legitimately, costs can be maximised in a fixed staged tariff system as well as in an itemised “time and line” system but, in the author’s view the Northern Ireland Court Service will be monitoring very closely what happens in Scotland with its fixed fee system in summary courts and what happens in England and Wales where the system of contracts is being further extended.

One thing is clear and that is that, while the timescale for the implementation of the new system and of the new Legal Services Commission is quite tight, the Government is wisely in no mood to hurry along a particular route. The Remuneration Order will be a first step to be taken by the Lord Chancellor. It, and the introduction of fixed fees, will presumably precede or immediately follow the taking over by the new Commission of its functions in April 2003. The Commission is charged with informing itself of the need for and the quality of criminal defence services in Northern Ireland.

No doubt, in deciding what levels at which these fees should be struck and what different stages should be allowed for, the Northern Ireland Court Service and the new Research Department of the Commission will properly evaluate, on the one hand, the need to adequately recompense work done by sufficiently competent professionals and, and on the other, the need to ensure that there is a sufficient pool from within which the right to choose one’s

the average cost per case. See consultation letter from the Scottish Office, 12th October 1998.

²⁰ The intention was to reduce the then budget from £53m by £10m. Scottish Office Press Release, 13th October 1998.

²¹ Evaluation of the Edinburgh Public Defenders Solicitors Scheme, Scottish Office, September 2001, at p 21.

²² *Scottish Legal Aid Board Annual Report 2001*. Solemn cases where fixed payments do not apply saw an 18% rise in costs, summary case where fixed costs largely apply saw a 6% reduction in costs.

representative can properly be exercised. This right to choose is enshrined in article 30 but this provision also gives particular powers to the Commission to determine the number, description and seniority of representatives.

It does not need to be emphasised here how important the issues of competent representation, the level of that representation, the choice and independence (both actual and perceived) of representation as well as the adequacy of forensic resources to both prosecution and defence are to us in Northern Ireland.²³ Perhaps, without being in any way controversial, I could say that one of the mainstays of the rule of law in Northern Ireland, a community with severe problems, has been the competence and availability of its legal profession to both defence and prosecution. Whatever else happens, I am reasonably confident that the Government and the new Legal Services Commission will appreciate the value of this equality of arms and ensure that it continues.

Of course the great danger of any new funding system and any change to an existing funding system is that it may well have adverse consequences, some of which are difficult to foresee. It has been recognised that any judicare or publicly funded legal aid system may provide perverse incentives to lawyers to continue cases.²⁴ For instance, there should be every financial incentive to negotiate a realistic plea as well as to do adequate and timely preparation. There should be no financial incentive to perversely continue cases. It is a fraught matter as to where the line should be drawn between a system of funding that provides adequate recompense for work properly and competently undertaken and a system which encourages something that has been euphemistically described as “strategic billing”. I will expand on the hidden costs of this when I comment upon the merits of the future development here of a salaried public defender service.

One of the great benefits that our system provides is that it ensures that persons being questioned by the police in police stations or detention centres are provided with professional representation. The benefits of the Police and Criminal Evidence (Northern Ireland) Order 1988 have ensured that there is an effective code for, amongst other things, the questioning of suspects by the police and their access to advice. This has to be borne in mind by anyone

²³ Recognised by article 30(6), which provides a safeguard against an individual’s choice of representative being restricted to employees of the Commission or bodies established by the Commission to employ salaried defence lawyers.

²⁴ Private Lawyers spend more time on case than staffers. See the Manitoba study quoted in *Legal Studies Findings No 19* n 15 *supra*. See also Edinburgh Evaluation Study n 21 *supra*. The alleged perverse incentives contained within Scottish criminal legal aid have been the subject of considerable debate. There is both concern that the complex system there encourages late pleas and does not provide adequate support for those pleading guilty and appearing straight from custody, but, as in so many things, Scotland is different. Our problem is that whilst there has been considerable public and private research and evaluation in both England and Scotland there has been next to none here. There are however remarkable similarities between the criminal practice scene in Belfast and Edinburgh, where, as in Belfast, 15 firms do the bulk of summary work are overwhelmingly dependant on legal aid and are still “small” in size. One difference is possibly that there is a greater specialisation between criminal and civil legal aid practices in Edinburgh.

who is assessing the public defender and judicare systems in other countries but particularly in the United States. NYPD Blue is not that far from the mark. Whilst persons in police custody there do have a right to a phone call and to be seen by a lawyer my understanding is that the public defender or publicly funded counsel does not get assigned until after the suspect has left the Precinct.

Strangely perhaps, the system is similar in Scotland. Defence solicitors do not have a right to be present during police interviews. Solicitors there do most of the representation in the Sheriff Courts but they do not regard attendance at a police station as a central part of their job. If they go to a police station it is for short interviews to facilitate a client and, in a sense, to provide moral support. The situation in England and Wales is vastly different. The major study of criminal defence work in England and Wales makes it clear that firms employ large numbers of paralegals. This is not the situation in Scotland, nor is it the picture here. While more clerks may sit behind counsel than in Scotland the use of paralegals is by no means as developed as it is in England where clerks are assigned to undertake different stages of a case.²⁵

There could be many reasons for this but one which perhaps makes Northern Ireland more similar to Scotland is that any representative entering a police station to fulfil duties under PACE must be a qualified solicitor. Unlike their English counterparts Northern Irish firms do not and should not employ non-professional staff of varying skills and ages to cover the long, unsocial hours of police station advice. In many respects ours is a “Rolls Royce” service and it costs. In many respects it sets standards that must be the envy of the Common Law world, if not also of other jurisdictions. The draft Order transfers advice and assistance that formerly funded such professional trips to police stations to the (non-capped) criminal defence services. While the Order appears to ensure, through a grant of representation, at the very least, a minimum of a solicitor, there is no such requirement that a professionally qualified person should provide the advice and assistance for an individual arrested and held in custody at a police station.²⁶ It may be that in practice not all those who attend to provide advice and assistance to those in custody at police stations in Northern Ireland are professionally qualified but the present system remunerates the attendance of solicitors and it is, in the vast majority of cases, solicitors who undertake this difficult, somewhat unsociable, and, to my mind, vital activity.

Public Defender Systems and Contracts?

This leads on to the last aspect of the prospective Order with which this article will deal. One of the most controversial provisions of the Access to Justice Act 1999 (which our draft Order in many respects closely follows) was that it allowed a salaried criminal defence service to be set up in England and Wales. Like the pilot project in Edinburgh it is now being piloted in four centres with another two to open shortly.²⁷ The time scale for

²⁵ McConville *et al* 194.

²⁶ Articles 23 and 30.

²⁷ In May 2001 Liverpool, Middlesborough, and Swansea opened. Birmingham opened in July 2001 to be followed this year by Cheltenham and another location

evaluation is tight. A report is to be submitted by September 2004 on data collected after April 2003.

It is perhaps not surprising, given this background, that the power to commence a salaried defence service is writ large in the new Order for Northern Ireland. It was not highlighted in the Northern Ireland Court Service's consultation document, *Public Benefit and the Public Purse – Legal Aid Reform in Northern Ireland*. In paragraph 12.21 views were invited on taking powers to enable the administrative body to employ salaried defenders to represent defendants. It is unlikely that many, if any, of the 29 bodies with whom those responsible for the drafting of the Order met expressed a positive view either about the need for or the beneficial effect of introducing salaried public defenders. Despite this, and perhaps understandably given what has been happening on the mainland, the power for the Legal Services Commission (LSC) to employ salaried lawyers for this purpose was one of four decisions formally included under the heading "Criminal Legal Aid" in the decisions paper, *The Way Ahead – the Future of Legal Aid in Northern Ireland*, published by the Court Service in response to the consultation process.²⁸

It is not entirely certain whether it will be activated here but it is anticipated by some members of the Law Society that, if a Public Defenders Office is piloted, it would operate initially in the Belfast City area and cover the four main designated police stations in connection with PACE work and representation on summary matters before Belfast Magistrates' Court.²⁹ It seems reasonably clear that there has been some discussion with relevant professional bodies about this. The view of the Lord Chancellor's Advisory Committee on Legal Aid in Northern Ireland has been hostile to the concept of introducing a Public Defender Scheme (PDS) here. The Committee's view was that the primary motive behind such a move was the desire to reduce or control the rate of increase of public expenditure on criminal legal aid in Northern Ireland – not in itself an ignoble aim. The Committee could not see any benefits in terms of increased quality of service in the introduction of a PDS here and was unaware of the existence of any evidence that the quality of service provided, albeit at some expense, by existing criminal legal aid in Northern Ireland was lacking. It also felt that a successful criminal defence service would not fulfil the Government's pre-requisite of controlling and reducing costs.³⁰

later this year. It will be evaluated by a team from the Institute of Legal Research at Warwick University and the Institute of Advanced Legal Studies headed by Professor Lee Bridges. *Methods for Evaluating the Public Defender Service* (a consultation document, School of Law, University of Warwick, February 2002).

²⁸ Para 77. "The Government will take powers for the LSC to employ salaried lawyers either in-house or as a separate entity to conduct criminal defence work. The powers will include setting criteria under which such lawyers will be used. The Government will consult before such powers would be exercised, including the operation of a pilot scheme". CM 4849 (Belfast, 2000).

²⁹ For this I am grateful to Brian Archer, a solicitor member of the Lord Chancellor's Legal Aid Advisory Committee for Northern Ireland.

³⁰ Submission by LAAC to LCD on *Criminal Defence Service* (LCD CP 9/00, June 2000).

My own view is that, whilst value for money and the control of cost are very relevant considerations, the greater use of fixed fees with uplifts for exceptional cases will prove to be the best way of ensuring that these objectives are met whilst still ensuring that the interests of justice are being kept to the fore. The LCLAAC³¹ argued that the need for practitioners to retain their clients and attract new ones by virtue of a reputation for quality service is the best kind of competitive pressure in this area. This was said in the context of the Government's proposal to consider the use of contracts in criminal legal aid but it applies with even greater force to a Criminal Defence Service. However the possibility of a PDS being piloted here is worthy of further scrutiny and consultation. Obviously this process will be informed by what is happening in Edinburgh, the new pilots in England and, also, by what is not happening in Dublin.³² There the Criminal Legal Aid Review committee, headed by Judge Buchanan, concluded, having conducted extensive consultations and costed various models, that the existing private practitioner system should not be either replaced or supplemented by the introduction of a PDS:

“Having regard to the pertinent question of cost, which, it ought to be stated was the impetus for this investigation, we believe that the (legal aid) Scheme as it is currently structured and operates, is less expensive than any of the alternative models profiled and costed in this Report.”³³

This would also be informed by the LSC's study of local conditions, pursuant to its duty under article 6. Every so often, and again perhaps for understandable reasons, a politician alleges that some criminal defence lawyers cosy up to their clients and, by implication, arrange alibis, suborn witnesses, provide defences and, as James Morton said do “all the other things of which good legal thrillers are made”.³⁴ It comes as no surprise that this suggestion has been made in Northern Ireland. It has however not been said often and, given the central role of the legal profession in both prosecuting and defending, that is perhaps the real surprise.

Lawyers who either prosecute or defend have a difficult and, quite often, very unpopular job to perform. Given the nature of defence work and the more personal relationship and trust that must exist between the professional and the client, this job is more difficult for the defender than the prosecutor. Sometimes judges are accused of being naïve but all I can say is that I have never been aware of any serious professional concern about this sort of problem in Northern Ireland. Nor has there ever been any hard evidence or any evidence produced to substantiate such an allegation. The LSC surely must, as will the Government, take into account that, whatever the merits of a Criminal Defence Service for England and Wales or Scotland, the citizen's freedom to choose an independent lawyer adequately remunerated from the

³¹ The Response of the Lord Chancellor's Advisory Committee on Legal Aid in Northern Ireland (LCLAAC) to the Government's Consultation Paper on the Reform of Legal Aid (Belfast, 1999).

³² *Criminal Legal Aid Review Committee First Report*, (Dublin Stationary Office, 1999).

³³ *Ibid* p 75.

³⁴ NLJ, March 2001.

public purse has been of immense significance in maintaining the rule of law in this jurisdiction over the last 32 years. The Criminal Justice Review did not cover legal aid matters in much detail but the general tenor of its recommendations and its proposals to transfer responsibility for all prosecutions from the Police to a new Public Prosecution Service for Northern Ireland can be taken as a clear sign that independence from the State should be a core value of the criminal justice system in this jurisdiction.

This is not to say that such independence cannot be secured in a PDS in the same way as the position and authority of the Director of Public Prosecutions ensures this in the field of prosecuting.³⁵ That can be done but one is not comparing like completely with like. A Criminal Defence Service in Northern Ireland, no matter how well it is funded in terms of financial and human resources and no matter how well buttressed it is from the State by an independent head and by a Commission, would almost certainly be seen to be an arm of the State by many shades of political opinion and by individual potential clients in Northern Ireland. And perception can almost be as important as reality in Northern Ireland.

It is now clear that, if it is progressed in Northern Ireland, the Public Defender's Office (PDO) will operate in competition with private practitioners. The right of choice as regards representative that originated in Diplock days has now been enshrined in article 30. The initial attempt, in Edinburgh, to enforce the direction of those whose birth dates were in January and February towards the PDSO was such a failure that it had to be ended, after 21 months, in July 2000. Not only did it, at least partly, skew the evaluation figures, it, by forcibly abstracting one sixth of the lower courts work from a close network of fairly specialised criminal private practices in Edinburgh, ensured that clients and professionals were going to be hostile to the advent of the PDSO in a way that even a dedicated, and fairly thick skinned, "staffer" would find difficult. It must be unique that star signs should determine entry into a publicly funded judicare system.

That will not happen here. If the new Commission finds the kind of financial and human resources to set up a PDO in Belfast it will have to compete on an even playing field with private practice. If that happens, I am quite certain that, based on experience elsewhere in the United Kingdom, the attitude of the professions will be neutral at worst and helpful at best. A lot will depend on the calibre, experience and commitment of those staffing the PDO and, in particular, its head. It requires, and no doubt will receive, adequate financial resources. The head of the pilot scheme in Liverpool, Richard Whitehead, will take a cut in his income from what he might have expected in private practice. However, the salary for a head of office there is, at £55,000, proportionate to the level of skill and experience that could be expected

³⁵ The importance of this has been emphasised many times. In the United States the most effective and respected systems possess an independent body, such as a Commission, acting as a buffer between the Government and the service. Without it services are exposed to political pressure and are more susceptible to funding cuts. Indigent defence in a system where many prosecutors and even judges are subject to election can suffer at the hands of taxpayers who can directly calculate how much of their money is being spent on Defenders. See *Public Defenders; Learning From the United States Experience*. (Justice, London, 2001).

given that fee considerations are removed from the equation that must affect every solicitor in private practice. Mr Whitehead said recently:

“Solicitors see the public defenders as one way to make progress in their own careers. The constraints of making a profit can be removed and you can actually get on with the job.”³⁶

A deputy “staffer” receives a salary of £30,000 to £35,000. It is not just the salary that pays the professional staff that is important, so too are the arrangements for establishing the office, the financing and providing of adequate support staff and facilities, and the arrangements that are made to provide for those essential disbursements required to ensure the interests of justice are advanced in individual trials. Who decides what disbursements should be incurred? Often a private practitioner has to obtain a specific authority from the Legal Aid Authority for such expenditure. Is this process made any easier or any more difficult if the PDS is an emanation of the funding Authority, the new LSC? The major potential benefit that a sizeable PDS office could have is that there may well be economies of scale. The provision of IT, of wider office services, of a library and of such opportunities as having earlier links with other agencies such as Probation and social services are not minor, fringe benefits but could be part of a “holistic” approach to defence services.³⁷

The first evaluation report on the Edinburgh PDSO was published last September.³⁸ It makes interesting reading. Nothing more will be recited here than the principal conclusions. It is sufficient to say that, in almost every respect, the jury is still well and truly out.

After an initial unfortunate start the PDSO became an accepted part of the somewhat closed shop of those defending in the lower courts in Edinburgh. To a certain extent PDSO cases tended to resolve earlier. There was a slight, though still significant, increase in its conviction/plea rate. There seemed to be a link between the tendency of the PDSO to resolve its cases earlier and its slightly higher conviction rate. An interesting phenomenon, and not apparently connected with anything in the actual case, is that there was a tendency for cases of those who were born in January and February to plead guilty earlier than those whose birth dates were in November or December. The authors of the report attributed this to how solicitors were paid!³⁹ There was no appreciable difference in sentence outcome. Client satisfaction was, however, markedly different. The authors recorded:

“The levels of trust and satisfaction expressed by directed (i.e. involuntary) PDSO clients were consistently lower than those expressed by clients using private practitioners. Directed clients were less likely to say that their solicitor had done a “very good job” in listening to what they had to say; telling

³⁶ *The Independent* 15th May 2001.

³⁷ The provision and use of IT has been assessed as being of vital importance in the United States. Its availability is one of the criteria for assessment of PD projects by the American Bar Association and others. See Justice n 35 *supra*.

³⁸ See n 21 *supra*.

³⁹ *Ibid* p 5.

them what was happening; being there when they wanted them; or having enough time for them. They were less likely to agree strongly that the solicitor had told the court their side of the story or treated them as though they mattered. Of particular concern was the fact that only 39% agreed strongly that their solicitor “had really stood up for their rights” compared with 71% of private solicitor clients”.

Of course these clients had no choice. They could not vote with their feet and go elsewhere unless they had received a formal Scottish Legal Aid Board waiver. Might this be an argument in favour of the power of consumer choice even where the consumer is not paying for the service!

Perhaps of more concern both generally and to the report’s authors was that, in a study of those who chose the PDSO after direction had ceased, volunteers were still less likely to agree strongly that the PDSO had “really stood up for their rights”. They were also markedly less likely to say that they would use that firm again than those who were clients of a private practice.⁴⁰ Of even greater significance than these matters that are, after all difficult to quantify and to assess, is whether the PDSO provided value for money. Cost effectiveness was the first, and foremost, criterion. Unfortunately for the evaluation, the Scottish Legal Aid Board in 1999 implemented a system of fixed fees that seems to have had the result of sharply reducing average summary case costs. The average cost per case of the PDSO was, on one set of assumptions, £65 dearer than the average case cost in private practice. It is true that that difference is not considerable but, if cost effectiveness was to be a yardstick for either the maintenance or extension of the project, the authors of the evaluation judged that case numbers would have to be increased by 15% or the office would have to lose one of its lawyers. This would be with all the accompanying uncertainty as to what effect the consequent increase in work load would have on outcomes, which, at the moment, seem to be little different from those of cases going through the Scottish private system.⁴¹

Underlying all that is happening in England and Wales (the introduction of contracts for the delivery of most criminal legal aid services, from April 2001, and the launch of the experimental public defender pilot projects) has been the perception by Government that not only has criminal legal aid expenditure, an essentially demand led budget, got to be controlled but also that the introduction of various initiatives to improve the quality of criminal legal services is either desirable or else necessary. It is not obvious that the latter is the case in Northern Ireland. Criminal legal aid in England and Wales involves an expenditure in excess of £800m a year and in the view of one eminent commentator, Professor Bridges, encompasses what is probably

⁴⁰ *Ibid.*

⁴¹ The relationship between resources and workload and the consequent impact on quality of work and outcomes is widely recognised. See Justice Report n 35 *supra*; Lee Bridges “Recent Developments in Criminal Legal Aid in England and Wales – Contracting, Quality and the Public Defender Experiment”, Melbourne ILAG 2001.

the most comprehensive system of state-funded legal assistance to criminal suspects and defendants in the world.⁴²

Northern Ireland seems, for some reason, to be cheaper in terms of expenditure per capita than either England or Scotland.⁴³ Despite this a service at least equal to that provided in England exists in Northern Ireland. There are always anecdotal stories about poor quality of representation, lawyers being under-prepared, counsel being changed at the last minute and, possibly, being hopelessly inexperienced, but in a system that has seen a through-put of cases that would have taxed any other jurisdiction of its size there appears to be a remarkable lack of public concern in this regard. In the light of a lack of any public perception that there is a significant problem and of the lack of any hard evidence that there is a significant problem of poor quality of representation of suspects here it would seem to be foolish in the extreme for either contracts as they are being developed in England and Wales or salaried public defenders to be introduced here without a proven and demonstrable need for change being established.

The Government, which deserves credit for the funding of the present legal aid system, should wait until the new LSC has bedded down and has addressed its duties under article 6. It is required to both inform itself of the need for criminal defence services, and the quality of such services. It then is charged with the task of how best that need should be met. The mainland experience will obviously be watched closely and a sufficient number of years allowed to elapse (perhaps unlike Scotland) before the impact of the introduction of fixed fees upon costs and quality can be properly assessed.

The system of contracting introduced in April 2001 in England and Wales has sensibly not attempted to impose a rigid fixed price either on the contract as a whole or on individual cases. It has not even sought to limit expenditure on individual aspects of cases (e.g. PACE). It does not limit case-loads and allows contracting firms to uplift contract prices in some cases. It allows monthly payments based on past experience (last year's work). It allows solicitors to continue to claim for work done under the previous system of hourly rates and fixed fees (e.g. for telephone calls). It is a very different beast from that of fixed fees. It certainly is very, very different from the present position in Scotland that seems, at least in part, to be achieving the aims the Scottish Office set.⁴⁴

The effects this will have on freedom of choice, the availability of firms prepared and capable of undertaking contracts, the difficulties of proper quality monitoring (as opposed to monitoring good "housekeeping") are all matters of present speculation and will be subject to future evaluation. It seems, however, that the system is far from simple. Billing complexities and the recording of work done may tend to favour larger firms. Larger firms may be more sophisticated in the type of case management and the routine delegation of tasks such as police station advice to non-solicitor staff. It is possible that this may mean that bigger firms can make economies of scale and be better able to exploit the funding opportunities available to them. It is

⁴² *Ibid.*

⁴³ See recent *Legal Aid Annual Reports* with accompanying LCLAAC reports.

⁴⁴ See various recent annual reports of the Scottish Legal Aid Board.

however a moot point whether these benefits will accrue to the Legal Aid Fund or to the firm itself. It is also a moot point as to what if any impact this will have on quality of service (and how that can be properly assessed). No doubt, special arrangements will have to be made for some cases here. There will probably have to be a way that some cases are taken out of “fixed” fees. These will presumably be rare enough. Some cases might profitably be the subject of individual contracts between the providers and the LSC, especially potentially long running serious fraud cases and multi-defendant cases. Here, yet again, the experience of those on the mainland will be useful. Very considerable research has already been done by the LSC and LCD on criminal costs and the next couple of years will permit what is happening there to be evaluated by the new LSC. This is one of the reasons why a research Department should commence work as soon as possible, perhaps initially under the Legal Aid Department of the Law Society.

I think I shall best conclude this, admittedly somewhat speculative article, by revisiting the Scottish PDSO in Edinburgh. I said above that there was a marginal cost disadvantage when PDSO average case costs were compared with those going through the private system. These were slightly lower. There is however a more hidden saving:

“Resolving cases earlier has the potential to save legal aid (and thus taxpayer) costs – though the PDSO would need to secure further increases in work (or make further reductions to staffing levels) for this potential to be realised. It also reduces court and prosecution costs. Fewer witnesses are inconvenienced. Clients are spared the wait and worry of repeated court appearances and are less likely to be held in detention pending the resolution of their case.”⁴⁵

The savings to courts (6%) and to the Procurator Fiscal (5%) are capable of some measurement. The savings in cost of unnecessary attendance by witnesses at “cracked trials” are not so easily capable of such quantifiable assessment. They are, however, very real. There was a very significant difference between the PDSO and private firms as regards “cracked” or adjourned trials. In broad terms in a sample of 100 cases the private firms had 44 cancelled trials involving 175 wasted visits by witnesses while by contrast the PDSO produced 31 ineffective trials affecting attendance by a total of 123 witnesses.⁴⁶ This is something which must also be put into the balance when the overall cost effectiveness of a criminal defence service is being evaluated.

If a system of salaried defenders is to be piloted here it will have to compete with private practice. In my view, that is the best yardstick by which to judge the new service. If it succeeds, it will do so competitively and may become a benchmark for private providers. It requires to be well resourced, patently independent, and buttressed from the State. It needs to be operated by persons of calibre, of some experience and who are capable of commanding respect, persons of ability to whom salary and job security are not the sole attractions of the job. It would help if the head of the PDS is, not

⁴⁵ See n 21 *supra* p 7

⁴⁶ *Ibid.*

only a capable, but a charismatic leader. Put this way, the public defender service could be both complementary to private practice and could have some of the virtues that a public-spirited ethos provides. Does this sit easily with cost control and value for money? That, I am afraid, remains to be seen.

Sometimes it is said that Northern Ireland tends to follow, rather slavishly perhaps, what is happening on the mainland. However, one of the advantages of being a small jurisdiction is that one gets time for reflection. We tend to follow. But let us hope that it gives us the opportunity to pick the best and to reject the worst.