Criminal Defence: The value and the price

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As I was preparing what to say today, Nigel Evans MP, the Deputy Speaker, was arrested and questioned by police on suspicion of rape and sexual assault. Denying the allegations, he said that they were completely false and he could not understand why they had been made. He went on to say that, notwithstanding the "very recent loss" of his brother, it was "the worst 24 hours of my life". I'm sure that all criminal lawyers recognise, from knowledge gained from their own clients, the trauma and anxiety that Nigel Evans must have experienced.

I don't know what arrangements Evans made for legal advice and assistance at the police station, but I couldn't help wondering whether he would have been happy to exercise his right to consult a legal aid lawyer if the tendering arrangements had been in place. Under those arrangements, of course, he would have had no choice as to which firm, or which solicitor, would advise him. I wondered whether he would have felt able to trust this lawyer who he had never met, and would have known nothing about, and whether he would have been confident that the lawyer was devoting enough time and care to his case given the 'swings and roundabouts' of the block payment system – which had been priced at least 17.5% below the historic average police station attendance claim value. In fact, I wondered, would Nigel Evans have been happy that the firm had secured its contract largely on the basis of price – that is, the lowest price – rather than on quality? Or that the lawyer was one of hundreds – perhaps employed on a zero-hours contract - employed by a corporation whose primary business was security or logistics.

The value

What I want to talk about today is the value of what we have, and the price of losing it. In order to assess the value of what we have – in terms of an effective criminal justice system, and the contribution of the legal profession – I want to briefly look at some of the developments over the past three decades; a period that more or less matches my own experience as a solicitor and as an academic.

But I'll start by going back a little further. My first real job was as a police cadet in the Metropolitan Police. Since the age of about 11 I had always wanted to be a police officer, and at the age of 17 I was attached to Hackney Police Station. Defence lawyers were rarely seen in police stations in those days, and the casual but endemic racism and sexism that I experienced made me re-evaluate by ambitions. My next experience in the criminal justice field was as a trainee solicitor in South London in the mid-1970s. Defence lawyers were still a rarity in police stations. The Judges' Rules required the police to inform suspects that they were entitled to legal advice, but this obligation was routinely ignored by the police and by the courts, and together with the absence of an effective legal aid scheme, the result was that only 6 out of every 100 suspects actually received advice from a solicitor at the police station – and miscarriages of justice were commonplace. I then went into practice as a solicitor in Bristol in the early 1980s. Defence lawyers were still a rarity in police stations, and my most vivid memory is of magistrates conniving in the fiction that a police officer could remember – more or less verbatim – what a defendant had said in a police interview that may have lasted for some hours with no contemporaneous record having been made.

And then a Conservative government, led by Margaret Thatcher, introduced the Police and Criminal Evidence Act 1984 (PACE), together with a non-means tested legal aid scheme at the police station, and this was the beginning of a sea-change in the operation of the criminal justice system. PACE was based on the recommendations of the Royal Commission on Criminal Procedure, the Philips Commission. It sought to establish a 'proper balance' between the rights of suspects and the investigative needs of the police. In doing so, it adopted three standards: fairness, openness and accountability. The right of suspects to consult a solicitor was a key mechanism for achieving these standards, and in the view of the Commission, could only be achieved with a free legal aid scheme.

At the outset, the Home Office was keen to ensure that the new PACE regime was effective. It commissioned a number of research projects to establish how the new regime worked in practice, and was open to giving effect to the results of that research. For example, when the research showed that many suspects did not understand the notice of rights, the Home Office introduced a new, plain English, version. The solicitors' profession did not come out very well in this research – it showed that many firms employed unqualified and untrained clerks to provide advice at police stations, which often consisted of little more than advice to remain

silent. But the Law Society – perhaps to forestall criticism from the Royal Commission on Criminal Justice (the Runciman Commission) – devoted time and resources to developing the police station accreditation scheme for police station representatives, which was subsequently extended to all solicitors. In developing the accreditation scheme, the Law Society also had to articulate what the role of lawyers providing advice and assistance at the police station is – and the Home Office, still in listening mode, agreed to incorporate a modified version of it into PACE Code of Practice. It would be wrong to suggest that the relationship between the Home Office, the Legal Aid Board and the legal professions was all sweetness and light but there was, what might be termed, a creative tension. From my research conducted in over a dozen countries in mainland Europe, and further afield, I can say that the outcome – PACE, the Codes, and the accreditation scheme – represent the most comprehensive and effective scheme for regulating the police and ensuring high quality legal advice and assistance that I have encountered.

Some will remember that legal aid franchising was introduced in the 1990s by the Legal Aid Board, and this certainly led to a great deal of tension, and stand-up rows between lawyers and the Board. It has to be said that the management practices of many law firms were antiquated, and quality assurance was an unknown concept. The next step for the Legal Aid Board, soon to become the Legal Services Commission, was the introduction of legal aid contracting, and the contrast between that and the proposed introduction of price competitive tendering, could not be more marked. The LSC, with some degree of independence from the Ministry of Justice, trod fairly carefully. Contracting was only introduced following lengthy consultation with the profession, piloting of the contracting arrangements in a number of areas, and an independent evaluation by Professor Lee Bridges and me. Whilst contracting was not welcomed by many in the profession, this careful approach did mean that its introduction was relatively trouble-free. Looking beyond the shores of England and Wales, legal aid contracting represents one of the best approaches to delivering legal aid that I have seen.

The solicitors' profession also largely did what was asked of it by the LSC in that a corps of specialist criminal defence firms emerged. Criminal defence is what they do. Criminal defence is what they know. And generally, criminal defence is what they are good at. Together with specialist criminal law barristers, the two professions, in my view, provide some of the best quality criminal defence in the world. Again, the contrast with other

countries is marked. In most of continental Europe, criminal defence lawyers rarely attend at police stations, and are marginalised during the trial phase. In many states in the USA, and in much of Latin America, public defenders are too under-resourced and overworked to provide anything like a good quality criminal defence service.

Emerging world-wide standards

Beyond England and Wales, in recent years there has been something of a game of catch-up – and until now the approach of England and Wales has been regarded as something of a model. The ECtHR has, over the past few years, developed its case-law on procedural rights in criminal proceedings and, in particular, has held that where the product of police interviews are used at trial, the right to fair trial requires that a suspect has access to a lawyer both before and during police interviews. This has meant that jurisdictions such as Scotland, France and Belgium, have had to introduce provision for legal advice and assistance at police stations.

The European Union has also been busy on procedural rights. In 2009 it adopted a 'roadmap' of procedural rights for suspects and accused persons in criminal proceedings, and the aim is to introduce a series of measures, most of which we largely comply with. The first Directive, on the right to interpretation and translation, must be implemented by member states by October 2013. The second Directive, on the right to information, must be implemented by June 2014. The UK, under special arrangements under the Lisbon Treaty, opted in to these two Directives. One result is that once they take effect, any court in England and Wales will be able to refer an issue of compliance with the Directives to the European Court of Justice. However, the UK government has not opted in to the proposed Directive on the right to legal assistance, despite the fact that our law more or less complies with its provisions – a political, rather than a rational, decision. Despite that, the UK has been part of a group of countries trying to weaken its provisions.

Despite its decision not to opt in to the Directive on legal assistance, the UK government did support a decision of the General Assembly of the United Nations in December 2012, to adopt new UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. Broadly, these promote the right to legal advice, assistance and representation for suspects and accused persons, and the right to free legal aid in many cases, including at the police station. This has already sparked interest from around the world in how to put them

into practice – I am currently writing a UN handbook on implementation of the early access provisions of the Principles and Guidelines – and again many have looked to this country for guidance on how to put them into effect.

Until recently, England and Wales could have provided examples relevant to many of emerging standards –

- A (relatively) independent institution for administering legal aid; [If anyone doubts the value of an independent legal aid body, they should look at the Legal Aid Agency Business Plan 2013/2014, which shows that it is totally wedded to the Ministry of Justice's *Transforming Justice* 'vision', and includes no aspirations for legal aid other than managing it more efficiently and cheaply.]
- Effective mechanisms for delivering legal aid, and legal advice, assistance and representations, both in police stations and at court;
- Mechanisms for ensuring appropriate training for criminal defence lawyers, and for assuring quality; and
- An independent legal profession.

…and the price

One might be forgiven for thinking that the government would have been proud of what had been achieved at home in ensuring access to effective criminal defence, and thus fair trial and a just criminal process worthy of public confidence. One might have thought that it would have been eager to capitalise on the kudos and respect that it could have earned internationally for our distinctive approach to ensuring a fair and just criminal justice system. Instead, whilst wanting to make London the commercial legal capital of the world, Chris Grayling appears to recognise none of the strengths of our criminal justice system. In his introduction to the legal aid consultation he claims – falsely – that legal aid costs have spiralled out of control, and talks of the need to make the system credible, as if it were a failing system.

So what will be the price of the proposed legal aid reforms?

I'm sure that you will all be acutely aware of the price that will be paid by you and other lawyers, many of whom have foregone more lucrative work to dedicate their working lives to providing legal services to those who cannot afford to pay for them. But I want to briefly look at other ways in which a heavy, and inexcusable, price will be paid. I will concentrate on just three areas.

Decline of confidence in the criminal justice system
If the tendering system is adopted, as you know –

- a suspect or defendant will have no choice as to their lawyer;
- they may be advised or represented by a different firm if they are arrested again;
- the lawyer may be based many miles from where they live or work; and
- the lawyer may be employed by a large, anonymous, corporation.

I am sure that you are all familiar with these consequences, and you will be talking about them during the day, so I don't need to rehearse them in detail. But what impact will these aspects of the proposed scheme have on confidence in the criminal justice system?

The relationship between a lawyer and criminal client is critical. Of course, not all such relationships are good, and not all clients know their lawyer. However, the fact of having a choice is not only important in enabling a person to choose a lawyer that they already know – personally or by reputation – but is also important in building trust. A relationship of trust is important because, as the example of Nigel Evans reminds us, a suspect or accused person may well be going through one of the most difficult periods of their life, on which their reputation, social standing, employment, and sometimes their liberty, depends. They may have to disclose the most intimate of details, and may have to comprehend and process unpalatable advice. This is true not only where a person is suspected or accused of a serious crime. As we all know, a minor allegation of theft, for example, can have serious consequences. And, of course, many suspects and accused persons are children, or vulnerable for a variety of reasons – despite the fact that the UN Principles and Guidelines say that special provision should be made for children and vulnerable suspects and accused persons, there is no mention of the special problems posed in the consultation. The Principles and Guidelines provide that states should take 'active steps to ensure that, where possible, female

lawyers are available to represented female defendants'. Removing the right of suspects and accused to choose their lawyer not only does just the opposite, but will also mean the end of specialist providers.

We know from research that some suspects believe that a duty solicitor is somehow connected to the police, and we also know that some suspects put the 'phone down on CDS Direct advisers when they are told that they can't have their 'own' lawyer. Lack of choice is likely to reduce the number of suspects and accused persons who have legal advice, or who are represented, and this will not only lead to more miscarriages of justice, but may also have adverse consequences for victims of crime, and to an increase in costs to other parts of the system. This will be exacerbated by the fact that a person who is arrested or prosecuted on a further occasion is likely not only to have a different lawyer, but a lawyer working for a different supplier. That will mean that knowledge and information collected by one lawyer or supplier will be lost, and the new lawyer will have to start from scratch each time in developing trust and in obtaining relevant information.

Since the lawyer assigned may be based many miles away, it will be even less likely that a client will visit their lawyer's office to provide instructions etc. This will result in courtroom door consultations, and either more adjournments and/or a reduction in the effectiveness of the advice and representation by the lawyer. Add to that the fact that the lawyer may work for a large, anonymous, corporation and a picture emerges whereby both trust in the lawyer, and in the criminal justice system will be diminished.

This is important because there is now a body of research which shows that trust in the criminal justice system, and in criminal justice institutions, is a key element in the willingness of people to obey the law. Trust means that people believe that they have a stake in the system which positively affects their attitude to the law and compliance with it.

Increasing costs to other parts of the criminal justice system

Some years ago, Richard Moorhead and I conducted a study on cost drivers in criminal legal aid for the Legal Services Research Centre, then part of the LSC. We concluded that the major costs drivers lay outside of the legal profession, and that legal aid costs were heavily influenced by the increasing complexity of the law, criminal investigation methods, and technology. The Ministry of Justice did not like that conclusion, but reluctantly introduced a

Legal Aid Impact Test (LAIT) by which the impact of new laws had to be assessed by reference to their impact on legal aid expenditure. This was never more than a half-hearted, back of the envelope, exercise but there was, at least, some recognition that legal aid costs should not be seen in isolation.

I looked in vain in the consultation document for a reverse LAIT, that is, the financial implications of the proposed tendering arrangements on other criminal justice institutions such as the police, the CPS and the courts. Unless it is well-hidden, it is not there. The assumption is that that every pound saved in legal aid expenditure is a pound less in government expenditure.

That is highly unlikely to be the case. Leaving aside the financial implications of the loss of trust, the lack of, or inadequate, legal advice and representation is likely to increase the costs of the police, CPS and the courts. There is a common perception amongst civil servants and governments that legal representation increases costs, but to my knowledge there has never been any evidence that this is the case. In fact, as many judges have acknowledged, legal representation enables the courts to work more quickly, deal with cases both efficiently and fairly and also, in some cases, pacifying difficult defendants. In police stations, lawyers can help identify vulnerable suspects and identify cases suitable for out-of-court disposal, and can enable police interviews to be conducted more efficiently and with less aggravation.

Of course, this is not always the case. However, the gross savings resulting from legal aid tendering are unlikely to be the same as the net savings to the criminal justice system as a whole.

Declining reputation and standing

Finally, there is the less tangible, but incredibly important, loss to the reputation that England and Wales currently has in respect of its criminal justice system. At a time when governments and civil society organisations globally are looking around to identify suitable models for legal aid provision and fair trial processes, England and Wales will not only have no appropriate models left, but the system will be seen to be in chaos. Already international networks are reporting actions like that of the Northern Circuit in all but going on strike, and the resistance to the introduction of quality assurance for advocacy. The prospects of an untried and untested tendering system being introduced will mean that credibility of the

English and Welsh approach to criminal justice will be completely undermined. Far from enhancing credibility of our legal aid system, it will be destroyed in the eyes of the world.

Conclusions

As the former Lord Chief Justice, Lord Woolf, told the Independent, the proposals will lead to a 'factory of mass-produced justice' and to miscarriages of justice. 'The long term effects of this', he said, 'will be very serious and once the damage is done it will be very, very hard to put right'.

The government not only does not understand the value of what it has, but it also does not understand the price of losing it.