



In this article Steve Hynes, LAG's director, discusses the development of legal aid policy in the early years of the current government. The article draws on material in LAG's latest book on legal aid policy, *The Justice Gap: whatever happened to legal aid?*¹

Legal aid development under New Labour

New Labour and legal aid

In opposition the Labour party had been vague about its plans for legal aid. In its manifesto *New Labour: because Britain deserves better*, the Labour party promised to establish a 'Community Legal Service' (CLS), introduce better regional planning of services and to have a wide-ranging review of legal aid. On taking power, the new Lord Chancellor, Derry Irvine, moved quickly to put flesh on the bones of this sketchy manifesto pledge. He initiated a review of legal aid in his first few months in office and, in November 1997, the legal aid world was caught on the back foot by Lord Irvine as he announced radical plans for reform in a speech to the Law Society's annual conference.

In his speech he proposed to take most civil legal aid cases, apart from family cases, out of the legal aid scheme. In future, all claims for money or damages would no longer be covered by legal aid. Lord Irvine made other announcements which were to set the direction for the first phase of legal aid under New Labour, including compulsory contracts and quality marks, and the establishment of a new CLS.

The CLS was the centrepiece of Lord Irvine's vision. It was intended to co-ordinate existing services, including private practice firms, Citizens Advice Bureaux, Law Centres® and other voluntary sector advice agencies. Lord Irvine said that he wanted the CLS to facilitate 'the refocusing of the legal aid scheme as a tool to help poor people solve

social welfare problems by gaining access to the justice system'. Under Lord Irvine the number of not-for-profit (NFP) agencies holding franchises increased substantially, growing from the initial 42 pilots started under the previous government to over 400 and thus making them a key provider of legal aid social welfare law services.

Access to Justice Act 1999

Steve Orchard was the chief executive of the Legal Aid Board (LAB) at the time. Steve Orchard says that the initiative to take civil compensation claims out of legal aid came from the government and not the LAB, but he had '... no issue with it as there had to be some prioritisation of what legal aid would pay for ... it was always by far the least worst option to save money'. Steve Orchard concedes, though, that there were difficulties with the eventual scheme due to the cost of insurance and the 'mark-up on fees'. Interestingly, Steve Orchard also reveals that the LAB had not looked seriously at competitive tendering in the period of the Conservative government, although it was discussed informally, as the LAB had been focused mainly on introducing franchising as it was 'driven by the analysis they had no control over quality' and due to the lack of control over expenditure 'they had no room for huge policy changes'.

Lord Irvine's proposals were met with widespread opposition and he was forced to adopt a watered-down version: 'no win, no fee' would be introduced for all

personal injury claims apart from medical negligence cases. In defending the proposals before the House of Lords, Lord Irvine argued that the extension of conditional fee agreements would result in £69 million being made available for social welfare law cases in 1999/2000, rising to £100 million by the following year. At the same time he also floated the idea of extending legal aid to employment tribunals. This proposal was met predictably with protests from employers and was eventually dropped.

The Access to Justice Act (AJA) 1999 represented the biggest shake-up of legal aid legislation since 1949. It replaced the LAB with the Legal Services Commission (LSC) and changed the rules on conditional fees. The Act also established the Criminal Defence Service (CDS) and included a provision for salaried defenders: the Public Defender Service (PDS). Speaking to LAG last year, Richard Collins, the former head of policy at the LSC, admitted that: 'Particularly in the early days, the PDS was much more expensive than private practice.'

The most far-reaching change the AJA introduced was a cap on overall expenditure. Until this point the LAB had controlled expenditure by altering scope and eligibility. It had mastered the art of predicting expenditure and lobbying the Treasury to fund increases when it went over budget. With the cap, the Treasury now had the upper hand.

Specialist quality marks and block contracts

The quality mark system and contracting represented continuity in policy between the Conservative and Labour governments. Lord Irvine implemented plans that had been drafted under the Conservative government to make it compulsory to hold a specialist quality mark in order to apply for a block contract to undertake legal aid work.

The Law Society opposed these changes, but a significant number of criminal law firms split with the society to carry out negotiations over block contracting with the LAB and participated in a pilot block contracting arrangement. A steering group of firms from Manchester and London had been formed late in 1997 to do so.² Steve Orchard admits that he always cultivated parallel relationships with the larger legal aid firms to circumvent the Law Society.

When the system came into force on 1 January 2000, around 5,500 contracts were awarded to firms and organisations with franchises. Fifty out of 52 Law Centres were awarded contracts. Citizens Advice Bureaux mainly received contracts in welfare benefits and debt. Soon after the implementation of the new contracts, Lord Irvine announced increases to civil legal aid, the first in four years. These were welcomed by the Law Society and civil legal aid providers, but criminal practitioners were annoyed that no increase for them had been forthcoming.³

Criminal Defence Service

Firms were asked by the LSC to decide whether or not they wanted to become part of the new CDS by applying for advice and assistance work contracts which included police station and magistrates' court work. These commenced on 2 April 2001. As with civil work, criminal quality marks were compulsory for firms wanting to undertake legal aid work.

In the run-up to the introduction of the CDS, Steve Orchard says that the LAB was under much pressure to ensure that enough firms signed up to the scheme to make certain it succeeded. There were protests by solicitors, including a threat of a 24-hour strike by some duty solicitors in November 2000 and a week of action in July 2000 organised by the Legal Aid Practitioners Group.⁴ Steve Orchard was accused of using bullying tactics in the run-up to the introduction of the contracts as he said, in a letter to the *Law Society Gazette*, that firms which did not sign the

contract would not be able to undertake work after April 2001.⁵ Large firms including Bindmans LLP, Fisher Meredith, Hodge Jones & Allen, and Burton Copeland all said that they were refusing to sign the contract.

In February 2001 a pay rise, the first in eight years, was announced for criminal practitioners. While some practitioners said that it would not be enough to persuade them to sign the contract, it seems that the pay rise was enough to take the wind out of the protests. Steve Orchard says it was a tactic, given at the last minute and designed to appear like a concession, so that the Law Society would give a clear recommendation to firms to sign the new contracts. According to Steve Orchard, Lord Irvine and his adviser Gary Hart played a key role in orchestrating the strategy and tactics leading up to the implementation of the new contracts. It took further last-minute concessions, including the continuation of payments under the old structure for police station work, to persuade the Law Society to recommend finally that firms sign the contracts.

The introduction of compulsory specialist quality marks and block contracts did reduce dramatically the number of legal aid suppliers, particularly in civil legal aid. However, most commentators agree that despite the reduction in access points, when judged overall the quality marks improved both advice and management standards. The private and NFP sectors both readily admit that the quality mark generally benefited non-legal aid services as it impacted on the management of the whole organisation. The main drawback to the block contracts was that for the first time suppliers were capped on the amount of work they could undertake. This situation continues today, with providers that exhaust their matter starts for new work having to turn clients away if the LSC has run out of cash for more work.

Community Legal Service

The new CDS consisted mainly of repackaging existing suppliers into a rebranded service under the criminal specialist quality mark, as well as integrating the budget for Crown Court and higher courts cases into the overall budget. The CLS was made up of a core of specialist-quality-marked firms and NFP agencies that overlapped with a much wider group of non-specialist services, which were quality marked at information and advice levels. In attempting to

integrate all civil general and legal advice services into a seamless service, the government was breaking new ground.

Regional committees were established to oversee the work of local committees of providers and local government. Community Legal Service Partnerships (CLSPs), as they were called, were eventually started in every area and these were intended as the main vehicle to co-ordinate and plan services. By 2002, the LSC was employing over 100 staff at a cost of £4 million to administer CLSPs. Unfortunately, they turned out to be mainly talking shops as after an initial flurry there was no cash to meet the needs they identified.

The raising of quality standards and extension of legal aid in October 1999 to cover representation before the Immigration Appellate Authority (IAA) was perhaps the greatest achievement of this period in legal aid's development. Steve Orchard was inspirational in driving through the quality agenda while Lord Irvine can take much credit for the extension of legal aid to the IAA; he argued successfully within government that this was essential in order to comply with article 6 of the European Convention on Human Rights. By 2002, though, the system was in crisis mainly due to the growth in criminal legal aid spending, and the budget was crashing into the hard budget cap imposed by the Treasury. In the same year Lord Irvine and Steve Orchard left their posts: the latter took early retirement and the former lost his position in a Cabinet reshuffle. Legal aid policy lost any sense of vision as the system entered a phase of desperate cost-cutting and the Carter review, the results of which are now being played out.

- 1 Steve Hynes and Jon Robins, LAG, April 2009, £20.
- 2 Rachel Halliburton, 'Firms go it alone in LAB pilot talks', *Law Society Gazette*, 3 December 1997.
- 3 Neil Rose, 'Mixed emotions as legal aid rates rise', *Law Society Gazette*, 24 January 2001.
- 4 Neil Rose, 'Striking solicitors fuel protest over criminal contracting', *Law Society Gazette*, 13 November 2000, and Robert Verkaik, 'Solicitors to strike for first time over shake-up of legal aid system', the *Independent*, 2 June 2000.
- 5 *Law Society Gazette*, 2 February 2001.