

Better late than never

Better late than never' was LAG's immediate response to the government's decision to appoint Sir Ian Magee last month to explore the separation of the Criminal Defence Service (CDS) and the Community Legal Service (CLS). After consideration, it is still our view that this is the way forward. Lord Bach deserves credit that the decision was taken on his watch as legal aid minister. If Sir Ian Magee recommends the separation of the funds for legal aid, though, this must be more than just a paper accounting exercise if it is to have a positive impact.

LAG argues that the funds need to be separated because otherwise the temptation will always be for cash-strapped governments to take money out of the CLS to pay for the CDS. Access to lawyers paid for by the state spread from murder trials to most criminal cases over the last century. It is right that the state recognises that when a person's freedom is at stake, access to independent legal advice is essential to ensure a fair trial. The problem is that financial constraints in the system often mean that this right trumps all others to the detriment of people's civil law rights.

With a separate CDS fund it would be easier to argue that the costs of providing the service need to be met by the Treasury when legislative and procedural changes impact on the criminal justice system. Unfortunately, the legal aid impact test has proved woefully inadequate in recovering such costs. According to Carolyn Regan, the Legal Services Commission's (LSC's) chief executive, speaking at the Legal Aid Practitioners Group annual conference, only around £15m has been recovered since it was introduced. This is despite 3,000 new pieces of criminal legislation being introduced under the current government. If the CDS had a standalone budget, this would better concentrate minds on funding the real costs of such legislative changes.

Much of the growth in criminal legal aid has come from the increasing costs of Crown Court and higher courts cases. Until 2003 these were administered separately by the courts system. Any separation of the legal aid budget will have to tackle the question of how best to administer these cases, as the bare figures do not indicate that the LSC has been any more successful in controlling these costs than through the previous

administrative arrangements. Perhaps more judicial management of the conduct and preparation of cases as well as control of costs could be part of the solution?

Civil legal aid developed in a piecemeal fashion primarily out of the demand for divorce driven by war and social change. Its major priority has now shifted to child protection cases. Over the years successive governments have altered what it will pay for, mainly in an attempt to trim the budget. Lord Chancellor Derry Irvine introduced the last major changes in scope by taking out personal injury and bringing in representation in immigration cases. If we accept that there will not be any big increase in the budget, it follows that even if the current budget stood alone what civil legal aid is spent on would still have to be prioritised.

In arguing for the separation of the funds, LAG sees a major opportunity to plan civil legal advice spending. In contrast to criminal legal aid, other government departments fund legal advice to the public as do local councils and, to a lesser extent, charitable sources. LAG believes that everyone should be entitled to access to basic legal advice regardless of their means and that free public legal education should also be provided. This should be the basis of any CLS worthy of the name. In such an integrated system, a ring-fenced civil legal aid fund could be focused on specialist casework. Protection of children as well as other vulnerable groups would still have to top the list of priorities, as would the protection of civil liberties from abuse by the state and corporate interests, which leads us to a final point.

Much of the recent history of legal aid has consisted of ill-disguised battles over how much lawyers get paid to provide the service. As LAG often argues in these editorials, the fear is always that as costs are squeezed quality suffers. One of the main purposes of the civil legal aid system is to uphold people's rights to challenge powerful public bodies when they get things wrong. The document *Legal aid: refocusing on priority cases*, which was consulted on last month by the government, represents a direct attack on this. The paper seeks to curtail access to judicial review, which is a vital legal mechanism to hold public bodies to account. This is linked to the argument over whether or not to separate the civil and criminal legal aid funds: separation of the funds will be meaningless unless there is a degree of administrative and policy independence from the state. LAG fears that the Ministry of Justice could use the separation of the funds to assert more direct control over the cash for civil legal aid. This could lead to government decisions being taken to put political priorities above the rule of law.

News 4-5

Legal aid review underway/
'Subdued mood' at LAPG
conference/**news feature**:
A 'compelling case' for raising
the default retirement age

Features 6-10

Legal aid at 60: bridging the justice gap 6

Procurement plans for social
welfare law/Adam Griffith

Community care 9

Bringing rights home: conference
report/Steve Hynes

Law & practice 11-33

Public law 11

Recent developments in public
law – Part 1/Kate Markus and
Martin Westgate

Employment 16

Employment law update – Part 1/
Tamara Lewis and
Philip Tsamados

Housing 22

Recent developments in housing
law/Nic Madge and Jan Luba QC

Administration of justice 27

The tribunal system: an appraisal
one year on/Edward Jacobs

Immigration 29

Recent developments in
immigration law – Part 3/
Jawaid Luqmani

Legal profession 33

Recent developments in practice
management/Vicky Ling

Updater 34

Letters 35

LAG books/Community Care Law Reports/training