RESPONSE OF THE BIRMINGHAM LAW SOCIETY TO THE MINISTRY OF JUSTICE CONSULTATION PAPER ON CROWN COURT MEANS TESTING

Before answering the specific questions, it is appropriate to identify some core issues first:

Firstly we are concerned that no distinction is made in the consultation document between those remanded in custody and those on bail. There is an issue of principle as to whether those remanded in custody, in Crown Court cases, should be subject to means testing. We find the lack of discussion on this important subject disappointing.

It is our view that there is a distinction and that those remanded in custody should not be subject to means testing at all, pre-conviction.

Secondly, the consultation document repeatedly implies that there have been no problems with means testing for legal aid in the Magistrates' Courts. That is not our experience, which is that there have been real practical difficulties, including:

(i) The production of proof of means for someone remanded in custody.

(ii) The means proof required for someone remanded in custody when their remand in custody has meant a change in their financial circumstances.

(iii) The difficulties in obtaining proof of means by those that are self employed.

(iv) The difficulties in obtaining proof of means by those that are paid 'cash in hand'.

(v) When a defendant's partner does not want to disclose their financial circumstances.

Thirdly, we are disappointed that the consultation document fails to address the philosophical argument that if the State prosecutes someone then the State is obliged to fund their defence too. This 'equality of arms' is enshrined in the European Convention on Human Rights.

Fourthly, we are disappointed that the consultation document itself does not assert that an acquitted defendant should not only have all his payments returned in full, but he should be paid interest. However, we do note that in the I Questions and Answers published by the Legal Services Commission and Ministry of Justice, it is proposed to pay interest on those funds when a defendant is acquitted.

Fifthly, we do not agree that a defendant should be obliged to disclose his/her means to the state, when charged with a criminal offence, in order to receive legal representation. Even less do we agree that a defendant's partner (who faces no criminal proceedings) should be obliged to disclose their means too. This issue is linked to the Government's unacceptable proposals on awards from central funds in criminal cases.

We feel that it is appropriate to make some further general comments before answering the specific questions:

It is unfortunate that the consultation document fails to point out that the overwhelming majority of those who face criminal charges plead guilty at the first opportunity and that a significant proportion of those who do not, do plead guilty to charges acceptable to the prosecution. In other words, the proportion of those charged who require trials is tiny. This is important because it puts in to context the percentage of trials against the number of those charged. If one adds in the number of those arrested who admit their offence and are dealt with administratively (by fixed penalty, caution, etc.) then the proportion becomes even smaller.

The proposition that access to justice is not free to all at the point of service is not accepted by the profession. The Government's commitment to ensuring that all defendants have adequate access to robust legal advice has already been undermined by the introduction of means testing in the Magistrates' Court. The proposal to implement a system of means testing, albeit of a somewhat different nature, in Crown Court proceedings will ultimately limit that access to the public, in the most significant proceedings brought against them, by the state.

The current proposals envisage that all defendants will be entitled to a representation order and that the grant of such orders will not be affected by means testing. In reality the scope of service which can be provided will be affected and defendants will find themselves under pressure to consider, at every stage, the extent of their instructions, fearing that they are paying for the cost of the proceedings. Any inducement to a defendant to plead guilty for his financial convenience or to avoid incurring costs is abhorrent and should be excluded from a system of provision of legal services in criminal cases. Unlike a large proportion of parties to civil proceedings, defendants have little or no ability to impact upon the decision to bring proceedings against them. They are subjected to inequality of arms when the State, with all its financial resources, can bring proceedings which the individual may be ill equipped to afford to defend. It undermines the checks and balances necessary in an adversarial system. A single defendant capitulating to prosecution to avoid the potential cost of defending a denied matter is one too many.

Likewise, the overwhelming majority of defendants are not in a position to decide which expert is appropriate in assisting their defence. They have to rely on their legal advisors. It would be wholly wrong if a defendant felt under financial pressure to instruct a cheaper expert or no expert at all, in order to reduce their financial liability. If the current proposals are introduced the quality of service will be further undermined by the natural caution of defendants in incurring costs they may later pay by way of contributions or loss of capital assets. Defendants will be placed in the invidious position of having to authorise expense in their case based on their ability to afford that expense as opposed to its relevance to the case of the item.

This is an attack on the principle of equality of arms which is fundamental, particularly in an adversarial system, such as ours.

The proposal to charge contributions to defendants within an income band above a basic minimum level ignores their practical ability to do so. Many defendants facing proceedings before the Crown Court are, by nature of the seriousness of the offences, remanded into custody. Many defendants do not have the resources of family ties and connections to enable contributions to be paid, often having given rise to their custodial remand status in the first instance.

An increasing number of defendants are excluded from representation at Magistrates' Courts by virtue of their inability to prove their income. Many of these defendants may otherwise be eligible but, by virtue of the requirements of the means test, are excluded from representation.

A recent example from Birmingham arises from the case of the self employed accountant of Polish descent working in the West Midlands: Upon arrest he was not at his home address nor aware of the significance of the need to prove his income if charged. Having denied the allegations of theft the defendant was charged and held in custody. Upon appearing at court he was remanded into custody, in the main due to concerns that he would abscond from the jurisdiction. He defendant had a single previous conviction for drink driving. His application for a representation order was refused on grounds that he could not furnish his accounts. The National Court Team would not accept a statement of truth relating to self employed income without accompanying documentation, in accordance with the regulations. The same position applied in relation to an application for hardship, which had to be accompanied by the documents he could not furnish. The outcome was an imprisoned defendant, whose first language was Polish, having to represent himself at trial, but who, were he to have been given his liberty would have been entitled to a representation order, because he would then have been able to locate the required documentation.

This defendant, had he elected trial at the Crown Court, would presently be represented without reference to his means. Under these proposals he would find himself a litigant in person at the Crown Court. If these proposals are to proceed, they would inevitably result in foreign nationals, particularly residents of EC member states being discriminated against in their access to the services of a Solicitor.

The assessment of means is based upon the Government's classification of "disposable income". At present, in the Magistrates' Court, that scheme fails to take into account the actual expenses of individuals, other than those few in the form CDS14. Under these proposals, whilst a representation order may be granted to a defendant in proceedings pending before the Crown Court, s/he may not in fact have sufficient net income to meet the contributions set by the court. That defendant will then be penalised by recovery over and above that deemed appropriate at the conclusion of a case if convicted, on the presumption that s/he has sought to frustrate payment of contributions,

when that may not be the case. The principle that those who can afford to pay should pay for their representation requires the definition of "disposable" income to accurately relate to the net income in fact available to defendants for payment to the court. Those practising in the Magistrates' Courts already experience great frustration in having to refuse to represent defendants facing serious allegations who are ineligible under the current assessment of means, but yet clearly unable to meet the private fees of a Solicitor.

The proposed system results in uncertainty for defendants as to their costs liability, should they be convicted. Defendants facing criminal proceedings already face significant levels of anxiety and stress without the additional burden of concern at the dissipation of their assets. We note that the proposed system has no opportunity for discretion outside the hardship application, with all its inherent problems outlined above.

The consultation document's explanation for the desirability of means testing over the current system of RDCOs is not accepted. The benefit of RDCOs is specifically in the judicial discretion applied to them, justly taking account of all relevant circumstances before the court. This system allows for representations to be made in an open/transparent environment which further allows for a system of appeal. Whilst RDCOs may not have been employed to the extent intended or desired by the Government that concern can aptly be redressed by the issue of guidance to the judiciary, as has only very recently recently occurred. There is no administrative official better placed than the trial Judge to consider issues of the burden of costs incurred by defendants in bringing proceedings, particularly in a criminal justice system where 'Goodyear indications' can be sought.

The figures relating to hardship applications are misleading because they cannot include those hardship applications not made because the defendant does not have the documentary proof required for the application to be processed. If a hardship caveat is to be provided the Legal Services Commission is asked to provide funding to assist defendants with such applications and more than one hour's worth of work, given what is involved in obtaining such information.

The timetable for implementation of the proposals makes clear that a pilot period is intended with the statutory framework available. Will a report be published upon that pilot before means testing is rolled out nationwide? The Questions and Answers published by the Legal Services Commission and Ministry of Justice indicate that means testing will be implemented irrespective of the outcome of the pilot. This implies that the pilot is no more than a means to evaluate the method of introduction.

The background to the present proposals is stated to arise from the current cost to the tax payer of providing representation in the Crown Court. It is understood that the present cost of the Legal Aid system in relation to criminal proceedings in their entirety amounts to a cost of around £100 per capita per annum. It is submitted that this cost is not excessive in the context of 117,000 defendants per annum receiving representation as they do at present. It is

challenged that the current cost to the tax payer of Crown Court proceedings in the majority of cases outside the VHCC environment is excessive. It is disappointing to note that the consultation document fails to record that the average costs of defending a Crown Court case has risen less than the average costs of prosecuting it, over the last 20 years.

We note that the consultation document carries no calculations of the likely costs of enforcement. This is obviously important, particularly as the previous universal means testing system was abandoned due to the disproportionate cost of enforcing and collecting payments from defendants, in comparison to the amounts recovered.

The proposals acknowledge the increased administrative burden on solicitors in connection with applications for representation in the Crown Court, which is currently granted automatically. In an environment of increased cuts in the scope of and funding of defence legal services the defence fraternity welcomed a reduction in bureaucracy in relation to funding applications. The current proposals will increase that burden. It is naïve to imagine that a fixed fee of £45.00 accurately meets the cost of time to be incurred by solicitors properly assisting defendants. The completion of a form is the beginning of the process of application and not the end in itself. Defendants will require advice on relevant documentation for submission with applications which will need to be checked, which may be returned requiring additional assistance. The current arrangements for submission of representation orders have proved insufficient. It is no doubt the intention of the Legal Services Commission to roll such fees into the graduated litigator's fee, such that little if any benefit reaches defence practitioners. This position is arguably exacerbated by the grant of orders in all cases but the ongoing obligation to disclose income/assets which will inevitably follow.

We regret that the proposed levels of contributions are not included in the consultation document.

The proposals suggest consideration of a process to consider placing charging orders on properties and whether orders for sale could be made to facilitate repayment of sums due. It is submitted that any such draconian remedy should be subject to judicial discretion and scrutiny and not a matter of administrative decision alone. The government currently expresses itself to be committed, through a number of recent initiatives, to avoiding repossession of those affected by the crisis in the financial industry. The current proposals have the ability to undermine those aims. It is noted that the crime rate tends to rise in times of recession and many offences are linked to the financial difficulties experienced by those in jeopardy of losing employment, accommodation and family connections.

The proposals fail to take account of the manner in which criminal proceedings impact upon the ability of defendants to secure an income. Many allegations result in suspension or dismissal, particularly those pending before the Crown Courts. Also in Crown Court proceedings, a higher proportion of defendants find themselves remanded in custody, which again impacts on

their opportunities to continue to earn income. We note that the consultation document makes no reference to the inevitable interplay between those of a convicted defendant's assets required under these proposals and those which are likely to be subject to proceedings pursuant to the Proceeds of Crime Act. In such cases assets are commonly restrained, by the state, very early on in the proceedings, often even before charge, pending the conclusion of proceedings and are not liquid to be applied to contribution towards the criminal defence.

The distinction between defendants committed for sentence and trial will see an inevitable rise in numbers of defendants declining to give an indication of plea or pleading not guilty at the Magistrates' Court where there is a risk they will be committed. The proposals provide a perverse incentive which undermines the desire to reduce costs and the principle of credit given for early guilty pleas. The funding of the defendant should not comprise the defendant's decision regarding election of jury trial.

We answer the questions subject to the above comments.

Questions

1. Yes. This should also apply to those committed for sentence and for appeals to the Crown Court against conviction and/or sentence.

2. The proposals do not provide enough time for defendants to prove the documentary proof required, particularly for those remanded in custody. It should be a minimum of one month, with a discretion to extend the time.

3. Yes. It should relate to the actual expenditure incurred by the defendant, from his and his partner's income. However, we repeat our assertion that the defendant's partner (who is not charged with any criminal offence) should not be obliged to disclose their means at all, and not just when they are the alleged victim or a prosecution witness, or a co-defendant with a conflicting interest.

4. No. This is far too low a level.

5. It is wrong to make this an open ended requirement. Given the availability of RDCOs, there should be fixed caps for different cases.

6. Yes, subject to our answer to question 5.

7. Payment should be on an hourly rate for work reasonably done.

8. The impact on the defendant and his family. We are strongly opposed to any right to force a sale, particularly pre-conviction.

9. Charging orders and Garnishee orders, attachment of earnings orders.

10. Non – long term fixed assets, such as bonds and pensions. These should be excluded both from the calculation and recovery.

11. Delay payment.

12. Committals for sentence should be treated the same as committals, sendings and transfers for trial. Some very serious and complex cases are either-way offences. A guilty plea may not simply result in one hearing, in the Crown Court, for sentence. There may be associated POCA proceedings too.

13. Appeals against conviction and against sentence need to be examined separately. It is our view that both should be treated the same as committals, sendings and transfers for trial. Cases in the Magistrates' and Youth Courts can be lengthy and complex. Examples include some health and safety prosecutions, public order prosecutions and applications for anti-social behaviour orders (ASBOs), whether in criminal proceedings or in stand-alone civil proceedings.

DATED 28th January 2009

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