RESPONSE OF THE BIRMINGHAM LAW SOCIETY TO THE MINISTRY OF JUSTICE CONSULTATION PAPER ON THE AWARD OF COSTS FROM CENTRAL FUNDS IN CRIMINAL CASES

PRINCIPLES

It is our view that when the State prosecutes an individual, or an entity, then there are two important principles that should apply to all such prosecutions:

Firstly, if the State is unsuccessful, the defendant should not be penalised 'by the back door'. Thus the defendant should not have to bear the costs of successfully defending himself or itself. The analogy given in the Foreword (second paragraph, page 3) with private education is incorrect, as would be an analogy with private medicine. In both of those cases there is a choice by an individual to depart from the free service offered. In neither of those cases is a response required as a result of action by the State, with all its resources.

Secondly, the defendant should be entitled to instruct the (properly qualified) lawyer of his choice to defend him/her/it.

These two principles inevitably overlap and we accept that neither are absolute. However, they are very important and they form the bases for our responses to this consultation.

In connection with these principles, it is worth while commenting on two issues which appear to form the bases of the Consultation Paper, which we do not accept:

Firstly, the Consultation Paper repeatedly asserts that the present "legal aid system pays both sustainable fee levels for practitioners and ensures sufficient level of quality for clients". (e.g. para 7, page 5.) We do not accept either of these assertions. Whilst we have no doubt that most criminal law legal aid practitioners will continue to offer the best service to their clients that they can, it is already evident that many practitioners are reducing their service for their graduated or litigator fees. Such is also the feedback from judges.

Secondly, the Consultation Paper repeatedly draws a distinction between the "sufficient level of quality for clients" on the one hand and "gold plating" on the other. (e.g. para. 50, page 22.). We do not accept that any level of service above that available for a legally aided client is automatically "gold plating". There are many levels of service. For most practitioners, the minimum level of service that they feel obliged to provide is above that available at legal aid rates but below that which they could provide as a "gold plated" service.

Questions

1. We do not agree on the need to reform Central Funds payments.

Whilst there have been increases in legal aid rates, since 1982, the increases have not been linear, but spasmodic. The figures provided, relating to the increase in the criminal legal aid budget, as a whole, take no account of the increase in offences (over 1,000 offences created since 1996 alone) or the increased complexity in the way charges are both prosecuted and defended. The reality is that, taking account of inflation/RPI, the actual hourly legal aid rates paid today are very significantly lower than in 1982. Paragraph 5 of the consultation document is misleading.

For these reasons, and the reasons given above, we disagree with the assertion in paragraph 8 of the consultation document.

With regard to paragraph 9 of the consultation document, the consultation document fails to grasp the requirement that the State must take responsibility for bringing prosecutions. If the State cannot secure a conviction, then the defendant should not be penalised "by the back door" by having to contribute towards his/her/its defence costs.

With regard to paragraph 16 of the consultation document, the method of payment for legal services has been and remains on the same basis as the payment of any service, be it that of a lawyer, accountant, electrician or plumber: "The time they have actually and reasonably spent [multiplied by] an appropriate hourly rate".

2. No.

3. No.

Paragraph 30 of the consultation document appears designed to penalise those who are acquitted.

Paragraph 34 of the consultation document appears to be an attack on the freedom of choice of an individual to choose which lawyer he wants to instruct to defend him/her/it. There are also those who, quite understandably will not want to disclose their personal financial circumstances. Modern British Governments appear to have no concept of individual privacy. Someone may want to defend themselves against the State but not want to divulge all their personal circumstances. Why should they? If they are acquitted, they should not have to pay for their defence.

There are many who are prosecuted, who want to defend themselves, for example to maintain their unblemished record, or perhaps because they are innocent, who will not satisfy the interests of justice test. Perhaps their standing in the community will be harmed by a conviction. A conviction in a denied matter may have a wholly disproportionate impact on the defendant, their family or otherwise, not necessarily covered by the Widgery Criteria. In addition there are frequently minor cases which do not pass the Widgery Criteria which are complicated. Examples include motoring offences and public order offences. The court's legal advisors cannot cross-examine witnesses on behalf of unrepresented defendants (even if they were equipped

to do so) and neither can they advise unrepresented defendants what questions to ask in cross-examination. When they are acquitted, defendant's costs in defending themselves should be re-imbursed.

The Magistrates' Court means test provides a very low bar to those applying for legal aid. Someone, or a family, does not need to be earning very much before they automatically fail this test. There are other problems with it too: The defendant's partner may not want to divulge their means; or the defendant's means (or that of their partner) may not be easily provable, because, for example, they are self-employed.

4. No.

5. No.

With regard to paragraph 43 of the consultation document, we note that no mention is made of the Legal Service Commission's Criminal Defence Service whose own statistics made it plain that the average cost of their offices was more to run than private practice. This suggests that solicitors in legal aid practice have to cut corners, at best in overheads, to remain profitable.

Although there is reference, in the consultation document, to the rates issued by the Chief Assessment Judge, known as 'expense rates' or 'broad average direct costs' ('BADC'), the consultation document does not actually compare the BADC with legal aid rates. The BADC is attached to a 'mark-up' to create a composite figure for towns and cities across the Country. For inner city Birmingham the rate is a little over £200 per hour, to take account of rents, rates, staff wages and other overheads. This compares with legal aid rates, in the Magistrates' Court, currently at £62.35 per hour for advocacy and £49.70 per hour for preparation and attendances. There are no separate payments for waiting at court or for travelling to and from court.

As paragraph 47 of the consultation document predicts, it is unlikely, in the extreme, that a solicitor (or barrister) would be prepared to work for a privately paying client at legal aid rates. Thus options 2 and 3 are not only depriving defendants of their choice of lawyer, but they are deliberately attacking an acquitted defendant.

As indicated above, there is a world of difference between the service offered at legal aid rates of pay and a 'gold-plated' service. An acceptable level of service can be provided which is above that available at legal aid rates of pay, whilst not being 'gold-plated'. This includes the qualification and seniority of the person preparing a case as well as advocating on the defendant's behalf. It also includes the number of times a client is seen and how witnesses are approached. The differences can be very significant.

For the reasons already given we do not accept the assumption given in paragraph 49 of the consultation document.

We do not accept the distinction, given in paragraph 51 of the consultation document, between individuals and companies. Particularly with small and medium sized companies: their reputation may be at stake and the costs of defending themselves may be ruinous if they are not able to recover their defence costs once they are acquitted. Any possible inconsistencies are easily ironed out. However, the principle of not being penalised, once acquitted, remains.

6. We believe in the fundamental principles outlined in the opening of this response. For the reasons contained herein we would not alter the current arrangements.

Concluding Remarks

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, plead guilty to alternative 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 proportion the percentage of trials against the number of those charged.

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 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 the individual may be ill equipped to afford to defend. 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 the 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, which often gives 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. The 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 were to be adopted, 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. 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 turning away 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 recently occured. 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 frequently answered questions ('FAQs') 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.

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