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# Parliamentary Brief



The Law Society

Draft Criminal Defence Service Bill Inquiry  
Constitutional Affairs Committee  
House of Commons

Written Evidence Submitted by the Law Society

June 2004

## Introduction

The Department for Constitutional Affairs has announced its intention to introduce a draft Criminal Defence Service Bill containing proposals for changes to the Criminal Defence Service grant of the right to representation. It has issued a consultation paper setting out the Government's proposals for these changes and has invited comment on the shape that the new scheme might take. The provisions fall broadly into two parts:

- The reintroduction of a financial eligibility (means) test.
- A transfer of the authority to grant the right to publicly funded representation away from the courts and into the scope of the Legal Services Commission.

The aim of the measures, according to the consultation paper, is to bring greater consistency, a control over grant and a quicker reaction to changes within the criminal justice system. The purpose of the Bill, as set out in the consultation paper, is to achieve "best value for money" for the taxpayer from the Criminal Defence Service. The paper recognises the tension between protecting the fundamental rights of the individual and the Government's responsibility to achieve improved management control over the legal aid system and the way in which the fund is spent.

At present, there is no means test for criminal representation or advocacy assistance before a court. Free advice and assistance, or advocacy assistance, is available to anyone arrested and held in custody at a Police Station, or who appears before a magistrates' court or the Crown Court. However, where representation is granted for cases that proceed to the Crown Court, the court can order a convicted person to pay all or part of the cost of the case – known as a Recovery of Defence Costs Order (RDCO).

Currently, the magistrates' courts have responsibility for granting the right to funding under the Criminal Defence Service. This can either be an order for representation in the magistrates' court or for a through order to the Crown Court. The Bill will enable the power to grant a right to representation to be transferred from the courts to the Legal Services Commission.

The paper sets out a number of models as to how a reintroduced means test could operate. The Bill itself is only an enabling Bill and the detail of how the two schemes will operate will be set out in regulation.

## **Summary**

The Government must look at innovative ways of tackling spending on criminal legal aid, whilst holding firmly to the principles of innocent unless proved guilty, fair trial and equality of arms. In doing this, the Government needs to engage with lawyers and other stake holders in undertaking a strategic review of its criminal justice policy in an effort to ensure that the needs of victims are met; that defendants are given a fair hearing; and that the criminal legal aid budget is brought under control.

### *Cost drivers*

The consultation paper is clear about the need to bring greater consistency, better control over grant and a quicker reaction to changes within the Criminal Justice System. These are laudable aims, with which we agree. However, it is equally important that the major cost drivers in the Criminal Justice system overall are identified, as it is these that will continue to lead to significant budget overspending on criminal legal aid.

We have identified failings in other parts of the Criminal Justice System that need to be addressed, both the police and the prosecution need to be included in any attempt to identify where costs are being incurred. Equally, the Government has consistently failed to assess accurately the impact of legislation on the Criminal Justice System and the subsequent increase in the costs to the legal aid budget. The Government must act to tackle these issues. We also urge the government fully to implement its proposals to reduce the cost of Very High Cost Criminal Cases, which take up more than half of Crown Court expenditure.

### *Means Test*

The proposed reintroduction of a means test is welcomed in principle by the Law Society, if it ensures that those defendants who can afford to pay their legal costs do so, and that those most in need of help continue to have access to justice.

However, the administrative system of means testing must be cost effective, so that any savings are not swallowed up in additional bureaucracy. Furthermore, it must not place an additional bureaucratic burden on solicitors, already weighed down with the administration involved in operating the General Criminal Contract.

### *Transfer of grant of representation*

The Law Society supports greater consistency of decision making in the grant of representation, but we have doubts as to whether the proposals in the consultation paper will lead to a reduction in the number of representation orders and therefore reduce the cost to the criminal legal aid budget.

We are also concerned about conflict of interest problems that might arise as a result of solicitors' involvement in the grant of representation. It must be wrong in principle for a solicitor to decide whether or not a case merits representation in the interests of justice and then have the opportunity of representing a client on a privately paying basis if the client turns it down.

We also have concerns about the transfer of this additional risk to the solicitor, as it would inevitably increase the amount of bureaucracy to which they are subject. Instead of a situation where solicitors might anticipate a move towards reduced auditing and a reduction in bureaucracy that would accompany it, they will find themselves being audit controlled for an aspect of work that was previously the remit of the courts.

**Why has there been such a large increase in spending on criminal legal aid?**

The Criminal Defence Service was established under the provisions of the Access to Justice Act 1999. In introducing the Bill to Parliament, the then Lord Chancellor described its broad goals:

*“The state, in the public interest takes accused people to the criminal courts, where they may be deprived of their liberty. So it is right that the State should provide high quality defence services to those who cannot afford to purchase defence services for themselves. There should be equality of arms between prosecution and defence.”*

Key drivers in the cost of criminal legal aid

- Increasing professionalisation of the magistrates’ court service
- The Government’s commitment to tackling crime
- Failures of other parts of the Criminal Justice System
- Very High Cost Criminal Cases

**Criminal Defence Service and Crown Court payments as a percentage of total net spend on legal aid**

<b>Year</b>	<b>CDS Payments Net £ M (1)</b>	<b>Crown Court and Higher Courts Representation Net £ M (2)</b>	<b>Total Net Spend on Criminal Legal Aid £ M</b>	<b>Total Net Spend on Legal Aid £ M</b>	<b>(1 + (2) as a % of Total Payments</b>
1999/2000	411	374	785	1,552	50.6
2000/2001	450.4	422.0	872.4	1,664.4	52.4
2001/2002	508.3	474.1	982.4	1,716.9	57.2
2002/2003	526.4	569.3	1095.7	1,908.6	57.4

The above table sets out the significant increase in Criminal Defence Service and Crown Court payments since the last year of the Legal Aid Board and following the introduction of criminal contracting in April 2001. The table also shows that the criminal budget has, as a percentage of the total net spent on legal aid, increased steadily in the last four years. This is a reflection of the need to ensure proper access to justice and equality of arms for those facing criminal investigation and prosecution, and demonstrates that, at least in the short term, the criminal legal aid budget is likely to continue to be demand led.

Over a period covering at least the last thirty years, there has been a trend toward increasing numbers of cases in the magistrates' courts being legally aided. This is largely the result of the increasing professionalisation of the magistrates' courts service and the reluctance of magistrates and their clerks to allow unrepresented defendants in serious matters. This has had the consequence of uncertainty about how far the clerk should help the defendant, rather than merely acting in support of the Bench. Undoubtedly the introduction of the Human Rights Act has contributed to the trend, as it reinforced the importance of proper representation wherever defendants were at risk of serious consequences.

#### *The Government's commitment to tackling crime*

The impact of the Government's commitment to tackling crime must also be recognised. In pursuit of its long term aim to reduce crime, the Government has not only introduced new and tougher penalties for existing crimes, but has also created many new criminal offences.

In addition, a series of late measures introduced to the Criminal Justice Bill (now the Criminal Justice Act 2003), including tougher sentencing powers and bail conditions, will impose further pressures on the legal aid budget. An entirely new sentencing framework will be put in place as a result, with a new range of sentences designed to give sentencers added flexibility in imposing a sentence best suited to the needs of particular cases, such as a 'custody plus order' and a 'custody intermittent order'. On bail, defendants will have a new limited right of appeal to the Crown Court against magistrates' imposition of conditions on grants of bail and a prosecution right of appeal against the grant of bail will be extended to all imprisonable offences. In addition, a number of pilot projects, including the street crime initiative and extended sitting hours, are all underway. Inevitably, these will have knock-on consequences for the criminal legal aid budget.

#### *Failure of other parts of the Criminal Justice System*

The Government must recognise that criminal legal aid is an integral part of the criminal justice budget as a whole. It cannot be tackled in isolation from other aspects of the criminal justice system. It must not be forgotten that no matter how hard the Department for Constitutional Affairs strives to bring the budget under control, part of these costs is attributable to failings on the part of the prosecution, be it the Police, or the Serious Fraud Office. Additionally, proper investment in technology in the courts could save much valuable court time. Unless the Government achieves real efficiency across the justice system, these costs will continue to increase and impact on the civil legal aid budget.

The consultation paper acknowledges that the most expensive 1% of cases in the Crown Court consume a disproportionate amount of expenditure; currently 51% of Crown Court expenditure or 24% of the entire Criminal Defence Service budget. Fees claimed by QCs make up a significant proportion of the costs of these cases. This figure has increased significantly over the last three years and must be brought under control through a system of contracting.

**Legal aid fund net cash paid out over last 3 years**

	<u>2001/02</u>	<u>2002/03</u>	<u>2003/04</u>
<u>Total legal aid fund (exc. Asylum)</u>	<u>£1,587m</u>	<u>£1,733m</u>	<u>1,896m</u>
<u>% Annual growth</u>		<u>9%</u>	<u>9%</u>
<u>Spend on top 1% of criminal volume</u>	<u>£222m</u>	<u>£264m</u>	<u>£303m</u>
<u>Top 1 % as percentage of total (exc. asylum)</u>	<u>14%</u>	<u>15%</u>	<u>16%</u>
<u>% Annual growth</u>		<u>19%</u>	<u>15%</u>

Whereas the maximum rate for solicitors acting in Very High Cost Cases as set out in regulation is significantly below private charging rates, there have been no such controls on the fees paid to QCs. The Law Society believes that the government should set fees for QCs, so that the earnings for those working full time on legal aid are broadly the same (after allowing for practice expenses), as a top hospital consultant. This would go some way to achieving a significant cut in expenditure.

**Do the Government's proposals present the best way of controlling rising expenditure on criminal legal aid, and how effective are they likely to be in practice?**

As we have explored above, there are a significant number of cost drivers within the criminal justice system, and the Government needs to address all of them as a way of controlling the rise in expenditure on criminal legal aid.

The recently announced Fundamental Legal Aid Review offers an opportunity for a thorough analysis of cost drivers and the Law Society cautions against any hasty and ill thought out measures being introduced until that review is completed. The Government must develop a long term plan to ensure an adequate supply of good quality advisers so that the most vulnerable people in society know their rights and obtain legal aid advice.

An example of such ill-thought measures is the scope changes implemented by the Department for Constitutional Affairs from 17 May 2004 to restrict the scope of criminal legal aid. These are:

- I. The provision of free legal advice in Police Stations is now limited in certain cases to telephone advice only. Suspects arrested for non-imprisonable offences, arrested on a warrant for failing to attend court, drink/drive offences, and those detained in relation to breach of bail conditions, will no longer be entitled to have a duty solicitor attend the Police Station. Exceptions apply in situations such as the suspect being a minor, having communication difficulties, or alleging serious maltreatment by the Police.
- II. Post charge advice and assistance is now limited to one hour where a representation order is not granted. The Department for Constitutional Affairs had suggested that there was no need for post charge advice and assistance as representation orders can be sought at an early stage. However, the Law Society successfully argued that this reason was flawed as, for more minor offences, representation orders would not normally be granted, leaving people with no access to advice at all, except at the door of the court where it would be too late to provide effective advice, or to obtain necessary papers.
- III. Advocacy assistance has been abolished for early hearings. This means that more defendants will appear unrepresented at first hearings, and this is likely to increase delays in the magistrates' courts.
- IV. The scope of the court duty solicitor scheme has been restricted to remove access for clients who are not in custody and who are charged with non-imprisonable offences. This is also likely to create additional delays, as defendants need adjournments to obtain legal representation. This change does not recognise the profound significance that even non-imprisonable offences can have on people's lives. For example, loss of livelihood as a consequence of a driving ban, or the impact of a fine for a person on a low income.

The Law Society expressed concern at the proposed removal of legal advice, assistance and representation from a number of areas of the criminal justice system, as it seemed likely to us that it would result in additional costs, delays and time spent on cases, due to the numbers of defendants appearing without legal advice and representation.

#### *Existing controls*

The current system of contracting dates from April 2001, however measures have been introduced previously to control fees for criminal legal aid work. These include standard fees in the magistrates' courts and graduated fees for advocacy in the Crown Court. These have been on the whole, very effective and have enabled downward pressure to be applied to the budget, without affecting access to justice.

#### *Standard Fees*

Most criminal cases in the magistrates' court are remunerated by way of standard fees. This system of payment has been in place since the early 1990's and is based on three identified categories of work. Each category has an upper and a lower fee. Solicitors are also able to claim an enhanced rate in cases where they can demonstrate to the Legal Services Commission that the matter falls within defined criteria. Certain types of cases fall outside the standard fee regime and these are assessed by the Legal Services Commission on a case by case basis.

### *Crown Court Graduated Fees*

Fees for advocates in the Crown Courts, including QC's fees, in cases lasting up to 25 days, are generally paid according to a formula that is intended to predict and control expenditure. Although it is difficult to calculate fees within the formula, it does provide some certainty of payment. Currently, fees for preparation in Crown Court cases are undertaken on a time/cost basis.

The above mechanisms for predicting and controlling criminal expenditure have shown themselves to have gone some way to ensuring predictability about the criminal budget. However, as the budget continues to rise year on year, it is evident that causes for the increase need to be sought elsewhere.

### **How will the reintroduction of a financial eligibility (means) test affect access to justice?**

It is argued by the Department for Constitutional Affairs that the reintroduction of a means test will focus resources on those that need help the most. Means testing will ensure that those defendants who can afford to pay their legal costs do so, and that those most in need of help continue to have access to justice.

The Law Society supports this aim, as those who have sufficient means to pay for their representation should be required to do so. It is only right that people with high earnings should be required to repay the cost of legal aid if they are found guilty of a crime. Legal aid means testing however, must be set at a level which would not leave some defendants unable to afford good quality legal advice. At the same time, the administrative system of means testing must be cost effective, so that any savings are not swallowed up with additional bureaucracy. Furthermore, it must not place an additional bureaucratic burden on solicitors, already weighed down with the administration involved in operating the General Criminal Contract.

However, it would be unacceptable for solicitors to bear the losses incurred in any failure of defendants to pay their contributions. Whilst it would be reasonable for solicitors to collect a single contribution at the start of the case and therefore not undertake any work until that was paid, the risk with what is proposed is that a solicitor may have to choose between withdrawing from a case halfway through where a contribution is not paid, or proceeding and having to bear the loss personally.

## **How difficult will it be to administer means testing in criminal cases?**

The Law Society's view is that access to justice for those accused of a criminal offence is paramount. In ensuring proper access, there is an argument for allowing a system whereby those accused of a criminal offence who are capable of paying for their defence should be made to do so. The Law Society was not fundamentally opposed to the abolition of the means test in April 2001, on the basis that the administrative cost of the system was considerable in comparison to the contributions recovered.

### *Administrative Burden*

Bearing this in mind, the Society would want to avoid a scheme being introduced that would increase the administrative burden on firms without a significant improvement in the collection of contributions from clients. The ability to pay must be a key principle, but the Society envisages some difficulty in the administration of a means test, other than one, which had as its basis, a very simple cut off level.

We are concerned that all three models proposed in the consultation paper place the burden on the solicitor for ensuring not only that the client qualifies for help, but also pays any contributions to the solicitor, rather than the court. This means that when the solicitor submits a bill for payment at the conclusion of the case, many fees paid would be net of the contribution paid or due from the funded defendant. We think it is unrealistic to expect solicitors to have to chase clients for unpaid contributions, not least because of the additional cost to the firm in so doing.

Whichever of the three models is considered, each of them is contrary to the spirit of reducing bureaucracy, which the Law Society has been keen to promote in conjunction with the Legal Services Commission, as part of the ongoing review of criminal contracting. The autonomy that has been recently offered to solicitors in proposed changes to audit procedures and in the Preferred Supplier Pilot, makes these proposals seem like a retrograde step.

### *Recruitment and Retention*

The Law Society is also concerned that any increase in the administrative burden, could have a further adverse affect on the recruitment and retention of criminal legal aid solicitors.

Qualitative research conducted by the Society in 2003 has confirmed the existence of serious recruitment and retention problems in high street firms, many of which are legal aid providers. The Gazette's 2004 survey shows that 60% of respondents had experienced problems recruiting lawyers in the last year. The Society is concerned by growing evidence that legal aid is no longer viewed as a viable career by those entering the profession. Preliminary findings of research conducted by the Law Society in January 2004 show that although, all things being equal (for example salaries, hours of work, working conditions etc), about 60% of student and trainee solicitors would have been likely to pursue a career in legal aid, in fact, only about 7% are now likely to do so.

The Law Society makes the following comments on each of the three proposed models.

### **Model One**

This model is similar to the previous means test that existed in the magistrates' court prior to April 2001. The responsibility of the solicitor will be to ensure that the legal aid application is fully completed and is supported by the documentary evidence where necessary. Where previously an application was submitted to the clerk to the justices or to the court, it is assumed that this would now be submitted to the Legal Services Commission for the application to be granted or refused. The scheme has the advantage of being broadly similar to the previous scheme and therefore familiar to the majority of solicitors; it would also be relatively straightforward to administer for firms. The disadvantage is that in circumstances where the individual has provided evidence that showed that he could afford to pay for the case himself, representation would have to be subsequently withdrawn. If this withdrawal of funding leads to defendants appearing unrepresented in proceedings where they were previously represented, this will in turn lead to an increase in the costs of the criminal justice system, negating any savings recovered by way of contributions.

### **Model Two**

This model is also relatively straightforward in that it envisages a straight cut off of household annual income of £25,000, above which an individual would not qualify for public funding. Individuals in receipt of a means tested benefit would automatically satisfy the means test, although documentary evidence would still be required and therefore reservations about this model are the same as for model one. It would also lead to inequity for those individuals who had a gross household income of just over £25,000 who would be ineligible for public funding, when other individuals with a gross household of just below £25,000 would be entitled to public funding.

### **Model Three**

This model is the most complex of the three and demonstrates that by allowing flexibility, a fairer system can be introduced, but at the expense of more administration to the solicitor. It again relies on the solicitor undertaking the means test of the client and being responsible for ensuring that any changes in disposable income of the client is reported to the Legal Services Commission.

As a result of changes to the criminal contracting scheme since April 2001, solicitors have seen a significant deterioration of their profitability, whilst their overheads have risen and there has been no increase in overall remuneration rates for this work. It is therefore of some concern that they will be expected to bear the additional administrative burden of administering the means test, whichever of the

three models is deemed preferable. The Law Society has previously raised concern about the recruitment and retention of legal aid solicitors, particularly in the area of criminal work.

### **Should the authority to grant the right to publicly funded representation be removed from the Courts and transferred to the Legal Services Commission?**

Whilst the Law Society supports greater consistency of decision making in the grant of representation, it is unclear whether or not this will lead to a subsequent reduction in the number of representation orders and therefore reduce the cost to the criminal legal aid budget. The interests of justice test will remain the same and therefore we would predict that there is unlikely to be a significant reduction in the number of representation orders granted.

Also, as the consultation paper makes clear, although applications for public funding will be made to the Legal Services Commission under the proposals, in real terms that power to grant will be delegated to solicitors with a General Criminal Contract.

The consultation paper suggests that where the interests of justice are not satisfied or the individual's means are such that he or she is ineligible for public funding, the solicitor will be able to advise the individual whether to proceed by privately instructing that solicitor or by representing himself. The Law Society thinks that such a proposal presents an unacceptable conflict of interest between the solicitor and the client.

The proposed transfer of grant will also have the effect of transferring the risk to the solicitor. They will be expected to show that they made 'reasonable' efforts to collect the evidence of means and that any work done was reasonable in all the circumstances. This will create extra bureaucracy at a time when there was an expectation that it would diminish significantly. Solicitors would be undertaking work that was previously the remit of the courts.

### **Are solicitors best placed to determine eligibility for criminal legal aid to grant help to qualifying clients?**

In theory, there is nothing to prevent solicitors determining eligibility for criminal legal aid, in many ways they are well placed to do so. Our concern however, is the practical effect of forcing them to do so.

As we have outlined above, the principle objection to solicitors determining eligibility for criminal legal aid is the possible conflict of interest that could arise. It must be wrong in principle for a solicitor to decide whether or not a case merits representation in the interests of justice and then have the opportunity of representing a client on a privately paying basis if the client turns it down.

*Solicitors Accounts Rules*

There is also a separate issue of whether and how these proposals might conflict with the professional obligations of criminal practitioners. A contribution paid by a client would be a payment on account of costs. Under the Solicitors' Accounts Rules 1998, a payment on account of costs is client money and must be paid into and held in a client account. Any contribution should then be transferred from the client to office account at the end of a case when the report has been made to the Legal Services Commission and the solicitor is entitled to his or her costs. A solicitor who holds or receives client money in any practising year incurs the cost of the annual accountant's report, and also has to pay the higher level Compensation Fund contribution.

## **Conclusion**

In conclusion, this Bill and its consultation paper is an opportunity to examine the fundamental problems affecting the criminal justice system and find innovative ways of solving them. Unfortunately, what has been drafted appears to be more interested in obtaining short term savings at the expense of an additional administrative burden to solicitors.

One approach to the issue of means testing in criminal legal aid is to return to the pre-1982 position. Under this, there was a fairly cursory means assessment, but people who obviously had some wealth could be required to make a down payment at the outset as a condition of receiving legal aid. At the end of the case a further contribution could be required. This system operated in both magistrates' courts and Crown Courts. People whose means plainly meant they could readily afford the whole costs themselves could be refused legal aid. This would seem to achieve the objectives of avoiding wasting money on people who could properly be expected to afford to pay for themselves, whilst avoiding the complex, unnecessary burden on solicitors' firms proposed in the current consultation paper. The one area where the pre-1982 arrangements were plainly wrong however, is that they permitted contributions to be required from acquitted defendants.

The Society is committed to working with the Department for Constitutional Affairs and Legal Services Commission to improve the criminal contracting regime and it is hoped that due consideration will be given to the views set out above.

