Government Response to the Constitutional Affairs Select Committee's Report on the Draft Criminal Defence Service Bill

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Introduction

The Government is grateful to the Constitutional Affairs Select Committee (CASC) for its helpful report on the draft Criminal Defence Service (CDS) Bill.

Legal aid provides proportionate public funding for advice, information and legal services so that the most vulnerable in society have access to justice. It facilitates the work of courts and tribunals and is required in many areas by the Human Rights Act. The availability of suitable representation for defendants in criminal trials is a key pillar of the criminal justice system and an important safeguard for defendants' rights. But it also remains a cornerstone of the Government's policy in this area that those who can afford to pay for their defence should do so. This principle was widely supported both by CASC itself and all of those who gave evidence to its inquiry into the CDS Bill.

The Government regrets the delay in responding formally to the Committee's Report. Both the Department for Constitutional Affairs (DCA) and the Legal Services Commission (LSC) have given careful consideration to the Committee's recommendations and have sought to respond positively and constructively to its concerns. Whilst the principles and aims in support of the enabling powers the Bill provides have not changed, substantial work has gone into refining the delivery model for the legal aid scheme in response to the comments we have received from the Committee, from the wider public consultation and from the professions and others. The additional time we have taken should help to secure greater support for our delivery proposals.

The Committee's Report

In summary, the Select Committee's report broadly supported the underlying aims of the CDS Bill in seeking to control the rising cost of legal aid. The Committee also supported the principle that those who can afford to pay for the cost of their own criminal defence should do so. The Committee felt, however, that a number of questions remained unanswered and that more detailed work was required to limit the practical difficulties of means testing and the transfer of grant as defined by the range of delivery models presented by the Government in its consultation paper.

The Committee also recommended that, before formally introducing the Bill, the DCA should undertake further work to ensure that its final proposals were in compliance with the Human Rights Act; and that the Government should give further consideration to the full costs of the proposed transfer of responsibility, to the risk of possible delays to the criminal process and to how conflicts of interest were to be avoided.

The New Delivery Model

In response to these concerns and with the benefit of some additional research, the Government has now developed a new delivery model, which will take the following form:-

- a means test as soon as a legal aid application is made based on a simple assessment of gross income[1] (determining qualification or disqualification from the scheme) with a single deduction for average costs of living calculated on the individual circumstances of the applicant; there would be no system of contributions; the system would only apply in the Magistrates Courts;

- a limited number of allowances based on individual circumstances (relative principally to numbers of dependants) would be introduced with the aim of ensuring that the scheme adequately reflects capacity to pay and does not give rise to Human Rights concerns;

- responsibility for conducting the means test, together with the existing merits test would be placed with the magistrates' courts;

- the process would cease to be a wholly judicial function and, in the first instance, will become an administrative function with court staff becoming responsible for its day-to-day operation under a Service Level Agreement with the Legal Services Commission. Accountability for both the means and the merits test would lie with the Commission;

- there would be an appeal against misapplication of the merits test initially to the Justices' Clerk and ultimately (and exceptionally) to the Magistrates. The Court would also retain the power to grant representation in cases where an overriding interest of justice imperative exists or where not to do so would threaten the effective and efficient running of the court;

- means information would be collected from defendants at the earliest opportunity after entry into the criminal justice system on a consolidated application form covering both the early advice and assistance scheme and the grant of representation;

- under the new two-tier scheme, defendants would be able to apply for legal aid in the form of a non-means tested advice and assistance scheme running up to and including the first hearing

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[1] Gross income will be defined as **all income whether from employment, state benefits or elsewhere**, (e.g. assistance from friends or relatives), before the deduction of tax, NI or any other allowances but (consistent with the civil means test) excluding a number of disregarded benefits eg. Disability allowance, Housing allowance etc.

at which time a means tested representation order would come into force;

- we do not intend at this stage to extend this new up-front means test to the Crown Court but rather that the existing system of Recovery of Defence Costs Orders (RDCOs) should be strengthened both in terms of their administration and their enforcement. However, the Government would wish to have the power to introduce means testing into the Crown Court, both to tackle very wealthy defendants or to guard against the eventuality that a disproportionate number of defendants elect to have their case dealt with in the Crown Court. The introduction of a scheme would be subject to affirmative resolution in both Houses.

The CDS Bill itself will deliver two enabling powers, which in turn will facilitate:

- the transfer of responsibility for the power to grant representation from the courts to the Legal Services Commission; and

- the reintroduction of a test of financial eligibility (means test).

Both powers relate only to criminal cases.

Response to recommendations

Below are specific responses to some of the Committee's recommendations. We have not sought to address here those parts of the Committee's report that touch on wider legal aid policy issues such as the outcomes of the Fundamental Legal Aid Review (FLAR) although we fully acknowledge the need to ensure that any developing legal aid scheme is fully integrated into the longer term planning for the future of legal aid. For this reason, work to implement the scheme envisaged here would form part of the wider programme of changes to be delivered following the FLAR report.

Transfer of Grant of Representation

Although we acknowledge the reason for the Department's desire to obtain greater control of the Criminal Defence Service budget by transferring responsibility for grant from the courts to the Legal Services Commission, we consider that the current proposals fail to address a number of key questions. These include:

- Whether, in practice, the Legal Services Commission and solicitors are better placed to apply the interests of justice test than the courts;

- When the test should be applied: if done prior to the case it may give rise to delays—or if done retrospectively the question arises of who should bear the risk;

- How conflicts of interest arising from the transfer from costs to solicitors, which could threaten the interests of the defendant and/or the envisaged savings to the Criminal Defence Service, could be avoided;

- What impact the proposals would have on the volume of representation orders granted or on Criminal Defence Service expenditure and whether this would outweigh the substantial downstream costs of the transfer.

Operation of the test

In developing the policy behind the CDS Bill, the Department has taken the view that practitioners are uniquely placed to gain an early and robust understanding of both the merits of their client's case as well as a picture of their client's means and capacity to pay. However, the Department accepts the concerns felt by practitioners about their capacity to administer such a system and the financial risks they might be required to bear.

In the light of the Committee's investigation, the wider consultation and subsequent discussions with stakeholders, the Department has acknowledged the view that in current circumstances, the existing grant teams within the courts are best placed – both in terms of administrative resources and expertise – to perform the new means test alongside the existing merits test. The Department also accepts the view expressed by a number of contributors (including the Magistrates' Association) that it would be both illogical and impractical to conduct the tests as two separate exercises.

Our delivery model now proposes, therefore, that responsibility for conducting the means test should be placed with the magistrates' courts alongside their existing role of conducting the merits test. The process will cease to be a judicial function and will instead become an administrative function of the court officers. Ultimate financial accountability for the process will be transferred to the Commission who will in turn delegate the administration of the test to court staff. This relationship will be governed and enforced by a service level agreement between the LSC and the Magistrates Courts Service within the new HM Court Service; a close working relationship will be established to ensure the success of the revised arrangements.

However, the Government also proposes a route of appeal against misapplication of the merits test such that the administrative decisions of the grant teams will be reviewed in the first instance (in the form of a paper appeal) by the Justices' Clerk and thereafter to the Magistrates. The court will also retain the exceptional power to grant representation in circumstances where it evident that an overriding interest of justice imperative exists or where not to do so would threaten the effective and efficient administration of justice. Again the LSC would provide appropriate guidance to the courts in the application of this power and would closely monitor its use. These proposals will, in our view, preserve an appropriate level of judicial scrutiny and discretion while enabling a consistent approach to the process of grant.

The revised approach will still require a CDS Bill to provide the Government with the necessary enabling powers within the Access to Justice Act. It will, however, allow us to realise the majority of identifiable savings a good deal more quickly and with considerably lower risk to delivery.

This arrangement provides substantial practical benefits.

It would place an obligation on the Commission to provide an agreed level of training and assistance with initially establishing the new system. It will also require the Commission to provide an on-going level of support and guidance to the grant teams. The courts will be able to refer to the Commission any cases where clarification or confirmation of the scheme is required.

In turn, the courts will be required to provide the Commission with the type of reliable and much needed management information it needs to be able to accurately monitor and predict grant trends. A service level agreement would also provide the Commission with useful management levers to ensure control and consistency over grant rate and behaviour through the use of guidance, training and IT support.

Delay

The Government does not wish the process of means testing to increase delay or to reduce the benefits emerging from the CPS charging initiative. One method of substantially reducing the potential for delay would be to introduce means testing only after the first hearing. This would take advantage of the fact that the natural management of cases allows sufficient pause to ensure that a proper means assessment can be conducted. An expanded, consolidated and non-means tested advocacy assistance scheme (covering all matters up to and including the first hearing) would ensure that the provision of publicly funded legal services in criminal cases will become 'front-end loaded', reflecting other similar initiatives in this area including Effective Case Management and the Charging Pilots initiative. The DCA and LSC are actively considering this as an appropriate development alongside the implementation of the new scheme under the Bill.

There was some concern that the Bill would add a layer of bureaucracy and delay at a time when all parallel initiatives are designed to increase efficiency. The Government believes that the approach taken in the final model, and in particular the administrative simplicity of the test itself, militates against this. Grant teams will be required to make a straightforward factual judgment of eligibility based on simple evidence of means and life circumstances. The Legal Services Commission will be required to assist them in this function by providing expert advice in complex cases and an on-going level of support and guidance on the operation of the scheme

The Government is also considering the introduction of a single consolidated application form and guidance pack (provided at point of entry to the criminal justice system) which will advise defendants on the operation of the scheme

and the point at which means tested representation will take over as well as the evidential requirements placed on them if they wish to apply for this type of funding. This will ensure that defendants are fully informed of the way in which the scheme will operate, solicitors will also be in a position to advise their clients on the types of information and evidence required to make a successful application for legal aid and grant teams will be in a position to apply the test without delay.

Impact on volume and costs savings

Both the DCA and the LSC have conducted independent research projects to establish the impact that the abolition of the means test has had and to estimate the financial effect of re-introducing the means test.

Research commissioned by the LSC and conducted by the Institute for Fiscal Studies clearly suggests that direct savings will be obtained from determining the eligibility of those who apply for legal aid and disqualifying that proportion of the population who can clearly and affordably pay for the costs of their own defence.

The DCA's own research has confirmed that the rapid increase in legal aid orders granted following the abolition of means testing was in considerable part due to defendants, who would have previously been excluded from legal aid because their means would have been considered sufficient to fund their own defence, no longer having to satisfy the means test. It supports the view that, perhaps as one might expect, numbers of applications rose considerably and rapidly once that element of financial self-selection was removed.

There has been some suggestion that magistrates' courts were suddenly less stringent in applying the interest of justice tests but there is no evidence to support this. The proportion of applicants refused on these grounds has remained constant at just over 4% for a number of years and throughout this period. A number of factors (eg new sentencing guidelines and the Human Rights Act) other than the abolition of the means test have been seen as responsible for the increase in grants. However, interviews with staff and clerks at magistrates' courts led us to believe the abolition of means-testing was a major factor.

The DCA has concluded, in the light of the evidence, that a substantial proportion of the 50% increase in grants is due to the abolition of the means test. It is not possible to determine precisely how much but an assumption that between 75,000 and 150,000 of the 212,000 addition grants arose as a result of the abolition. The average cost of representation in the magistrates in 2002/3 was £515. On this basis, reinstating the means test would save between £39m and £77m, dependent on the exact income cut-off and the eligibility allowances built into the final model. The DCA's final analysis suggests that, after a realistic deduction for the cost of administering the new system, we can expect to achieve annual indirect savings in excess of £35 million. This figure does not include any of the additional direct savings that

might flow from disqualification of applicants (as suggested by the IFS research).

This analysis is also supported by the fact that since April 2001 we have seen a marked reduction in payments from central funds to defendants acquitted in the magistrates' court.

Given the importance of the interests of justice test, any change to its application should be made in a transparent manner, capable of scrutiny, rather than by means of amendments to the General Criminal Contract. Even if some courts were applying the test inappropriately, we see no reason why this could not be rectified by the Department issuing appropriate guidance to the courts or by introducing a Bill which would change the wording of the interests of justice test as set out in the Access to Justice Act. (Paragraph 94)

Under the revised delivery model, amendments to the General Criminal Contract will no longer play a role. Solicitors will be required to acquaint themselves with the new scheme but only in so far that they will need to advise their clients on the mechanical process of applying for funding (as they did under previous schemes) and in completing the means information on the application form along with providing evidence of means.

The Government does not intend and nor has it proposed at any time to change the application or interpretation of the interests of justice test which we believe to be clear and robust. A considerable amount of anecdotal evidence does exist, however, that supports the Government's view that there is a growing trend for courts to apply an interpretation of the interests of justice test that is somewhat wider than that envisaged by the Widgery criteria. The Government is seeking to reflect the views of a large number of stakeholders in ensuring that the system is predicated on the need for certainty and consistency in the application of the merits test and the types of cases that satisfy its criteria.

Under the revised model, and the envisaged service level agreement, the Legal Services Commission will be placed in a position to offer constant support, guidance and training to the courts to remove the potential for drift and inconsistency. This would be a feature of the service level agreement proposed to support delivery of the new model and would involve a management regime requiring the LSC and HM Court Service to work closely together. It is also intended that revised and more robust guidance on the application of both the means and the merits test should be published formally by the LSC. This published document would also be made available to solicitors for use as a basis in advising their clients.

The Government agrees that there is a need to ensure transparency in this process and the final model will be the subject of further Parliamentary scrutiny when the secondary legislation is put forward.

If these proposals were to be implemented, we consider it essential that there should be an expeditious right of appeal to the courts or an independent

tribunal and that the courts should be given a fallback power to grant legal aid, in exceptional circumstances, where the interests of justice so require. (Paragraph 104)

The Government agrees with this recommendation and has sought to build into the revised model an appeals structure that meets these concerns. A route of appeal against misapplication of the merits test will see the administrative decision of the grant teams initially reviewed (in the form of a paper appeal) by the Justices' Clerk and ultimately, if necessary, by the Magistrates. The court will also retain the exceptional power to grant representation in prescribed circumstances where an overriding interest of justice imperative exists or where not to do so would threaten the effective and efficient running of the court.

Means testing

Two of the proposed models rely on the collection of contributions, which we have been told solicitors may not be willing to do. The only model which does not require contributions to be collected imposes an arbitrary cut off point, based on an undefined notion of gross "household income and capital", and takes no account of defendants' expenses. We consider there to be a significant risk that defendants who could not in practice afford to pay for their own legal representation would be denied representation under these proposals, even if the interests of justice required them to be legally represented, leading to the possibility of a challenge under the Human Rights Act. (Paragraph 136)

The revised model proposes a means test (for the magistrates' courts alone) based on a simple assessment of gross salary or income with a single cut-off point. This non-contributory approach represents a distillation of the most popular of the original three indicative models put forward for consultation and pre-legislative scrutiny. The Government has always emphasised the need to balance administrative simplicity with a clear desire to preserve fairness to the defendant.

In order to build a higher level of fairness into the new delivery model, we are proposing to introduce a range of eligibility allowances which will more closely reflect individual circumstances and ability to pay (the most obvious of which would be based on numbers of dependants). It is also worth emphasising that a financial cut-off based on an appropriate gross income (subject to annual review) will still ensure that a large majority of applicants will be financially eligible to be funded by the state or passported into the system on the basis that they receive benefits. We are conducting further research to model the level at which the cut-off should be set. This, coupled with the fact that acquitted defendants will be reimbursed for the full cost of their defence, was well received by key stakeholders with whom we have tested the new model.

The Government is confident that all of these proposals are HRA compliant. The Government's analysis on the Human Rights implications of these proposals is set out below.

Reintroducing means testing will undoubtedly cause delays. We consider there to be a significant risk that these proposals would, therefore, have an adverse impact on other initiatives designed to increase the efficiency of the Criminal Justice System in general, such as the Effective Trial Management Programme and the work of the Criminal Procedure Rules Committee, which represent an opportunity to generate more sustainable savings to the overall cost of criminal justice. The Department will need to demonstrate how these problems are to be avoided. (Paragraph 155)

Some concern around the reintroduction of the means test has come from CJS stakeholders who do not wish to see an added layer of bureaucracy and delay introduced at a time when we are trying to drive such inefficiencies out of the system. The simplicity of the final model militates against this, as does the likely timing of its operation. It is currently proposed that the means test will only come into play at the end of the first hearing. A system of non-means tested advice and assistance at the beginning of the criminal process will ensure that initiatives such as the new charging pilots will be fully supported and enhanced. It will also allow a generous amount of time for defendants to make an application for means tested representation and obtain supporting evidence and for the courts to determine the application prior to trial. The Government suggests that all but the most uncooperative and obstructive defendants will have ample opportunity to ensure a smooth transition between the non-means tested advocacy assistance scheme (covering arrest through to first hearing) and means tested representation for trial and beyond.

We have tested these proposals thoroughly with both internal and external stakeholders (including the Law Society, the Bar and the LAPG) who see merit in this way forward.

We do not think these proposals have been properly costed. The Department has produced no convincing evidence demonstrating that reintroducing means testing would result in substantial cost savings, particularly because they have failed to consider the downstream impact on the Court Service. In view of past experience we see no evidence to suggest that these proposals will save significant funds unless they do so by deterring sufficient numbers of people from applying for legal aid. Even if they did, they would not be desirable to deter people from applying for legal aid if they are eligible. (Paragraph 161)

Research conducted separately (and based on differently identified data sets) by both the DCA and the Institute for Fiscal Studies on behalf of the Legal Services Commission has confirmed that there will be significant cost savings associated with reintroducing the means test. Savings will come both in the form of those who are refused grant on the basis of means (having applied) but also from those who do not choose to apply because they would not pass the means test. We have no evidence from the past application of the means test that those who are eligible will be deterred from applying.

The DCA is working closely with Court Service colleagues to more closely identify the likely costs of administering the new scheme. Based on the level of savings identified around the time of abolition, the Government believes that the extra resources required to put the new mechanism in place would not exceed £5 million.

We are concerned that the Department may not have conducted sufficient analysis to judge the impact of these proposals in relation to the Human Rights Act. In evidence the Minister seemed broadly dismissive of any concerns, yet if there were to be a significant growth in judicial review applications where defendants were refused legal aid, as suggested by the judiciary, this could have substantial and unwelcome cost implications. Furthermore consideration needs to be given to the supply of solicitors conducting Criminal Defence Service work. If these proposals were to lead to a reduction in provision, it is important that the Department recognises the difficulties which could result. (Paragraph 170)

Some concern has been expressed about the possibility that the transfer of grant powers to the Legal Services Commission could be used to facilitate changes in the application of the interests of justice test in the grant of criminal legal aid. In the Department's view this concern is unfounded. Schedule 3, paragraph 5 of the Access to Justice Act 1999 provides that any question as to whether a right to representation should be granted shall be determined according to the interests of justice, and sets out the factors that must be taken into account in applying this test. This provision closely follows the requirements of ECHR article 6(3)(c). The test is not amended by the Bill, and the Legal Services Commission, and any persons making decisions on grant of legal aid on its behalf, will be bound to apply it.

It is also suggested that the absence of statutory provision for a full appeal from decisions of the LSC to an independent court or tribunal is likely to breach ECHR Article 6(1) and Article 6(3)(c) in failing to provide a sufficient appeal to an independent court or tribunal.

In relation to this, the Department notes that statutory provision for appeals is already found in Schedule 3, paragraph 4 of the 1999 Act, which is not amended by the Bill. This will continue to exist in addition to a new power in paragraph 4ZA, as inserted by clause 2(3) of the Bill, to make regulations prescribing a separate right of appeal against decisions on financial eligibility. Paragraph 4 already provides that, except where regulations otherwise provide, an appeal shall lie to such court or other person or body as may be prescribed against a decision to refuse to grant a right to representation or to withdraw a right to representation. It is intended that regulations under this paragraph should provide a right of appeal to the justices' clerk, and thereafter to a magistrate, against a decision made on behalf of the Legal Services Commission to refuse to grant a right of representation on the grounds that the interest of justice test is not satisfied. Whilst it is not intended that the justices' clerk or the magistrate should be able to overturn the LSC's decision about financial eligibility, it is intended that there should be a separate right of internal review of that decision.

Clearly, the revised delivery model will have considerably less impact on the role of practitioners and extensive discussions with the professions in which the new model was mooted suggest that there is no reason to suppose that these provisions will influence levels of supply.

Over the course of our inquiry, we have been told by a number of witnesses that there are better ways of controlling spending on criminal legal aid than reintroducing means testing and transferring responsibility for grant. We recommend that the Department should focus more of its efforts in other areas, such as reducing expenditure on the most expensive criminal cases, which consume a disproportionate amount of the Criminal Defence Service budget. We recognise that the Department has made some progress in this area, but believe that further savings could be found. Greater use of Recovery of Defence Costs Orders, including in the magistrates' courts could also be considered. In addition, initiatives which could create savings to the overall cost of the Criminal Justice System by, for example, effective trial management, should be pursued and supported. (Paragraph 182)

The Government, of course, fully accepts that the proposals within the Criminal Defence Service Bill are not the only method by which we should seek to control the rising costs of legal aid. We are working on other measures to improve efficiency within the Criminal Defence Service and to ensure the limited budget is being spent where it is most needed. A package to deliver better value for money has already been introduced. All these initiatives are needed if we are to live within the resources allocated to legal aid and maintain the current Community Legal Service budget.

In particular, the Fundamental Legal Aid Review (FLAR) has been established to look at long-term strategies to give certainty about expenditure levels and the value for money in legal aid spending. The Review will consider a range of measures to ensure we reduce the cost of legal aid processes and prioritise them further on the most important outcomes. The nature of the Review does mean, however, that it cannot have a very rapid effect. It is likely that savings will not be available until 2006/07 and we must continue to actively pursue all other available efficiency savings in the meantime.

Conclusion

The Government thanks the Constitutional Affairs Committee for its thorough investigation into this complex policy area and for the useful feedback we have received through its report. We would also like to thank all of those stakeholders both within government and in the wider legal community who have contributed to the evolution of this policy.

In redesigning the delivery model we have sought to respond positively and constructively to the suggestions and concerns we have received during this process and we believe that the final outcome strikes an appropriate balance

between fairness to the defendant and administrative simplicity as well as ensuring that we are getting the best value from taxpayers’ money.