Response to the Consultation Paper concerning the Award of Costs from Central Funds in Criminal Cases

1 This is the response of the Criminal Bar Association to the Consultation Paper, "The Award of Costs from Central Funds in Criminal Cases" published by the Ministry of Justice on 6th November 2008.

General Observations and Introduction.

2 It is our opinion that the acquitted defendant should continue to be entitled to the payment out of central funds of costs properly incurred in the course of defending the proceedings irrespective of whether he funded his defence privately or with the assistance of Legal Aid. We are of the view that it is a fundamental right of an acquitted defendant to be reimbursed the reasonable costs of his successful defence subject to the overriding discretion of the trial judge to disallow such costs in the limited range of cases where such an award would be inappropriate. We have been unable to identify any public interest or other compelling argument in favour of a change in the law. As will become clear from this response, we seriously doubt whether the changes proposed in the Consultation Paper will occasion any savings to the public purse at all, indeed we suspect that they will bring about increased costs to public funds.

The First Question: "Do you agree that Central Funds payments should be reformed to ensure that the taxpayer does not subsidise disproportionately high private rates for legal representation in criminal cases?"

3 The first question posed by the Consultation is a leading question of the most obvious type. It is in a form that would be permitted by no judge

because it so firmly suggests the answer desired. It contains a number of assumptions and premises which we do not accept. These are explored in this response.

4 A better question identifies the correct starting point for a consideration of the issue of the refunding of expenses to an acquitted defendant. It is this : 'Do you agree that an acquitted person should be entitled to recover expenses properly, reasonably and actually incurred by him in defending the proceedings in which he was acquitted?'

5 We consider that no lawyer, nor any informed person concerned with civil liberties would answer that question in the negative.

6 There are central tenets of the criminal law that prompt that intuitive reaction to the question properly at the heart of this consultation. We make no apology for reciting them. The criminal law places the burden of proof on the prosecution. Until he has been convicted, the presumption of innocence means that a defendant is entitled to be presumed innocent. An innocent man does not choose to be prosecuted. The State chooses to shoulder the burden of proving the guilt of a defendant, and in the event of an acquittal, it has failed to discharge the burden which it has voluntarily taken upon itself.

7 Those whose duties do not bring them into regular contact with persons the subject of prosecution may not appreciate the consequences to such persons of being prosecuted. To most defendants the fact of being prosecuted is all consuming. It represents a life defining incident. It can deprive them of their liberty, their livelihood, their reputation, their family and radically influence the course of their life. This is so for all defendants, irrespective of their walk in life. The response of an innocent man to the fact of being prosecuted is not therefore a lifestyle choice analogous to the selection of one's child's schooling. Persons facing prosecution are fighting for their lives, not their lifestyles. When they are acquitted, proof positive is established that they were right to do so, and the State was wrong to assert otherwise.

8 Historically, the remuneration available under criminal legal aid was sufficient to attract the best to the criminal Bar. They chose the criminal Bar because the work was perceived to be of public service and accepted that their earnings would be less than their colleagues in the commercial world. Many of the best are still at the criminal Bar, providing a professional service within the ever tightening constraints. However, the reality is that more professionals on both sides of the profession are turning from publically funded work either because the differentials are now simply too great, or because it no longer provides a sustainable business model. It is beyond doubt that the criminal Bar no longer attracts the brightest law graduates, as it once did: the disparity between earnings at the criminal Bar and earnings elsewhere is now just too great.

9 Thus an innocent man facing prosecution is presented with a choice insofar as representation is concerned. He may choose to instruct legal aid lawyers doing their professional best under the constraints imposed, or he may make such arrangements as he can to secure privately funded representation. We anticipate that the choice will become the starker as the erosion of publically funded criminal legal aid advances.

10 This Consultation Paper concerns the position of the innocent man who chooses private representation and is acquitted. Under the present system, the innocent man is entitled to the refund of the costs properly, actually and reasonably incurred in securing his acquittal, with the calculation of the same resolved through a well established taxation procedure. The effect of the proposal is that the State, having unsuccessfully prosecuted him, should bear none of the litigation risk of having done so, or, alternatively that the litigation risk should be confined to what would have been available under Legal Aid. Instead, the acquitted defendant should bear all or much of the cost of securing his acquittal. It is respectfully submitted that understood in this way, and stripped of detailed historical and legislative analysis, the unfairness of the proposal is exposed.

11 It is these reasons of general principle that underlie our approach and are the foundation of our essential opposition to the proposals. Unless there are compelling arguments based on a strong public interest then the case for change has not been made out. We have seen no such arguments and accordingly can see no reason for why there should be change to the present system.

12 Against that general introduction we now turn to matters of detail.

The Existing Regime

13 The Ministry of Justice offers the opinion that 'it cannot be right, or a responsible use of taxpayers' money that individuals who chose not to take the available State funded service should then be able to claim back their costs'.

14 The system now described as incapable of being right has been thought right for at least 100 years, its legislative roots reaching back at least as far as the section 6(3) of the Costs in Criminal Cases Act 1908. The essential test is now as it has been since at least this Act, namely whether the costs incurred were reasonable. As the authors of the Consultation Paper emphasise : 'should there be any doubt about whether any costs have been reasonably incurred or are reasonable in their amount, then that doubt must be exercised in favour of the Central Fund'.

15 The existing costs regime has not resulted in judicial criticism or in public disapprobation or in complaints from practitioners. It appears therefore that there is no impetus for change from those operating the regime. This is hardly surprising bearing in mind the reasonable and proportionate manner in which the regime permits for the recovery of a successful defendant's costs.

16 This was made clear in the recent case of *Balchin v South Western Magistrates' Court* [2008] EWHC 3037 which contains a useful summary of the existing regime. Davis J. said that;

"The relevant provisions by virtue of which costs fell to be assessed are contained in the Prosecution of Offences Act 1985, section 16 (1) , and in particular, for present purposes, section 16(6) which says this:

> *"A defendant's costs order shall, subject to the following provisions of this section, be for the payment out of central funds, to the person in whose favour the order is made, of such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings."*

Then in the relevant Regulations, being the Costs in Criminal Cases (General) Regulations 1986 , and in particular Regulation 7 , this is said by 7(2):

> *"In determining costs under paragraph (1) the appropriate authority shall take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved."*

Regulation 7(1) provided:

> *"(1) The appropriate authority shall consider the claim, any further particulars, information or documents submitted by the applicant under regulation 6 and shall allow such costs in respect of-*
>
> *(a) such work as appears to it to have been actually and reasonably done;*
>
> *(b) such disbursements as appear to it to have been actually and reasonably incurred,*
>
> *as it considers reasonably sufficient to compensate the applicant for any expenses properly incurred by him in the proceedings.*

...

(3) When determining costs for the purposes of this regulation, there shall be allowed a reasonable amount in respect of all the costs reasonably incurred and any doubts which the appropriate authority may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved against the applicant."

17 Though it has identified the correct legislative material, it may be that the Consultation Paper has proceeded on an important error of law. On page 12, at Paragraph 16, the authors assert that 'the assessment of 'reasonable' legal expenses is a discretionary and subjective process'. This is in fact wrong in law. In the case of *Balchin v South Western Magistrates' Court* [2008] EWHC 3037 (Admin) referred to above, an acquitted defendant sought to recover his costs from Central Funds. Davis J described events which culminated in Mr. Balchin receiving the response to his application :

At all events, the decision of the legal assessor was given on 26 October 2006. The letter stated:

"Your bill in the above case has now been taxed. As a taxation officer and guardian of the public purse, I have to assess the reasonableness of the work done and claimed for in your case. This is a subjective test."

18 Having quoted the letter, Davis J, with whom Latham LJ agreed, continued

Pausing there, that is indeed a puzzling and, it has to be said, an incorrect statement, because the test is of course not a subjective one, but an objective one.

19 We consider to be self evident the importance of the application of an objective test to the question of whether the costs in the case had been reasonably incurred. It underlines the fact that the current costs regime is

designed to control expenditure that may be recovered by a successful defendant and to ensure that only such costs as can be demonstrated on an objective test to have been reasonably incurred shall be recoverable. We do not understand how it can sensibly be argued that a defendant who takes objectively reasonable steps to ensure his acquittal should be prevented from recovering such costs or should be penalised by a reduction for having done so.

20 It is troubling that the Consultation Paper should be based upon a fundamental misapprehension of the applicable law.

21 An acquitted person is not automatically entitled to take advantage of the regime described above. His access to this regime is governed by the trial judge. It is to him, in the first instance, that the application for costs is made. He has a discretion as to whether to make the defence costs order. The discretion is guided by the Practice Direction (Costs: Criminal Proceedings) [2004] 2 All E.R. 1070. The trial judge may not grant the order sought, or he may in his discretion only allow a percentage of the costs sought. He may refuse the application. His discretion cannot be challenged on appeal either to the Court of Appeal or by way of judicial review.

22 If the trial judge allows the acquitted defendant to avail himself of the statutory regime, the application of that regime is first by a legal assessor, now within the National Taxing Team. The NTT award may then be appealed to a Costs Judge of the Supreme Court Costs Office. This procedural route has of course generated a substantial body of case law, none of which is commented upon in the Consultation. Even a superficial review of this case law reveals that public servants, Judges and Courts are robust in the protection of Central Funds and regularly disallow claims found to be excessive.

23 By way of example reference may be made to the following recent cases : *(R (on the application of Crowch) v DPP* [2008] EWHC 948 (Admin) £1600 reduced to zero. *Balchin v South Western Magistrates' Court* [2008] EWHC 3037 £12,000

reduced to £3,142. *Edgar v Walsall Magistrates' Court* [2007] EWHC 2895 (Admin) £2,026.64 reduced to £413.64. *R (on the application of Brewer) v Supreme Court Costs Office* [2006] EWHC 1955 costs in excess of £25,000 refused. *R v Stewart* [2004] 3 Costs LR 501 costs in excess of £500,000 refused. *R v Martin* [2004] Costs LR 167 costs in excess of £17,600 refused. The experience of those involved in responding to this Consultation, who include specialist costs counsel, can furnish many more similar unreported examples.

24 The authors of the Consultation Paper provide a further example at paragraph 51 of the Consultation. There they describe a case in which defence costs were reduced from £3.5 million to £2.64 million. Far from being an example of why the current system should be changed it is an example of the current system working. The fact that £2.64 million had to be paid out in costs is because the State brought a very expensive prosecution against a defendant and failed to prove its case to the satisfaction of the jury. The money was therefore rightly paid out. The fact that the costs, properly incurred and for which Central Funds monies were required, were reduced from £3.5 million to £2.64 million demonstrates that robust controls are placed on payments from Central Funds. This establishes that only those costs as are appropriate are actually paid out.

25 Thus, we suggest, the criticisms of the present system are misplaced. the current system operates robustly to protect Central Funds from unreasonable defence expenditure. This means that the current system prevents what is referred to as 'gold-plating' in the Consultation Paper, an activity twice complained of (paragraphs 48 and 50). If by 'gold-plating' the authors seeks to identify expenditure which is 'unreasonable' or 'improper', then such expenditure is already excluded by the operation of Section 16(5) of the Prosecution of Offences Act 1985 and the Costs in Criminal Cases (General) Regulations 1986. We are unaware of any examples where 'gold plating' has been permitted by the taxing masters, who are themselves subject to appeal, nor is any example provided by the Consultation Paper.

26 The Consultation Paper, at paragraph 51, identifies certainty as an additional advantage likely to accrue to defendants from the change proposed. At present it is correct that privately funded defendants face uncertainty as to whether they will be acquitted, and the knowledge that if they are acquitted, they will be able to recover only the costs that they have properly, reasonably and actually incurred in the proceedings and that their claim might be taxed down. This is to be replaced with the certainty that the acquitted defendant will recover none of his costs, or, alternatively, such of his costs as would have been paid under legal aid. Understood in this way, it will be seen that the purported advantage of certainty is unlikely to prove an attractive one. We are of the view that it is disingenuous to assert that the certainty of removing a person's right will be welcomed by the person from whom it has been removed.

Large Cases

27 The authors of the Consultation Paper identify at paragraph 18 one high profile case which had generated Central Funds payments totalling £21 million across two years. It bears observation that had that expenditure fallen in one year it would have represented or exceeded the entire overspend, and but for that case the system would have been within budget.

28 The case to which the authors are referring is, we believe, the well known 'Jubilee Line Case'. It is correct that Central Funds bore the brunt of the collapse of that case, but its cause was found, following a detailed and published review, to have been a 'cumulative effect of shortcomings by agencies and individuals within the adversarial system'. It is trite to state that difficult cases make bad law but the 'Jubilee Line Case' was a particularly difficult case. It is almost certainly unique and suffered from the sorts of problems and failings that should never occur in a criminal trial. We are of the view that it would be quite wrong to base any conclusions about changes to the current regime upon that example. It would certainly be wrong to do so without having first identified which of the costs borne by Central Funds were in fact occasioned by privately funded defendants. Since such costs ought to be excluded from any recovery from Central Funds under the

current regime it is impossible to see how the case provides any support for those advocating change.

29 A case which similarly has run for many years, and ultimately collapsed, was the SFO investigation into an alleged price fixing cartel in the supply of generic drugs to the NHS. This was investigated as Operation Holbein. As we understand matters, the question of costs is yet to be resolved, but it is liable to result in substantial payments from Central Funds. This however is because the SFO chose to bring a prosecution for an offence that is not known to law. If a prosecution chooses to bring such a high profile prosecution in the hope that the courts may be persuaded to the SFO's view of the law, but fails in the event, why should those dragged through the process have to bear the costs of demonstrating that the SFO was wrong all along? Far from being an example that supports the need for change it does the reverse. The fact that a defendant may recover his costs from Central Funds should remain as an important disincentive to speculative prosecuting conduct such as occurred in this case.

30 There are other examples of large cases which have collapsed and resulted in substantial orders made out of Central Funds. The Fallon horseracing case is one such example. The prosecution eventually accepted that there was no case to answer against Mr Fallon. The prosecution twice failed however to respond to lengthy defence letters setting out why they were in danger of misunderstanding the evidence in reliance on a foreign "expert" with no experience of British racing. The prosecution wholly set their face against recognising the defects in its case. Why should Mr Fallon have to bear the cost of having to litigate in order to demonstrate why the prosecution should drop the case, as eventually occurred at the close of the prosecution evidence? Given that the prosecution was prepared to bring that prosecution knowing that Mr Fallon could recover his costs if he succeeded, how much more ready will the prosecuting authorities be to chance inappropriate prosecutions if there is no risk, or a limited risk, of a defendant recovering his costs?

31 We believe that there are three key points to be drawn from these large cases, and which should inform the approach to the payment of the acquitted person's costs. Firstly, the large cases have a tendency disproportionately to skew the figures. Secondly, the large cases emphasise the importance of a robust taxation system through the Supreme Courts Costs Office and beyond. Thirdly, they reveal that errors of approach by prosecutors are the cause of the problem, not the steps taken by those seeking to defend themselves.

32 It is in respect of this third point that improvements could be made with a view to reducing the call on Central Funds. Had greater prosecutorial scrutiny been devoted to the 'headline' cases at an earlier stage, substantial defence costs orders could have been avoided, not to mention the enormous costs incurred by the relevant prosecution agencies, and the Court. So far from encouraging such prosecutorial scrutiny, the proposal releases the State from the litigation risk of bringing 'high risk' cases; a spur to such prosecution rather than a brake upon them.

Likely Unintended Consequences of the Proposed Change

33 We believe that the proposed changes will have expensive consequences adverse to the efficient administration of justice.

i) Increased resort to legal aid.

34 We acknowledge that private representation has increased in the Magistrates' Court in the wake of the reintroduction of the means testing regime there. We do not foresee the same increase in private representation in the Crown Court as a result of the intended reintroduction of means testing in the Crown Court.

35 The simple reason for this is that the Crown Court is much more expensive.

36 An attitude not uncommon amongst those the subject of prosecution is that they arrange their affairs as best they can to secure the best possible representation, since if they are convicted, they will effectively lose everything

anyway, and if they are acquitted they will have a good prospect of recovering a large proportion of their costs. Thus defendants remortgage their homes, or take advances on inheritances or otherwise arrange their affairs to secure the defence of their choice.

37 It is our opinion that many such defendants, if they are unable to reassure their spouses or parents or other funders, that there is at least a prospect of their costs being recovered, will resort to legal aid. Thus a proposal designed to reduce the call on public funds will in fact increase it.

38 Many privately funded persons are in fact convicted following their trial. The question of their being refunded their expenses therefore does not arise. Under the current regime the State has therefore been spared the costs of defending them. If the proposed change drives those persons onto legal aid, then once again, the public purse will have to endure a cost it does not presently bear. It is likely to be the case that only a small proportion of privately represented defendants are acquitted. The vast majority of privately represented defendants are therefore convicted. If these changes are effected it is likely to mean that considerable additional Legal Aid costs will be borne in providing Legal Aid to such defendants who but for these changes would have paid privately, been convicted and hence not been a drain on Central Funds. It does not appear to us from the Consultation Paper that any consideration of this important issue has taken place.

39 Furthermore, if, as the Consultation suggests, private rates are driven down to legal aid rates, there will no longer be any incentive for providers to prefer private funding to legal aid funding. Indeed, given the difficulty which sometimes arises in securing payment from privately funded defendants, providers who remain in criminal litigation may prefer to be paid under legal aid, since there is (at least in theory) greater certainty of receiving payment. For this further reason the call on legal aid might increase.

ii) Interlocutory Costs Applications.

40 Even where privately funded defendants are acquitted on the majority of the charges they face, it is not uncommon for trial judges to exercise their

discretion against the award of a defendant's costs order in respect of those parts of the defence costs which related to the charges where there were acquittals. It is within the experience of those involved in this Response that judge's have exercised their discretion against such partial awards. As the law presently stands there is no appeal against such a ruling in the Crown Court.

41 Thus under the present system Central Funds are protected first by the judiciary, who, in our experience, carefully exercise the discretion reposed in them under the Act, and secondly Central Funds are protected by the NTT staff who now implement the system.

42 As matters presently stand the privately funded defendant generally recognises that the question of costs will be resolved at the end of the trial. Thus the frustrations which arise, particularly in long and large cases which may be fraught with delays and adjournments, are borne by most with the knowledge that, in the event of an acquittal, the privately funded defendant will hope to recover the costs arising from Central Funds. The existing regime allows Counsel to give that advice to their clients, and cases generally may proceed without substantial interlocutory costs arguments.

43 We foresee that this would change under the proposal under consultation.

44 A defendant with no prospect of recovering his costs from Central Funds, or with the prospect of securing at best only a small part of his costs, is liable to pursue with greater vigour wasted costs against the prosecution which may arise in the course of his case. Why should such a defendant, whether he is ultimately acquitted or convicted, bear the costs consequences of a prosecutor not being ready to proceed with an argument, or a delay arising out of the failure of the prison service to produce a co-defendant, or an error in Court listing resulting in the Court having insufficient time to hear a case, or a Judge having had insufficient opportunity to read into a case?

45 Privately funded defendants in such positions are liable, in our view, to seek redress. Insofar as defendants chose to remain privately funded, we would

therefore expect to see an increase in interlocutory costs applications. These will be expensive of Court time, and corrosive of good relations which generally exist between those who prosecute and those who defend. Such applications will have to be adjudicated upon, potentially subject to appeal, with attendant opportunities for defendants to perceive bias in judicial findings which went against them. If a defendant were eventually to be acquitted, but have no prospect of securing costs from Central Funds, we can expect costs application against prosecutors and wasted costs applications in respect of the entire proceedings, as acquitted defendants strive to recover from any available source the costs expended in demonstrating that the State had made a false accusation.

46 We therefore consider it is likely that successful privately funded defendants under the changed regime would mount applications against the prosecution asserting unnecessary or improper acts in relation to the whole or at least a part of the costs arising in the proceedings. This would certainly have been so in the cases of Fallon and Operation Holbein. In such a case a further unintended consequence of the proposed changes would be to transfer the costs complained of to prosecuting authorities whose budgets are not currently designed to subsume such expense. There would need to be a compelling public interest reason for doing so: none has been identified.

47 It is our view that the proposal lacks intellectual vigour, since it carries within it implications for the wider administration of justice which may be thought unattractive, but must be grappled.

iii) Recovery of Prosecution Costs

48 For example, if an acquitted defendant must be confined to the recovery of only what his case was worth on Legal Aid, why should a convicted defendant pay more in the way of prosecution costs than what the case was worth on legal aid? The new rules as to costs would have to apply equally to prosecuting costs as to defence costs otherwise the regime would not withstand applications under Article 6 that the trial process is not fair. Why in a case where the prosecution have chosen, and presumably paid for, senior

Counsel of standing, should a convicted defendant have to pay his costs, when there were available perfectly competent Counsel who could have done the case at legal aid rates?

iv) Parity of treatment – civil proceedings

49 For example, an acquitted defendant being an innocent man, why should he be in any different position than a successful litigant against the State, who as matters stand, is not confined in his application for costs against the State to such sum as might have been available to him had he pursued his case under a civil legal aid order? It cannot be right, we venture, that an acquitted defendant should be in a worse costs position than a successful civil litigant simply by virtue of the nature of the tribunal in which he had been vindicated against wrongful allegations made by the State.

Consulting on Inadequate Evidence : Companies

50 We have observed above that the impact of large cases can skew the statistics. This appears especially to be the case in respect of corporate defendants.

51 At page 40 of the Consultation Paper, paragraph 29 of the 'Evidence Base' contains an important statistic relating to corporate defendants. It is that there are a small number of prosecutions relating to companies. 'Criminal prosecutions against companies in the Crown Court amounted to 0.12% of the total in 2005 (105 prosecutions from a total of 85,165 cases)'.

52 At page 10, paragraph 9 of the Consultation Paper, the authors note that they 'will be conducting research over the consultation period to assess the types of business currently prosecuted under criminal legislation and will factor our findings, particularly with regard to the potential effect on small businesses, into our final impact assessment'.

53 The Consultation Paper therefore invites our comments absent important evidence.

54 In our combined experience, the vast majority of companies the subject of prosecution are prosecuted for regulatory offences. The largest single group of offences covered by the collective experience of those involved in this response, is health and safety offences. These commonly arise in a corporate setting, and usually the defendants are corporate rather than human. When charged under Sections 2 and 3 of the Health and Safety at Work Act, (which suffers none or few of the legal complexities introduced by the prosecution when manslaughter charges are preferred) experience shows that a large number of prosecutions are successful.

55 The statistics available from the HSE website bear out our anecdotal experience. For example, in the year 2004 – 05 the HSE brought a total of 212 charges in the Crown Court, 152 of which resulted in a Guilty plea. Of the 60 remaining, 27 were withdrawn. (It is unclear whether they were withdrawn because defendants had offered acceptable pleas to other charges, but this seems likely). Of the remaining 33 charges which proceeded to trial, 23 resulted in convictions. The HSE material does not distinguish between corporate and human defendants, but it is our experience that the vast majority of HSE defendants are corporations. Thus in only 10 of the 212 charges brought were acquittals achieved, and therefore was there scope for an application for a defence costs order. (The HSE material does not demonstrate whether, in any of those ten cases, judicial discretion was exercised in favour of a defence costs order).

56 Thus in the overwhelming majority of HSE prosecutions convictions are secured. Not only do the convicted companies bear their own costs, they pay those of the prosecution.

57 Other prosecutions brought against companies in our experience have been for a variety of regulatory offences, for offences as diverse as breaches of enforcement notices under Town and Country Planning legislation, to Food Safety offences, to Environment offences to Companies Act offences. Again, properly and tightly prosecuted, and statistically these types of cases

frequently result in convictions following Guilty pleas, fines, and convicted companies bearing their own costs and paying those of the prosecution.

58 This is largely because the costs of defending such prosecutions are not economically viable to a company against whom the only sanction is financial. The few companies that choose to contest the prosecution and the fewer still of those who succeed represent a tiny proportion of criminal defendants. It cannot be right to structure a sweeping rule change with particularly adverse consequences to human defendants because of failed prosecutions against a tiny proportion of corporate defendants.

59 Even so, the principle that a person should not be penalised in costs for establishing his innocence applies just as much to a company as it does to an individual. A successful defence for which no costs can be recovered could lead to serious problems in the company with job losses and other negative consequences. It is quite wrong to resort to a knee-jerk response over costs merely because those paying are corporations.

60 Thus cases such as Operation Holbein which represent such a large percentage in terms of costs, represent a tiny percentage of the tiny percentage of cases which are brought against companies. Cases of this nature call for a review of the prosecutorial function, not the principle that acquitted defendants should be able to recover the costs properly reasonably and actually incurred in meeting a prosecution.

61 The frequency with which costs awarded to acquitted companies is referred to in the Consultation is testament to the care which must be employed in considering a change as fundamental as that which is here proposed.

Consulting on Inadequate Evidence : The Role of the National Taxing Team

62 At Paragraph 48 the authors of the Consultation Paper observe that the 'National Taxing Team at HMCS have recently taken over responsibility from justices' clerks for determining defendants' costs orders from Central

Funds, which should help to achieve consistency in the sums allowed. Some administrative savings may also come from this transfer of responsibility'.

63 In our view the increasing role of the National Taxing Team is an important development in the strengthening of the existing regime. At the very least time should be given to allow the impact of this case to be assessed before implementing changes as fundamental as those within this proposal.

The Evident Sustainability of Legal Aid Rates

64 At a number of points in the Consultation Paper the authors refer to the 'sustainability' of legal aid rates. (Paragraph 7 of the Executive Summary, Paragraph 8, 24, Paragraph 43 to 45 contain other positive assertions as to the legal of legal aid fees, as does paragraph 49. The evident sustainability of legal aid fees is again asserted at paragraph 50).

65 Despite the frequency of the assertion, it is not accepted that legal aid rates can properly be described as 'evidently sustainable'.

66 It is not proposed to address this point in detail in this Response. It is well documented elsewhere. Simple examples suffice.: the VHCC rates and the 'undeeming' of legal aid rates. It is assumed that the authors of the Consultation Paper will be familiar with these events and their meaning.

67 Other Respondents to this Consultation we know will have their own observations about the sustainability of legal aid rates.

68 We merely recite one example which might be thought apt to compare the service liable to be available to the privately paying client with that available to the legally aided client. As matters presently stand under the GFS the fee is structured to include up to three conferences with Counsel, though no separate remuneration is allowed for those conferences. Should further conferences be required, Counsel, irrespective of seniority, is entitled to seek remuneration as 'special preparation', presently remunerated at £35 per hour, gross of all expenses and tax. Whatever the strength of his vocation,

whatever the modesty of his personal expenses, whatever the complexity of the case, or deserts of the client, the point is reached when, saving subsidy from some other area of his practice, Counsel simply cannot afford to offer the further conference. Many Counsel (and solicitors) have and continue to subsidise their legal aid work with other work. That is not, as repeatedly asserted in the Consultation, 'sustainable'.

69 A privately funded defendant suffers no such difficulties. He can secure the services of his legal team at the earliest opportunity, and ensure assiduous and early preparation, consistent with the overriding objective of the Criminal Procedure Rules, in a manner which is simply impossible for publicly funded Counsel. It cannot be right that such a defendant, when acquitted, should be penalised in costs.

70 We do however, discern an insight into the thought processes behind the proposal in the 'Evidence Base' paragraph 2 at page 34 of the Consultation. There it is suggested that 'in certain circumstances, privately funded acquitted defendants are effectively being treated more *generously* that those whose defence costs are met by legal aid'. As we have striven to demonstrate through this Response, privately funded acquitted defendants, who are, incidentally, innocent people against whom the State has made a false accusation but failed to prove it, recover only their reasonably and properly incurred costs. For the Ministry of Justice to describe such persons as in receipt of 'generosity' is troubling.

71 We are of the view that it is clear that privately funded defendants obtain a better quality of defence not because of the inherent quality of the barrister defending them but because of the resources available to ensure that no stone is left unturned and no reasonable application is left un-pursued.

72 If such extra resources produce the evidence or the submission that ensures the acquittal why should the innocent defendant so acquitted not recover those reasonable expenses? For example in the Fallon case those representing Fallon, privately, had the resources available to them to produce

a detailed analysis of over two years of telephone traffic between the defendants and others. This demonstrated Mr Fallon's innocence. None of those defending the co-accused were permitted to perform such time consuming and expensive preparation by the Legal Aid authorities. They made heavy use of Fallon's telephone schedules in the case which had Fallon been legally aided would not have existed. It is beyond doubt in that case that Fallon had a better defence available to him privately than would have been possible on Legal Aid.

The Questions Posed.

73 Against this background we now turn to consider the questions posed :

Question 1: Do you agree that Central Funds payments should be reformed to ensure that the taxpayer does not subsidise disproportionately high private rates for legal representation in criminal cases?

74 No.

75 The taxpayer does not subsidise disproportionately high private rates for legal representation in criminal cases. An acquitted defendant is only entitled to his reasonably and properly incurred expenses, when he has persuaded a trial judge to order that he receive such expenses and when he has persuaded a civil servant as to what those expenses are. Any dilution of this approach against the acquitted person is wrong in principle for the reasons we have given.

Question 2. Do you agree that it is right that individuals who are eligible for legal aid in Crown Court cases, but choose instead to pay privately for their legal representation, should not be able to reclaim their costs from Central Funds in future?

76 No, for the reasons set out above.

Question 3. Do you agree that individuals who have failed the interests of justice test in the magistrates' court or on appeal to the Crown Court should no longer be able to claim any legal costs they have incurred from central funds?

77 No.

78 As is observed at paragraph 39 of the Consultation Paper, such cases are likely only to be the most straightforward of cases. The authors of the Consultation suggest that such defendants should rely on the assistance of the magistrates' legal advisors. It is unclear whether the opinion of the magistrates' court legal advisors has been sought on this suggestion. Since advice is best given and received outside the Court room, and before proceedings commence, it is unlikely as a practical matter that many magistrates' court legal advisors will be physically able to provide advice. In the event that they do take it upon themselves to advise, and do so robustly, prosecutors will rightly complain at the consequential undermining of the independence of the Court. The consequences of incorrect advice being given by a magistrates' court legal advisor would also have to be borne in mind when considering the propriety of their being given the responsibility of advising the unrepresented defendant. That is not their role, and it is undesirable to place additional burdens upon them.

79 Defendants whose cases do not pass the Interests of Justice test have no entitlement to legal aid. Thus, if they are acquitted, they will not have chosen to pay for the case privately; they had no choice. As a matter of principle, such acquittals are indistinguishable for those secured in the Crown Court; the State had brought an allegation and failed to prove it. Provided that such cases are appropriately taxed these defendants should be entitled to their costs for the reasons set out above.

Question 4. Do you agree that it is appropriate to cap payments from Central Funds to the relevant legal aid rates for individuals who have failed the means test in the magistrates's court or on appeal to the Crown Court?

80 No.

81 We are of this opinion for all of the reasons set out above.

Question 5. Do you agree that it is appropriate to cap payments to the relevant legal aid rates for companies in either the magistrates' or the Crown Court?

82 No.

83 As a matter of principle there is no difference between the acquitted defendant company and the acquitted human defendant. All of the reasons set out above therefore apply with equal force.

84 They are not diminished by the fact that a company cannot be imprisoned. They can suffer significant fines. They can and do suffer reputational damage, and their shareholders can and do suffer a reduction in their share price. Tenders may be lost by virtue of disclosure requirements revealing the fact of conviction. Insurance premiums increase. No company, in our experience, takes lightly the fact of prosecution.

85 As a matter of practice, the evidence does not justify the position of corporate defendants provoking the fundamental change in the law proposed. Rather the exceptional cases to which the authors of the Consultation refer, should prompt an examination of the prosecutorial role in the bringing of such high risk and high cost prosecutions.

Question 6. What amendments, if any, would you make to any of the options outlined should we decide to progress with the reform of Central Funds payments?

86 None.

87 A proper understanding of the existing regime reveals it to accord both with principle and good practice.

THE CRIMINAL BAR ASSOCIATION.
MONDAY 19 JANUARY 2009