CROWN COURT MEANS TESTING A JOINT RESPONSE BY THE CRIMINAL BAR ASSOCIATION AND THE BAR COUNCIL TO THE CONSULTATION PAPER PUBLISHED NOVEMBER 2008

Introduction

1. This is the joint response of the Criminal Bar Association and the Remuneration Committee of the Bar Council to the Consultation Paper, "Crown Court means testing" published by the Ministry of Justice on 6th November 2008.

2. The Criminal Bar Association accepts the principle that a procedure should exist for a convicted Defendant to contribute to his publicly funded defence costs if he has the means to do so.

3. The questions in this consultation paper are not structured so as to invite opinion on the merits of the proposed means testing scheme. We regard this issue as central and we therefore deal with it in this preliminary overview.

Preliminary overview

4. **Means of a Defendant should be taken into account:** The Criminal Bar Association accepts the principle that a procedure

should exist for a convicted Defendant to contribute to his publicly funded defence costs if he has the means to do so.

5. **Reduction of the availability of legal aid in Crown Court proceedings:** We are concerned that the proposed cut-off from entitlement to public funding is set at a level which excludes, partially or totally, too great a proportion of Crown Court Defendants and will cause hardship. According to the figures available from the Magistrates' Court scheme (consultation paper p.52), and on the basis that the means of Crown Court Defendants are broadly similar to those of Magistrates' Court Defendants, 27.8% of Defendants in the Crown Court will not qualify for legal aid or, in longer and more complex cases, will pay a contribution to their legal costs.

6. The proposal to limit legal aid to those with disposable income of less than £3,398 or more than £3,000 in capital or £30,000 equity in their house risks creating the perception that criminal legal aid is only a safety net for the unemployed and low income earners and that those on average incomes must fend for themselves. This will not increase confidence in the criminal justice system.

7. The operation of the means testing scheme in the Magistrates' Courts is that a high percentage of those who do not qualify for legal aid represent themselves. We do not know how this will develop if these reforms are rolled out in the Crown Court. The vast majority of Magistrates' Courts trials and hearings have the advantage in this context of being short, reasonably straightforward hearings. Defendants will undoubtedly pay for their representation in the Crown Court if they can. But a Defendant representing

himself in front of a jury could easily double the length of trial or cause the discharge of the jury thereby significantly increasing the cost to the taxpayer and causing distress and upset to victims.

8. The selection of an income cut-off level which is the same in the Crown Court as the Magistrates' Court creates a real risk that in either way offences some Defendants will feel forced to opt for summary trial in cases which undoubtedly could and should be tried in the Crown Court. Our opinion is that there should be a higher threshold for Crown Court litigation.

9. **Costs of administering the scheme:** We are not provided with the basis for the cost estimates in the consultation paper. We are concerned that the costs of the scheme have been understated and, therefore, that the proposed savings figures are over-optimistic.

10. Enforcement costs for unwilling Defendants will be high. The proposed measures are attachment of earnings orders, distress warrants, clamping orders, freezing injunctions, third party debt orders and charging orders: (Paragraph 41 of the consultation paper). It is, presumably, expected to enforce a contribution order through the courts. It is not clear from the consultation paper how the cost of enforcement action has been calculated. It does not appear that any assessment has been carried out of the impact on the courts (presumably County or Magistrates' Court) through which enforcement is to take place.

11. The cost of running a contributions scheme is not a new problem. The administrative cost of the scheme was the driving force behind the abolition of the means testing system which existed in the 1990's. According to a government white paper

"Modernising Justice", published in 1998, the cost of administering the contribution system was £5 million and the revenue from contributions was £6.2 million. The procedure was described in that white paper as a "complex and costly process." It added "The Government intends to end this unjustifiable waste of taxpayers' money"

12. The current system of retrieving unsuccessful Defendants' legal aid funding through a Recovery of Defence Costs Order ("RDCO") was recently amended on 6th October 2008. The regulation provides for the payment by an unsuccessful Defendant of his legal costs if he earns more than £22,235 gross per annum, or has more than £3,000 capital or equity in his principal residence of over £100,000, unless such an order is unreasonable or payment would exceptionally involve undue financial hardship. The amended scheme should be given time to work through so that its efficacy can be properly assessed against this proposed scheme.

Question 1: Should individuals who are committed, sent or transferred for trial before the Crown Court be automatically passported through the interests of justice test.

13. Those charged with offences which come before the Crown Court should be entitled to assistance subject to their means. The consultation paper acknowledges, (executive summary paragraph 4) an obligation on the part of government under the European Convention on Human Rights to help every citizen who is accused of crime.

14. We understand that it is intended to passport those who come before the Crown Court for trial and that a representation order will be granted in any event, irrespective of means, in order to avoid delay and disruption to the trial process. In summary the plan is to grant the representation order first and sort out the contributions later. Whilst we support the attempt to minimise disruption to the court process, we have the following concerns.

15. Where the Defendant's means are such that he is clearly above the disposable income level and the case is a short and straightforward, say, three days in length, it is potentially a pointless waste of public resources to passport him and then make him pay the full cost of his legal assistance. Not only does he not benefiting financially from a representation order, but if he were to be acquitted he would then get the money back. The position of the Defendant with sufficient means to pay for all of his defence costs in a short trial may become a common phenomenon.

16. It is crucial therefore that a Defendant in this position is given early notification that, in effect, he is required to pay the full cost of his legal assistance, so that he can exercise his informed choice whether to pay privately for his representation at an early stage.

17. Whilst we understand the reasons for not adopting a straight "in or out" system in the Crown Court it should be possible in the great majority of Crown Court cases to inform the Defendant very quickly what his position is. The effective working of the system depends on sufficient resource being allocated for the scheme to be administered effectively and quickly.

Question 2: Do you have any views on our proposed liabilities for those Defendants who fail to provide sufficient evidence of their income and status?

18. We think it is sensible that there is a sanction for failure to fill out the form and provide evidence of means. This may take the form of requiring contributions to be made. This is, however, bound to increase administration and costs. The unco-operative non-paying Defendant will tie up resources.

Question 3: Are there any other areas of expenditure which should reasonably be included in the assessment of disposable income?

19. We agree with the areas of expenditure identified at paragraph 54. In addition we take the view that debt repayments, such as credit cards and loan repayments should be taken into account. The cost of child care is included but there may also be care costs of other relatives which should be included.

Question 4: Is it reasonable to take account of all truly disposable income above £3,398 when setting the level of the income contribution?

20. We take the view that the level of disposable income, at £3,398 is set too low. The capital levels of £3,000 and £30,000 equity in a residence are also set too low. We note that the £3,398 income figure in the Magistrates' Court excludes 27.8% of Defendants from any legal aid in the Magistrates' Court. The government has a duty to provide legal assistance to those it charges with offences. The proposed levels exclude too many people from entitlement to legal aid. The threshold should in our opinion be higher.

21. This exercise has been conducted and the levels set without data as to individual Defendants' levels of affluence and the offence type and cost of trial: (Part 1 paragraph 23). We note that the modelling on which the exercise is based is not to be published until the publication of the consultation response. It is therefore difficult to comment on this exercise.

22. We note the concern that to adopt a cut-off income level in the Crown Court which is different to that which exists in the Magistrates' Court may cause perverse incentives to elect trial. In our opinion the greater concern is that Defendants should not be dissuaded from exercising their right to trial by jury because their contribution would be greater if the case were to be tried in the Crown Court rather than the Magistrates' Court. This aspect should in our view be monitored through any pilot period. It is apparent that we favour a higher threshold in the Crown Court. A differential between the Magistrates' Court and Crown Court relevant income level should not prevent the adoption of a fair and appropriate income cut off point in the Crown Court.

23. We agree that all truly disposable income above an appropriate level should be taken into account, subject to our response to question 5 regarding capping, but the test for establishing what is

truly disposable must be sufficiently flexible and detailed to accurately identify an individual's true outgoings.

Question 5: Are there other factors that ought to be considered in determining how to cap the income contribution payable?

24. The consultation paper does not give any detail as to how it is proposed to deal with the Defendant in regular income who is charged with a substantial offence such as a heavy fraud which takes several months or years to come to trial. In such cases there should be a discretion to permit variation to deal with unexpected hardships, unforeseen circumstances or delay in the trial process.
25. The grant of such a discretion would militate against the creation of a system which dissuades Defendants from exercising their right to jury trial in cases which are triable either way, simply by reason of likely higher cost in the Crown Court in comparison with the Magistrates' Court.
26. There is a risk where shorter cases are delayed or adjourned that a monthly contribution by a Defendant would result in that Defendant paying significantly in excess of the case cost before that final cost is established at the end of the trial. Notwithstanding the MOJ's intention to repay overpayment with interest, there should be a mechanism for ceasing monthly contributions in these circumstances in order to avoid undue hardship. The grant of a discretion would achieve that.

Question 6: In cases where a Defendant has little or no capital resources, but retains their employment following conviction, is it

appropriate that income contributions continue post-conviction until all defence costs have been met?

27. Yes, subject to the totality of the cost. In a high cost case, for example, it would be iniquitous to demand the recovery of full case costs from a Defendant on an average income over a lengthy period. The ongoing contribution would have to be capped as to amount or time limited.

Question 7: Do you think that we should pay a flat fee to solicitors for supporting the provision of evidence in every Crown Court case or should the £4 million be divided in such a way that it reflects the little and great amount of work at each end of the scale?

28. We take the view that there should be a basic fee with an uplift to reflect time spent on work done for the more complex cases.

Question 8: What factors ought to be considered in deciding whether or not to apply for an order for sale?

29. There should be no order for sale where the house is the home of family and dependents. In general, if other means of enforcement of contributions are available, then they should be adopted first. The response of the MOJ should above all be proportionate. If the amount outstanding is limited then it will often be preferable simply to protect the government's position by obtaining a charging order on the property. An order for sale should only be resorted to where all other means of obtaining the

outstanding contribution have been tried and failed or are not applicable. Orders for sale should be restricted to cases where the amount outstanding is truly substantial and the realisation of the equity in the property would make a significant reduction in the debt.

Question 9: Applying for an order for sale is very much seen by MOJ as a last resort. What other mechanisms might be adopted to ensure a convicted Defendant meets their defence costs?

30. If the Defendant has income the enforcement sanctions listed at paragraph 41 of the consultation paper may be used. If he has no income the Defendant is unlikely to have significant equity in a house. For those few who are in that position it should be made clear that the power to obtain an order for sale exists and will ultimately be pursued.

Question 10: What range of capital assets should be considered for the purposes of the final contribution order?

31. There should be no particular restriction on the range of capital assets, save for the family home containing dependents, in particular, dependent children. Clearly the realisation of assets is much easier if they are liquid but there is no reason to restrict the category of assets solely to liquid assets. Clearly the usual provisions relating to bankruptcy should apply: ie clothing and the tools of a defendant's trade by which he can earn an income should

be excluded. The overriding consideration should be one of pragmatism in recovering assets.

Question 11: What other types of support can we offer to Defendants to help them pay off their contribution order?

32. We think that the supported compliance suggestion at paragraph 69 of the consultation paper is a good one, subject to the issue of cost. Discounting for early payment is also a good incentive. In addition, interest may be charged on late payments, and the final contribution could be payable in instalments.

Question 12: Do you have any views on our proposals for committals for sentence?

33. We note that the representation order granted in the Magistrates' Court will be extended to cover the Crown Court if the case is committed for sentence. The cost to the Defendant who has disposable income in excess of £3,398 per annum will be £1,500. This is an extension of the Magistrates' Court system and we agree that the committal for sentence is suitable for a one-off payment in contrast to Crown Court trials.

Question 13: Do you have any views on our proposals for appeals?

34. The majority of Crown Court appeals are suited to single payment of publicly funded legal costs if unsuccessful and we therefore have no further observations on these proposals.

Question 14: Do you have any views on the initial impact assessment including any potential adverse impact on any particular group of people, what steps should be taken to mitigate this, and anything else the full impact assessment should cover?

35. We note the MOJ's view (page 69 consultation paper) that they do not believe that the scheme will tip any Defendant into debt. We suggest that care should be taken not to undermine rehabilitation of offenders by, for example, overly onerous obligations to repay for legal services for a lengthy period after the conclusion of the case. Continuing contributions from income, for example, should be time limited after the conclusion of the case.

36. We note that it is proposed to recover costs where an acquitted Defendant has brought suspicion upon himself by misleading the prosecution into thinking that the case against him is stronger than it was. So long as this goes no further than the current law then we can see no real objection to this. We would not that in practice this rarely occurs.

Question 15: Do you have any other comments?

37. None.

CRIMINAL BAR ASSOCIATION

REMUNERATION COMMITTEE OF THE BAR COUNCIL