Society of Conservative Lawyers

Affording justice: How to reduce the bill for criminal legal aid without compromising the quality of legal representation.

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Introduction

As Conservatives, we believe in a free society and giving people power over their lives. We believe in giving people choice. We believe competition, properly regulated, can improve the quality of service provision. We believe in law and order, necessitating an effective criminal justice system, which also respects the rights of the citizen who finds his reputation or liberty at risk. We also recognise that we live in an era of financial austerity when government must make difficult choices.

One area where we accept that difficult choices must be made is in the criminal legal aid budget. This has grown considerably in recent years, now totalling over £1 billion a year. Not unreasonably in the current economic climate, the government seeks to make savings in this budget and the Ministry of Justice has recently launched a consultation paper: "Transforming Legal Aid: delivering a more credible and efficient system".

At the same time, we consider that is important to look across the criminal justice system as a whole. There is a danger that a focus on reducing cost in one part of the system, legal aid, may have unintended consequences for the operation and cost of other parts. We believe that there are further efficiencies which can be made and in this paper we identify them. We also consider the proposals in the Transforming Legal Aid paper.

Executive Summary

A modern criminal justice system must deliver justice to all stakeholders at a reasonable cost. It must allow choice to the consumer, and must not be monopolistic or anti competitive. We propose a ten-point plan to cut waste, reduce cost and retain choice. The concept of block contracts is both unnecessary and undesirable.

1. The powers of the Magistrates Court should be enlarged.
2. The role of the CPS in summary cases should be reduced.
3. Video-link hearings should be expanded and further use of e-mail encouraged.
4. Pre sentence reports should be prepared only in serious cases.
5. Restrained assets should be permitted to be used for the payment of legal costs.
6. The post conviction costs regime should be more rigorous.
7. Enhanced commercial court fees should be levied and applied to fund legal aid.
8. A legal aid threshold should be introduced on a household basis.
9. A residence test should be introduced for legal aid.
10. Legal aid in civil cases should be merit tested.

Recommendations for cost-saving in the criminal justice system

Magistrates' Courts Jurisdiction

A number of inefficiencies in the criminal justice system arise from restrictions on the jurisdiction of magistrates. This leads to more hearings, as cases have to be transferred to the Crown Court and more cost, as juries have to be empanelled and cases take longer. We therefore suggest:

(1) Magistrates' Courts powers should be increased. Their maximum sentence for a single offence could be increased to 12 months (currently it is 6 months for a single offence and 12 in combination). Fines could be increased to £10,000 rather than £5,000. These reforms were enacted in the Criminal Justice Act 2003 but never brought into force.

(2) Magistrates could decide more "either way" cases. An either way case is one where the defendant may elect whether he is tried in the Magistrates Court or in the Crown Court. If he elects for trial in the Crown Court, further hearings and (if a not guilty plea is maintained) ultimately the empanelling of jury follow. The thinking behind allowing this choice is a belief that a citizen charged with an offence carrying a risk to liberty or reputation ought to have the option of being tried by his peers rather than magistrates or stipendiaries who are *perceived* to be case-hardened. However, many "either way" offences are comparatively minor (e.g. low value thefts) and unlikely to result in a significant period of imprisonment if they result in imprisonment at all. The concern to protect reputation loses force if the defendant already has previous convictions. Lay magistrates and stipendiaries can try their cases fairly and efficiently. The previous administration tried and failed to introduce a reform restricting the right to elect trial in the Crown Court to those charged with dishonesty offences who were of good character. We believe that the idea should be revisited, as it would deliver substantial savings without compromising fairness in the trial process.

(3) Working hours for Magistrates' Courts should be carefully assessed. In particular consideration should be given to a more widespread start time of 10am, not 10.30 as occurs in some courts.

(4) The old system of the police prosecuting cases in the Magistrates' Court could be resurrected, in whole or part. A partial system could involve the CPS taking over once a not guilty plea is entered and a summary trial or Crown Court committal is anticipated. However, first appearances, initial bail applications, plea before venue, and guilty plea sentencing are all within the ability of the police. It would also give constables a valuable experience of court procedure and criminal law, which will improve their case preparation in more serious cases. It will also be much less bureaucratic and costly.

Criminal procedure

There remain significant inefficiencies in how criminal procedure as a whole operates. We consider that the following areas in particular merit reform:

(1) Considerable delay is caused by the defendants failing to attend hearings. The Crown Court in particular should proceed in the absence of a defendant who has failed to appear far more readily. The Magistrates' Courts mostly already do so. Multi-handed cases are particularly prone to delay due to defendants not turning up on time or at all. Although it may require primary legislation, not guilty pleas should be capable of being entered automatically at a listed plea hearing if the defendant does not attend, and thereafter the trial should proceed in his absence if he does not attend that either.

(2) 'Mentions' – court hearings other than trials, sentences or formal pleas are prolific in the court system, and mostly unnecessary. Every court building of any size typically has a court room hearing such matters. Such mentions discuss disclosure complaints, administrative bail variations and pre-trial reviews. More use should be made of paper/e-mail submissions and telephone conferences with a judge, as happens in the civil courts. A mention in person in open court should be the exception, not the rule.

(3) More interlocutory hearings could be conducted by video link, thus saving travel time and cost and costs of prisoner transfer. Consideration should be given to removing the statutory restrictions in the Crime and Disorder Act 1998 section 57(1)(a) upon use of the link.

(4) The practice of some defence advocates (whether barrister or solicitor) appearing in two courts simultaneously on two trials, or in one all day trial and other courts for mentions simultaneously, should cease.

(5) Pre-sentence reports are currently routinely requested for likely non-custodial and custodial disposals. In many cases they are unnecessary and serve only to add delay before sentencing and create further mentions and hearings. They also occupy much of NOMS' (the prisons and probation service) time and money. Only the most serious cases should merit a report.

(6) Appropriate use of restorative justice should be encouraged since it is likely to save time and money as well as bring a more satisfactory resolution for victims.

(7) Much delay in the criminal justice system is caused by prisoners arriving at court late. To some extent, this could be ameliorated by a greater use of video attendance. However, consideration should be given to standard system of costs penalties for prisoner transport delays caused by the companies responsible for their transportation, such that it is only profitable for the companies if they deliver prisoners on time.

(8) Defence solicitors and Counsel tend to work on fixed fees for most of their income. Delay is their enemy. They are likely to be able to identify areas where the system could work more efficiently in the courts in which they appear. The prosecution, judiciary and court administration regularly meet under the auspices of Criminal Justice Boards. Defence lawyers should be represented in these groups too, as they used to be in the predecessors of Criminal Justice Boards, the Court Liaison Committee.

Funding Legal Aid

We suggest that the Department should consider other methods of funding criminal legal aid. There are at least 3 methods which should be considered.

(1) The Victims' Surcharge could be expanded and enlarged beyond its current limited scope.

(2) Restrained assets should be applied towards the payment of legal costs (that is, prosecution and court costs). This is in addition to the payment of defence costs.

(3) A system of enhanced commercial court fees could be levied on overseas litigants based upon the value of any claim and/or the length of any hearing and applied to legal aid funds. 61% of current Commercial Court cases in London involve overseas litigants who currently pay only a standard court fee. This is in effect a state subsidy to those involved in commercial litigation.

The "Transforming Legal Aid" consultation paper

We agree with many of the proposals in this paper, notably:

- Restricting the scope of legal aid for prison law (though careful thought should be given to cases where the category of prison is being determined, since that is a major milestone to eventual release).
- The introduction of a UK residence test for those qualifying for legal aid.
- Vigorous cost recovery post-conviction.
- Removing the prohibition upon restrained assets being used for defence legal costs.
- The introduction of a financial eligibility threshold.

However, we do have grave reservations about some of the proposals raised, in particular:

- The introduction of block competitive tendering
- Across the board fee reductions and "harmonisation" in the payment for advocacy and criminal litigation
- Across the board fee reductions for the payment of experts

Choice and quality

The Conservative economic argument

We are concerned about the potential impact on choice and quality which these reforms would have. Of considerable concern, from a Conservative perspective is the proposal that individuals who are accused of criminal offences will lose the ability to choose who should represent them.

Chapter 4 of the consultation is titled "*Introducing Competition in the Criminal Legal Market*". As Conservatives, we believe that competition is a good thing. However, it already exists, with solicitors competing for work from clients and barristers competing for work from solicitors who can choose to go elsewhere if they are unhappy with the service which is provided. We fear that the introduction of "competitive tendering" for block contracts for the provision of criminal defence services, giving citizens no choice in whom they instruct to represent them could lead to the creation of anti-competitive monopolies.

The market for criminal defence has room for more efficient working practices and consolidation. Better use of modern technology must be made, which will be facilitated by

the upcoming arrival of electronic case file. We hope that legal aid reforms would result in bigger and more efficient solicitors' firms, and possibly some barristers' Chambers adopting the new "alternative business structure" model. They are not the only ones. Some companies with very different business structures to conventional legal providers have also evinced an interest.

We believe that consumer choice is fundamental to a free market. A firm competing in a free market has a profit-maximising incentive both to reduce costs and increase income. So does a firm which is not competing in a free market, such as a monopoly. However, the free-market firm controls costs in a way which does not harm its income stream and which requires the provision of a quality product or service that consumers want to buy. A firm whose consumers are compelled to buy has no incentive to provide a quality service; worse, it has a positive incentive to cut costs with modest regard for quality.

The position becomes more acute when ownership and management are separated. Currently lawyers practise in firms or chambers that are lawyer-owned. The proposed reforms are likely to see criminal legal services provided by non-lawyer owned entities. In the normal free market companies can raise cash by equity sales that drive further investment, growth and innovation. But without customer competition the incentives change. A company seeking (as normally speaking it should) to maximise its return upon investment may well cut down the administration costs which is a major driver of the Ministry of Justice consultation paper, but it is unlikely to stop there: first, it will wish to pay its litigators and advocates as little as possible; second, it will also seek to maximise its variable income from the Ministry of Justice in graduated fees and Very High Cost Cases. Its employment practices may not be tempered by the quality of service and its maximisation of graduated fee/VHCC income but rather by what the professional regulators will let them get away with.

There is an important principle at stake with the quality of defence litigation and advocacy. The intended required standard is described repeatedly in the consultation paper and its Impact Assessment as "acceptable". The power to punish and imprison is the most coercive of any which the state possesses. Even arrest or short terms of imprisonment can be life changing experiences. We believe that immense caution should be exercised before creating a system in which there is minimal economic incentive to improve the quality of a person's defence against that power.

A further advantage of a competitive marketplace for legal services is specialism. Areas of specialism in criminal litigation include fraud and sexual offences, as well as myriad regulatory areas. The judiciary and CPS already appreciates this: the judiciary uses a system of training and specialism through the use of approved and trained judges for serious sexual offences, fraud and murder; and the CPS requires significant training and specialism for prosecuting sexual offences. These are also among the more high profile and expensive cases. This specialism and knowledge is required at the litigation stage as much as it is from the advocate.

Any idea that the prosecution or courts would benefit from sub-par defence work is a myth. It is important that proposed reforms of one part of the criminal justice system look at the likely impact on other parts of that system. Inadequate defending (particularly the litigation element) can involve not getting to grips with the trial issues, not editing the interview transcript in time, not serving a proper defence statement, requiring the attendance of excessive numbers of witnesses and so on. The principal consequence of this is delay – and costs which are loaded on to the prosecution and court administration. These costs will be difficult to quantify, and manifest themselves as ineffective hearings, longer trials unnecessary witness attendance, more appeals and re-trials. We fear that more appeals and retrials are a likely consequence of the proposed fee reductions for both advocates and experts. These greatly increase the risk of cases being conducted and evidence given by those who have insufficient experience or ability.

Conclusion

Legal Aid has grown in an uncontrolled fashion over many years. Much of this has been caused by inefficiencies throughout the criminal justice system.

One of principal drivers of increased costs in the criminal justice system has been the remorseless flow of criminal legislation in the last 20 years. Sentencing policies, court procedures, the Human Rights Act, sentencing guidelines have all contributed to longer and more expensive hearings both in the Crown Court and the Magistrates' Court. We would encourage the Department to reverse this trend by reconsidering codification of criminal offences, abolition of unnecessary and overlapping criminal offences and simplification of criminal procedure generally. To give just one example, the process of summing up criminal trials has become immeasurably more complex even in simple jury trials.

In recent years a number of steps have been taken to reduce fees and curb waste. There is a limit to the amount of cuts which legal services providers can bear before the criminal justice system experiences real damage. The purpose of this paper is not to seek to defend the rights of lawyers but to defend a criminal justice system which delivers real justice to all involved at a reasonable cost to the public purse. We have made a number of suggestions to this effect.

We urge the Department to consider with great care the concerns we have raised in respect of block contracts and fee reductions. The damage is likely to be swift and real.

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