House of Commons

Constitutional Affairs Committee

Draft Criminal Defence Service Bill

Fifth Report of Session 2003–04

Volume I

HC 746–I

House of Commons

Constitutional Affairs Committee

Draft Criminal Defence Service Bill

Fifth Report of Session 2003–04

Report, together with formal minutes

Ordered by The House of Commons
to be printed 20 July 2004

HC 746–I
Published on 27 July 2004
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

The Constitutional Affairs Committee

The Constitutional Affairs Committee (previously the Committee on the Lord Chancellor's Department) is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Constitutional Affairs and associated public bodies.

Current membership

Rt Hon Alan Beith MP (*Liberal Democrat, Berwick-upon-Tweed*) (Chairman)
Peter Bottomley MP (*Conservative, Worthing West*)
Mr James Clappison MP (*Conservative, Hertsmere*)
Ross Cranston MP (*Labour, Dudley North*)
Mrs Ann Cryer MP (*Labour, Keighley*)
Mr Jim Cunningham MP (*Labour, Coventry South*)
Mr Hilton Dawson MP (*Labour, Lancaster and Wyre*)
Andrew Rosindell MP (*Conservative, Romford*)
Mr Clive Soley MP (*Labour, Ealing, Acton and Shepherd's Bush*)
Keith Vaz MP (*Labour, Leicester East*)
Dr Alan Whitehead MP (*Labour, Southampton Test*)

Powers

The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via www.parliament.uk

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House.

All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/parliamentary_committees/conaffcom.cfm.

Committee staff

The current staff of the Committee are Roger Phillips (Clerk), Dr John Gearson (Second Clerk), Richard Poureshagh (Committee Assistant), Alexander Horne (Legal Specialist), Jago Russell (Legal Specialist—Scrutiny Unit), Julie Storey (Secretary), Tes Stranger (Senior Office Clerk) and Adèle Brown (Committee Media Officer).

Contacts

Correspondence should be addressed to the Clerk of the Constitutional Affairs Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 8196 and the email address is conaffcom@parliament.uk
Media enquiries can be addressed to Adèle Brown, Committee Media Officer, House of Commons, 7 Millbank, London SW1P 3JA. Telephone number 020 7219 0724 / 07711 155 722 and email address brownac@parliament.uk

Contents

Report

Page

Summary 3

1 Introduction 5
- The draft Bill 5
- Our inquiry 5

2 Background 8
- The Criminal Defence Service 8
- Legal representation 9
  - Representation orders 9

3 The rising cost of the Criminal Defence Service 11
- Rising cost 11
  - Difficulties 12
  - Consensus 13
- Why has CDS expenditure risen? 14
  - Internal factors 14
  - External factors 15
  - Further research 17
  - "Joined-up Government" 18

4 Transfer of grant of representation 21
- Proposals 21
  - Who would decide about the grant of legal aid? 21
- Who should make grant decisions? 22
  - Budgetary control 22
  - Arguments against transfer 22
  - Current administration 26
- Financial and administrative impact 29
  - Estimated savings 29
  - Downstream costs 30
- Other options 33
  - Guidance to courts 33
  - Restricting the interests of justice test 34
  - Statutory amendment to the test 35
- Necessary safeguards 35
  - Fallback power 35
  - Appeal right 36

5 Means testing 38
- Abolition of means testing in the Access to Justice Act 1999 38
- Suggested models 39
  - Model 1—net income 40
  - Model 2—all or nothing 41

Model 3—sliding-scale contributions 42
Analysis of Model 2 43
Household income 45
Practical implications 46
Evidence of means 46
Contributions 48
Delays 49
Unrepresented defendants 51
Calculation of savings 52
The deterrence aspect 54
Other concerns 54
Human rights implications 54
Shrinking number of criminal defence solicitors 56

6 Other options 58
Very High Cost Criminal Cases 58
Trial management 59
Recovery of Defence Cost Orders 60

7 Conclusion 62

Conclusions and recommendations 63

Appendix 67
Correspondence between Rt Hon Jean Corston MP, Chair, Joint Committee on Human Rights and Rt Hon Alan Beith MP, Chairman of the Constitutional Affairs Committee

Formal minutes 71

Witnesses 72

List of written evidence 73

Reports from the Constitutional Affairs Committee 74

Summary

We support the underlying aim of the draft Criminal Defence Service Bill to control the rising cost of criminal legal aid. The rate at which Criminal Defence Service (CDS) spending has increased in recent years is unsustainable and is reducing the funds available for other important legally-aided work. The draft Bill, published in May, aims to control rising costs by transferring responsibility for the grant of criminal legal aid from the courts to the Legal Services Commission (LSC) and by reintroducing means testing. We also support the policy that those who can afford to pay for the costs of their own legal defence should do so. Despite this, before the proposals can be finalised, a number of important questions must be answered. More work is also needed to limit the practical difficulties of means testing and the transfer of grant.

In many criminal cases the interests of justice require defendants to be legally represented. The outcome of a case could have serious consequences for the defendant or their families, or representation may be needed to protect other parties such as prosecution witnesses. Legal aid plays a vital role in ensuring that those who cannot afford their own defence costs can still obtain legal representation. It also protects against unfair trials and "inequality of arms" between the defendant and the prosecution and makes it easier to protect defendants' rights.

Measures designed to reduce expenditure on criminal legal aid must not interfere with the ability of legal aid to satisfy these fundamental objectives; doing so could breach the UK's obligations under the European Convention on Human Rights. Before introducing a Bill, the Department for Constitutional Affairs (DCA) must undertake further work to ensure that its proposals are human rights compliant. A fair means testing system must be designed, which does not deny help to those who need legal representation but cannot afford to pay their own defence costs. A satisfactory and expeditious right of appeal against legal aid determinations must also be introduced.

It has been the responsibility of the courts to administer the interests of justice test since the introduction of legal aid for representation in the criminal courts. The DCA proposes that responsibility for administering the test should be transferred from the courts to the Legal Services Commission. In practice, the test would be devolved to solicitors in more serious cases, but reserved for LSC personnel in less serious cases. The DCA must consider the full costs of the proposed transfer of responsibility, the implications for delays to the criminal process and also how conflicts of interest are to be avoided.

Reconciling the conflicting imperatives of simplicity and fairness to the defendant is the greatest challenge that any means testing system must overcome. The DCA's current proposals are still a long way from achieving this. Two of the proposed means testing models would be unworkable in practice and the other could lead to successful challenges under the Human Rights Act. A substantial risk exists that means testing would cause delays, both while evidence of means is being obtained and considered and because the number of unrepresented defendants would increase if the availability of legal aid were restricted. This would run counter to a number of other, promising initiatives designed to improve the overall efficiency of the criminal justice process. Means testing would

significantly increase the administrative burden on criminal defence solicitors and the Legal Services Commission. This would threaten the LSC's efforts to reduce bureaucracy for legal aid solicitors and could dissuade practitioners from undertaking legally-aided work.

The Department for Constitutional Affairs must account for the downstream cost implications of reintroducing means testing and transferring responsibility for the grant of legal aid. Without this, it is impossible to determine whether the net savings across the Criminal Justice System warrant the additional bureaucracy which these proposals would involve. Further savings could be achieved in other areas such as the most expensive criminal cases and more effective case management. The Department must also do more work to identify the main cost drivers of CDS expenditure. This would enable it to develop longer-term initiatives to target the causes of growing costs as well as short-term policies designed to tackle the symptoms. As we concluded in our recent report, *Civil Legal Aid: adequacy of provision,*[1] the Government needs to take a more joined-up approach to legal aid budgeting because many of the drivers of CDS spending fall outside the DCA's remit.

1 *Civil Legal Aid: adequacy of provision*, Fourth Report of the Constitutional Affairs Committee, Session 2003-04, HC 391-I

1 Introduction

The draft Bill

1. Total expenditure on legal aid has risen by about £500 million since 1997/98 to over £2 billion in 2003/04. It accounts for almost two-thirds of the Department for Constitutional Affairs' entire budget. Over half of this £2 billion is spent on criminal legal aid, the cost of which has risen significantly in recent years. The proportion of the total legal aid budget spent on criminal legal aid has also grown.

2. The Queen's Speech in November 2003 included the announcement of a draft Bill on the Criminal Defence Service.[1] The *Draft Criminal Defence Service Bill: Consultation Paper and Explanatory Notes* was presented to Parliament in May 2004.[2] The draft CDS Bill is one of a number of initiatives, introduced by the DCA, designed to address the increasing cost of criminal legal aid. Other measures have included restricting the availability of police station advice as well as a range of measures which aim to address the disproportionate cost of the most expensive criminal cases.

3. The draft CDS Bill outlines two basic policies:

- the transfer of responsibility for the grant of criminal legal aid from the courts to the Legal Services Commission; and
- the reintroduction of means testing for criminal legal aid.

The detail of these policies is not, however, contained in the four clauses of the draft Bill. It is proposed that this will be left to secondary legislation and documentation issued by the Legal Services Commission, drafts of which have not yet been published.

4. Instead of presenting a set of finalised proposals to Parliament, the Department has chosen to publish a Consultation Paper alongside the draft Bill. This aims to explain the background to the basic policies; suggests a number of ways in which these policies could be implemented; and seeks responses from stakeholders to a number of important, outstanding questions. The deadline for responses is 6 August 2004.

Our inquiry

5. The documentation published in May illustrates that the Department has a long way to go before finalising the current proposals. This has affected our approach to the scrutiny of the draft CDS Bill. Our inquiry did not focus on the content of the four clauses of the draft Bill, but instead posed questions which the Government will need to answer before finalising its proposals and introducing a Bill before Parliament. The questions on which we initially sought written evidence were as follows:

1 Her Majesty's Most Gracious Speech to both Houses of Parliament, Delivered Wednesday 26 November 2003: "A draft Bill will be brought on the Criminal Defence Service"

2 *Draft Criminal Defence Service Bill* Consultation Paper and Explanatory Notes, Department for Constitutional Affairs, Cm 6194 (hereafter referred to as the *Draft CDS Bill*)

- Why has there been such a large increase in spending on criminal legal aid?
- Do the Government's proposals represent the best way of controlling rising expenditure on criminal legal aid and how effective are they likely to be in practice?
- How will the re-introduction of a financial eligibility (means) test affect access to justice?
- How difficult will it be to administer means testing in criminal cases?
- What are the relative advantages and disadvantages of the three means test models suggested in the Government's Consultation Paper?
- Should the authority to grant the right to publicly funded representation be removed from the courts and transferred to the Legal Services Commission?
- Are solicitors best placed to determine eligibility for criminal legal aid and to grant help to qualifying clients?

A number of additional questions which the Department will need to answer before introducing a Bill have arisen during the course of our inquiry. These are set out later in this report.

6. **Because the draft Bill does not contain the detail of the current proposals, which would instead be set out in secondary legislation and in the General Criminal Contract issued by the Legal Services Commission, we recommend that prior to the introduction of a Bill a draft of the secondary legislation should be published for consultation. The structure of our inquiry and report has been affected by this lack of detail. Instead of scrutinising a finalised set of proposals, our inquiry and report have focused on posing questions which the Government will need to address before introducing a Bill.**

7. We do not question the underlying objectives of the draft Bill. Although criminal legal aid is a vital way of ensuring access to justice and safeguarding defendants' rights, spending on criminal legal aid must be brought under control. The growth in spending over recent years is unsustainable and, as was highlighted during the course of our recent inquiry on civil legal aid, increased spending on criminal legal aid has eroded the budget available for civil legal aid. The current proposals indicate that the Department is trying to address the pressing need to control CDS expenditure. We welcome this. We also accept the basic position that defendants who can afford to pay for their own legal defence should do so. As the Department has explained, this "has always been the will of Parliament and [is] a cornerstone of the Department's legal aid policy".[3] The overall aim of our inquiry has been to identify further work which is needed before these proposals are finalised and to highlight their practical implications.

8. **We acknowledge that the rising cost of the Criminal Defence Service must be addressed and commend the Department for Constitutional Affairs for attempting to achieve this. We agree with the principle that defendants who can afford to pay their legal costs should do so. Nevertheless, the Consultation Paper leaves a number of key**

3 *Draft CDS Bill*, para 2

questions unanswered and we are concerned that reintroducing means testing in the ways proposed could give rise to practical difficulties which outweigh any cost savings likely to be achieved.[4]

9. We were keen to report on the draft CDS Bill in good time to enable the Department to take account of our conclusions and recommendations when finalising its proposals and before introducing a bill. This limited the time available for our inquiry and also meant that the inquiry ran in parallel to the Government's own consultation. Despite this, we received written evidence from a number of key stakeholders, listed on page 73. We also held three oral evidence sessions, which included taking evidence from the Parliamentary Under Secretary of State for Constitutional Affairs, Mr David Lammy MP, and Clare Dodgson, Chief Executive of the Legal Services Commission.

10. We are grateful to our two specialist advisers during the inquiry: Professor Ed Cape, of the University of the West of England, and Professor Richard Moorhead, of Cardiff University. We would also like to thank the Joint Committee on Human Rights for providing us with their comments on the human rights implications of the draft Bill, published as an Appendix to this report.

4 See paras 137–161 below

2 Background

11. The underlying purpose of the draft Bill and accompanying Consultation Paper is to reduce CDS expenditure. The basic proposals are twofold:

- First, to transfer responsibility for the grant of criminal legal aid from the courts to the Legal Services Commission; and
- Secondly, to reintroduce means testing for criminal legal aid.

The Criminal Defence Service

12. Criminal legal aid exists to ensure that defendants who cannot afford to pay their own defence costs are still able to access legal services when needed. Without this system, some people would be unable to obtain legal advice and representation. This could in turn lead to unfair trials and "inequality of arms" between the prosecution, on the one hand, and the defendant, on the other. Legal aid also helps to protect the rights of defendants and can serve to reduce burdens on the courts.[5]

13. The Criminal Defence Service is run by the Legal Services Commission and its aims are:[6]

- to ensure that the Government meets its statutory and international obligations which provide that:
    - people arrested and held in custody have the right to consult a solicitor privately at any time; and
    - defendants have a right to defend themselves in person, or through legal assistance of their own choosing; or, if they have insufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- to help ensure that suspects and defendants receive a fair hearing at each stage in the criminal justice process; and in particular that they can state their case on an equal footing with the prosecution;
- to protect the interests of the suspect or defendant; and
- to maintain the suspect's or defendant's confidence in the system, and facilitate his or her effective participation in the process.

14. The CDS has responsibility for managing most criminal legally-aided defence services. To a large extent it does this through the General Criminal Contract (GCC), although Very High Cost Criminal Cases are dealt with by individual contracts. Representation in the

5 For example, legal representation can discourage unmeritorious trials and ensure that cases which are brought are argued rationally and coherently

6 'Contract Documentation Overview', *General Criminal Contract, Contract Documentation*, LSC, para 1.2. Available at www.legalservices.gov.uk

Crown Court is not currently covered by the GCC, but since April 2003 the LSC has been accountable for all CDS expenditure in the Crown Court.

Legal representation

15. The current proposals would not impact on all legal work funded by the Criminal Defence Service. They would only affect legal representation. Representation provides for the cost of a solicitor advising and assisting their client in the preparation of their case, representing a defendant in magistrates' courts, and ancillary applications such as for bail. In appropriate cases, it also covers the cost of an advocate (often a barrister) in the Crown Court, as well as advice on appeal against a verdict or sentence and preparing a notice of appeal.

16. Although legal representation is only one element of the legal services funded by the CDS, it represents a significant proportion of total CDS expenditure. Funds paid out in respect of representation account for the majority of the criminal legal aid budget.

Representation orders

17. Criminal legal representation is only funded by the Criminal Defence Service where a representation order has been obtained by the defendant. Although the Legal Services Commission is responsible for funding the CDS, the courts grant representation orders. Most often this is done by magistrates' courts, even if the case is to be tried in the Crown Court. The Justices' Clerks explained to us that, in practice, clerks or other court staff decide whether legal aid should be granted in the majority of cases and that this decision may then be appealed to the court.[7]

Interests of justice test

18. Representation orders may only be granted where it is in the interests of justice to do so. In broad terms, it is in the interests of justice to provide a defendant with free legal representation in cases:

- where the outcome could have serious implications for the defendant, such as imprisonment, loss of livelihood or serious damage to their reputation;
- where the proceedings would be difficult for a defendant to understand or defend in person;
- which involve an important question of law; or
- where representation is necessary to protect a victim or witness against personal cross-examination by the accused.[8]

---

7 Q 32 (Neil Clarke)

8 The test applied by the courts in order to determine whether publicly funded representation is required in the interests of justice is set out in the Access to Justice Act 1999. This is based on the criteria contained in the 1966 Report of the Committee on Legal Aid in Criminal Proceedings, chaired by Mr Justice Widgery (for this reason they are also known as the 'Widgery criteria')

Means testing

19. At present, a defendant's means are irrelevant in the determination of whether or not they should receive publicly funded criminal legal representation. If the interests of justice test is satisfied, the cost of a defendant's legal representation would be paid by the Criminal Defence Service. In the Crown Court, a Recovery of Defence Costs Order may, however, be made at the end of a case resulting in a defendant paying some or all of their legal aid costs.

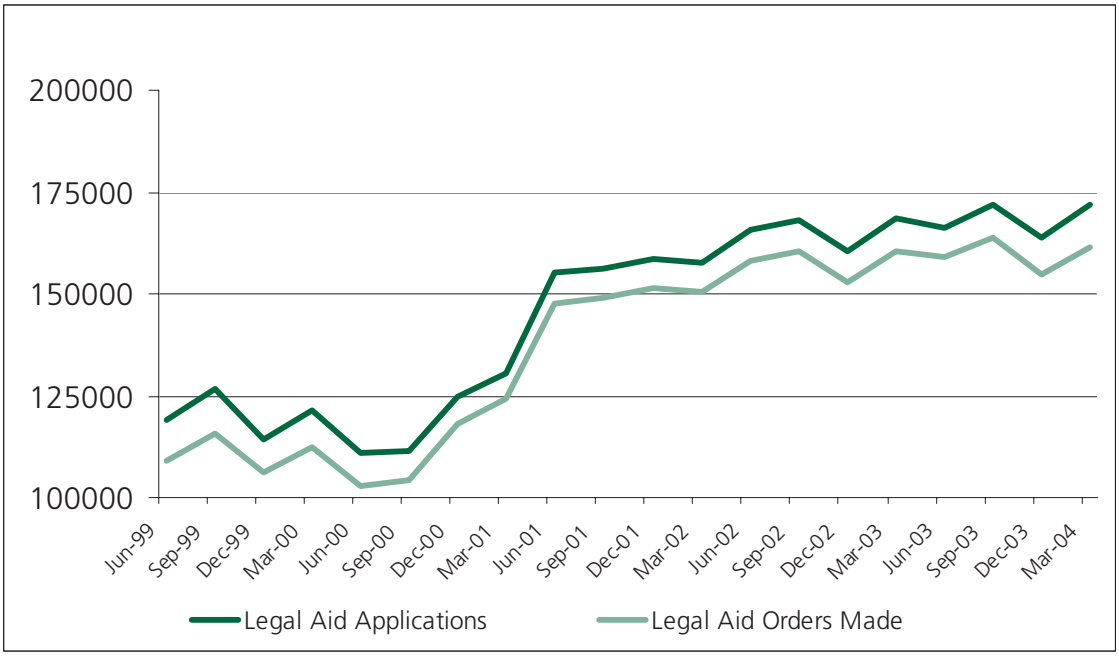
3 The rising cost of the Criminal Defence Service

20. Although the Minister has acknowledged that "legal aid is a vital public service", he has commented that "we need to ensure that we put spending levels on a sustainable footing."[9]

Rising cost

21. The Consultation Paper explains that the volume of grants of legal representation has grown significantly since 2001.[10] This rise is illustrated in Figure 1 below (Volume of representation orders) which shows the volume, per quarter, of applications for and grants of representation orders.

Figure 1: Volume of representation orders



Source: Compiled from data provided by the Department for Constitutional Affairs.

22. The Consultation Paper also explains that spending on legal aid has risen rapidly from about £1.5 billion in 1997/98 to over £2 billion in 2003/04. This is an increase of over £500 million or 37% since 1997/98.[11] The DCA's 2003/04 Annual Report shows that over half of this total expenditure is on the CDS.[12] Since 2000/01 there has been a significant rise in the cost to the CDS of criminal legal representation in the magistrates' courts, illustrated in Figure 2 below (Total Cost to CDS of representation orders). Figure 2 does, however,

9 'Legal Aid Review to Target Funds Effectively', DCA News Release, 14 May 2004

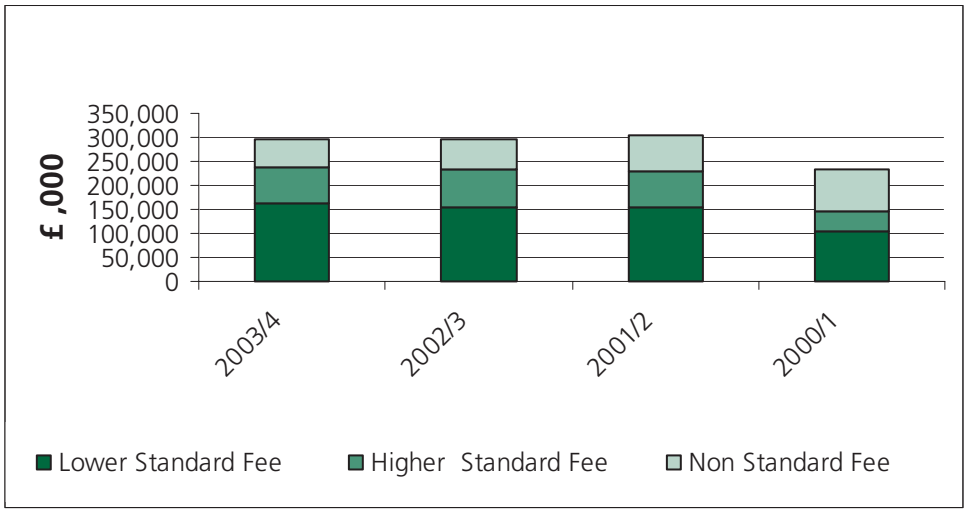
10 *Draft CDS Bill*, para 45

11 *Draft CDS Bill*, para 23

12 *Departmental Report 2003/04*, DCA, Cm 6210

indicate that expenditure on representation in the magistrates' courts has been relatively stable over the past three years.

Figure 2: Total Cost to CDS of representation orders:



Source: Compiled from data provided by the Legal Services Commission

The Law Society has also provided evidence that the cost of legal aid, in particular CDS expenditure and Crown Court and Higher Court representation, has risen significantly since 1999/2000 (Table A: Rising Cost of CDS).

Table A: Rising cost of CDS

Year	CDS Payments Net £m (1)	Crown Court and Higher Representation Net £m (2)	Total Net spend on Criminal Legal Aid £m	Total net spend on legal aid £m	(1) + (2) as a % of total payments
1999/2000	411.0	374.0	785.0	1,552.00	50.6
2000/2001	450.1	422.0	872.4	1,664.40	52.4
2001/2002	508.3	474.1	982.4	1,716.90	57.2
2002/2003	526.4	569.3	1,095.7	1,908.60	57.4

Source: Law Society evidence

Difficulties

23. The Bar Council warned us of the difficulties in using the available statistical information to demonstrate, with precision, the increasing demands on the CDS budget:

> "You have to be careful with these figures all the time … these figures leave out the fact that civil proceedings have diminished within legal aid. If you treat it as a proportion, it is not only a growth in crime and a growth in top crime, all personal injury has come out over the same period, clinical negligence has diminished greatly because of the rationalisation and narrowing, so the proportions do not always tell you very much…The absolute growth also does not tell you as easily what you might want to know because during the relevant period we have gone from entirely *ex post*

> *facto* payment, payment after the event, to a position where some of these big cases have been paid before they begin. So you are having a cashflow clump come into it, the older cases paid two years late and the newer cases paid before they begin or as you go along, so even in terms of the raw growth it is probably overstated."[13]

We ask the Legal Services Commission to estimate the effects of changes in times of payments and the introduction of a system of payments on account on the figures for the cost of Very High Cost Criminal Cases.

24. We have been told of a number of factors which could have created an exaggerated impression of rising legal aid demand and costs. Roy Morgan of the Legal Aid Practitioners' Group explained that the apparent rise in the volume of representation orders could be partly explained by a change in magistrates' court practice.[14] The LSC also acknowledged that the rise in CDS expenditure on representation in the magistrates' courts (shown in Figure 2: Total Cost to CDS of representation orders, above) could be due, in part, to: (A) the fact that post-charge advice and assistance, which would previously have been claimed separately, was included as part of the magistrates' court claim; and (B) an increase in rates of pay.

Consensus

25. Despite such difficulties, none of our witnesses questioned the Department's underlying assertion that the cost of criminal legal aid has risen and many expressly acknowledged that this rise must be addressed. Lord Justice Judge described this as follows:

> "we simply cannot work on the basis … that there is a tree at the bottom of the garden full of ten-pound notes. There is not, and therefore there has to be some control exercised."[15]

The Magistrates' Association similarly acknowledged that "there is a large and continuing increase in the amount of money spent on legal aid, and we accept that the amount available is not infinite."[16]

26. The Consultation Paper states that "it is worth emphasising that the impetus behind the Bill is not only the need to halt the rising costs associated with criminal legal aid, but also to prevent further erosion into the civil legal aid budget. Any cuts that may have to be made into the civil budget will have serious implications for the wider fight against social exclusion."[17] This statement echoes what we found during our civil legal aid inquiry. In our recently published report, *Civil legal aid: adequacy of provision*, we concluded that:

> "Increases in spending on criminal legal aid reduce the availability of money for civil help and representation. Provision for civil legal aid has been squeezed by the twin pressures of the Government's reluctance to devote more money to legal aid and the

13 Q 174 (Stephen Irwin QC)

14 Q 144

15 Q 76

16 Ev 51, para 1

17 *Draft CDS Bill*, para 12

> growth in criminal legal aid, as well as the cost of asylum cases. Whatever action the Government may take to reduce the financial impact of asylum cases on the legal aid system, it is likely that the growth in criminal legal aid will continue to be a burden. There may be scope for bearing down on the cost of criminal legal aid by better case management and a new criminal procedure code."[18]

Why has CDS expenditure risen?

27. Although the fact of rising CDS expenditure is not disputed, the reasons for the rise are. In our call for written evidence, we specifically sought responses to the question "Why has there been such a large increase in spending on criminal legal aid?" Understanding this is vital to ascertaining whether the Department is focusing its efforts on the right areas. A number of our witnesses commented on the importance of identifying the drivers of rising costs. The Law Society, for example, wrote that it is: "important that the major cost drivers in the Criminal Justice system overall are identified, as it is these that will continue to lead to significant budget overspending on criminal legal aid."[19]

28. A number of reasons have been cited for the growing demands on the CDS budget. These include a combination of internal and external factors which are discussed below.

Internal factors

29. The Department has identified the following internal factors as major causes of rising expenditure:

- *Abolition of the means test:* The Department argues that: "Since the abolition of the means test many who previously would have been privately represented or who chose to represent themselves have applied for public funding";[20] and
- *Role of magistrates:* The Consultation Paper comments that "one of the reasons for the increase has been the apparent willingness of the courts, especially magistrates' courts, to grant representation orders."[21]

When asked about the cost drivers of the CDS, the Minister reiterated the Department's view that the current proposals are targeting the major causes:

> "We have got a good analysis of what is driving the cost because we know that there has been a 50% rise, and that has happened since we moved away from means testing and moved to a court-based representation order system. That is clear."[22]

18 *op cit*, HC 391-I, para 13

19 Ev 58

20 *Draft CDS Bill,* para 47. The deterrence aspect of means testing was not appreciated when means testing was abolished in 2001

21 *ibid*, para 40

22 Q 191

External factors

30. A number of our witnesses have questioned the extent to which these internal factors have driven CDS expenditure. The Legal Aid Practitioners' Group, for example, has argued that "the causes of the increases in the CDS budget are almost exclusively external, not internal."[23] Robert Brown of the Criminal Law Solicitors' Association also told us:

> "… are we concerned about the budget always going up, of course we are concerned about it but that is a consequence of the society in which we live and other decisions that are taken. The Government sets targets to increase arrest rates. As we know there are more and more new criminal offences created all the time; very budget-rich policing; the creation of the National Criminal Intelligence Service; the creation of the new Organised Crime Squads. If society wants to tackle crime—and of course we support society doing that—there will be a knock-on effect, there will be more cases. The technologies in the methods of investigating crime are far more sophisticated now than they used to be. We cannot just look at the budget 10 years ago and say, 'What has changed? Why has it gone up?' It is because the police are more active; it is because they use methods of detection in terms of getting access to computer records, mobile telephone records and so on which just did not exist 10 years ago. It is partly a consequence of drivers which are actually beyond the control of those who are responsible for the budget."[24]

31. The Department has denied the significance of such external factors, commenting that "it is likely that the impact of any of these other factors is not that large and do not account for the overall increase in the number of grants."[25] The external factors which have been cited as driving the growth of CDS expenditure are discussed in more detail below.

Narrowing the justice gap

32. The policy of bringing more offenders to justice was cited as one of the most significant drivers of rising criminal legal aid costs by a number of our witnesses.[26] The Legal Aid Practitioners' Group explained:

> "If any initiative is going to increase the numbers of defendants that appear before the courts, where they meet the interests of justice test, it will inevitably increase the requirement for representation and the requirement for representation orders, hence the costs will inevitably go up."[27]

33. The Department has acknowledged that "narrowing the justice gap has led to more cases being brought before the courts".[28] The Legal Services Commission has also acknowledged that the "number of arrests and charges, which is influenced by e.g. crime

23 Ev 47, para 8

24 Q 135

25 *Draft CDS Bill*, para 75

26 Ev 76, para 11(a) and Ev 88, para 5

27 Q 154 (Roy Morgan)

28 *Draft CDS Bill,* para 45. The Department has a target that 1.25 million offenders will be brought to justice by 2005/06, from 1.02 million in 2000/01. Rt Hon David Blunkett MP made a statement last year that 29,000 more people had been prosecuted in the magistrates' court than in the previous year

initiatives [and] new offences created by legislation" has been a cost driver.[29] In oral evidence to us, however, the Minister denied that this policy was a significant cost driver, telling us that:

> "certainly narrowing the justice gap and the work that is emanating from the Home Office is one [driver], but that amounts to perhaps 2% of the overall volume when you consider that the numbers of cases have only risen by 2% ... I am afraid it is too easy to say that because we are bringing more people to justice that by definition has led to rising expenditure on legal aid when you look at the number of cases. It just has not gone up sufficiently to account for that; the volume has only gone up by 2%."[30]

This surprising statistic does not, however, tell us anything about the relative seriousness of the extra 2% of cases. Neither does it indicate how many of the additional defendants would qualify for legal aid.

Sentencing

34. The DCA acknowledges that "changes to the sentencing guidelines meant that there is a greater risk of imprisonment for a range of cases".[31] It follows from this that the interests of justice test, one limb of which is the likelihood of imprisonment, will be satisfied in more cases and, accordingly, that representation will be granted more frequently:[32]

> "Another reason cited for the increase in representation orders (beyond an increase in the number of defendants) is that sentencing has been becoming harsher in recent years, and therefore even within a static profile of cases, the proportion of cases that meets the interests of justice test for representation will have increased."[33]

In 2002 the average prison population was 70,861, an increase of 59% (or over 26,000) since 1993. More recent monthly data shows the population has continued to rise in 2003 and at the end of November 2003 stood at 74,055 people. It is predicted that by March 2005, the total prison population will increase to between 80,600 and 82,300.[34]

Complexity

35. The increasing complexity of criminal conduct, criminal offences and criminal procedures has also been cited as contributing to the rising costs of criminal legal aid. The Bar Council wrote that:

> "The firm practitioner view is that the central driver is increased complexity and trial length. We live in an age of rapidly changing criminal justice policy with annual Criminal Justice Bills, and the last decade has produced major legislative changes in

29 *Legal Services Commission Corporate Plan 2003/04*, LSC, para 3.6

30 Qq 186 &187

31 *Draft CDS Bill*, para 45

32 Ev 59, Ev 22, para 22 and Ev 85

33 Ev 47, para 20

34 Home Office, Research Development Statistics, available at www.homeoffice.gov.uk

> almost every area of law, practice and procedure of which the Human Rights Act, and Proceeds of Crime Act are but two important examples."[35]

The Legal Aid Practitioners' Group also cited the examples of anti-social behaviour orders and the Proceeds of Crime Act which, it explained, have "added complexity to existing cases so that they take longer and are more expensive."[36]

Very High Cost Criminal Cases

36. A number of witnesses commented on the fact that the most expensive cases are consuming a growing proportion of the CDS budget.[37] This is discussed in more detail in paragraphs 171 to 175 below.

Further research

37. A number of our witnesses complained of a paucity of research into the factors which have driven the rising cost of criminal legal aid. The Bar Council, for example, wrote that:

> "The reality is that no systematic work has been done on what the real cost drivers are and the Department appears to concede that the answer is simply not known."[38]

The Justices' Clerks' Society also commented that the "reasons for the increase in the costs in the criminal legal aid budget merit further research before conclusions are drawn."[39]

Legal Aid Review

38. The publication of the draft CDS Bill was accompanied by the announcement of "a far-reaching study into the underlying legal aid system, which will focus on how best to provide legal help to those who need it in the longer term".[40] The Review is expected to report to Ministers early next year.[41] The Law Society has written that:

> "The recently announced Fundamental Legal Aid Review offers an opportunity for a thorough analysis of cost drivers and the Law Society cautions against any hasty and ill thought out measures being introduced until that review is completed."[42]

The Judges' Council has also told us that it is surprised by the timing of the current proposals, "having regard to other matters currently in progress", giving as one example the fact that "the Department has recently set up a Review Board to undertake a

---

35 Ev 84

36 Ev 46, para 6

37 Ev 48, para 25; Ev 60 and Ev 76, para 11(b)

38 Ev 84

39 Ev 57, para 4.1. The DCA's Research Programme for 2004 does not include work on the cost drivers of CDS expenditure. The only item relating to criminal law is 'An exploration of the factors which influence the length of Crown Court trials in different regions of the country', available at www.dca.gov.uk

40 'Legal Aid Review to Target Funds Effectively', DCA News Release, 14 May 2004

41 *ibid*. The Legal Services Commission has commented that "The report from this review is expected in December 2004", para 33

42 Ev 60. See also Q 125 (Evlynne Gilvarry)

fundamental review of legal aid." [43] It also commented that "the Consultation Paper gives no explanation of how the draft Bill ties in with that fundamental review."[44]

39. When we put the Judges' Council's comments to the Minister, he said:

> "it is a fair question, but, with the greatest of respect to the Justices that spoke to you, at the end of the day it is the ministers and the financial officer, in terms of Clare's job, that do have to ensure that the public is getting value for money in terms of the legal aid spend; and that is why I said it would be extraordinary if I just sat here and did nothing for a year because there was a Fundamental Legal Aid Review going on. You have got to act."[45]

The Minister explained that the Fundamental Legal Aid Review is one of the Department's long-term strategies for addressing the rising cost of the CDS but that this must also be combined with short-term and medium-term initiatives, such as the current proposals.[46]

40. **We hope that the Fundamental Legal Aid Review will enable the Department to identify the major factors which have caused the increase in Criminal Defence Service expenditure. The financial savings sought by the draft Bill will only be achieved if initiatives target these major cost drivers. We are concerned that the current proposals have not been integrated with the Review.**

"Joined-up Government"

41. The external drivers of the CDS budget cited above are outside the control of the Department for Constitutional Affairs and the Legal Services Commission. This was highlighted by the LSC in its 2002/03 Annual Report:

> "Other criminal justice agencies continue to make significant changes to law and procedure, the impact of which on CDS expenditure is not taken into account when proposals are developed and costed."[47]

In oral evidence to us, the previous Lord Chancellor acknowledged that this difficulty also exists at a Departmental level. When asked about his Department's overspend on legal aid and whether this was due to initiatives by other parts of government, the former Lord Chancellor told us that:

> "It is absolutely critical when changes to the substantive law are being made, particularly in the criminal field, which have downstream consequences for the courts, that the thing should be looked at end to end and the downstream consequences should be funded and that is a position that I have consistently maintained… One of the problems is that criminal legal aid is demand-led. It is therefore, inherently difficult to predict and in times past we have had underspends and this time we had an overspend, but because something is inherently difficult to

43 Ev 79, para 4

44 *ibid*

45 Q 199

46 Q 193

47 *Legal Services Commission Annual Report 2002–03*, LSC, HC 743, para 3.11

> predict because it is demand-led, you cannot look for perfection in budgeting, but you must do as best you can and I agree with you that it is absolutely critical that changes are not made to the substantive law unless also you take on board the downstream consequences for the courts and fund that."[48]

42. A number of our witnesses have commented that the impact of government policies on the criminal legal aid budget is not taken into account. Rodney Warren of the Law Society gave us two examples of initiatives which would have an impact on the CDS budget, but in which this impact had not been accounted for: (A) the Community Justice Court Pilot, which is being run in North Liverpool; and (B) "Operation Payback", a scheme to chase fine defaulters.[49]

43. A number of witnesses also commented that the impact on other departments of changes to the availability of legal aid should be taken into account. Stephen Irwin QC of the Bar Council also told us:

> "We have seen it again and again in the public funding of legal aid that you only look at this little segment of the budget. Before we make any changes we should be looking at Group 4, the prisons, the Home Office, the probation service, the cost of adjournments—all of it together."[50]

The Law Society also wrote that "the Government must recognise that criminal legal aid is an integral part of the criminal justice budget as a whole. It cannot be tackled in isolation from other aspects of the Criminal Justice System."[51]

44. This was echoed in the information we received during our civil legal aid inquiry. In particular, the Matrix Review of the Community Legal Service noted that there is a need for the DCA to:

> "…undertake more robust legislative impact analysis and seek an undertaking either from the Treasury or other government departments that the DCA's budget will increase by the amount necessary to meet increased demand due to new legislation."[52]

In our recently published report on civil legal aid, we concluded that:

> "It is vital for the Government to ensure that part of the cost calculation of policy initiatives includes an assessment of the impact on the legal aid budget and that there is adequate liaison between the Constitutional Affairs Department and departments such as the Home Office which legislate in relevant areas. This is a key recommendation; we expect the Government to be able to demonstrate that it has

48 Oral evidence, 2 April 2003, HC 611-i, Qq 3–4

49 Q 133

50 Q 165

51 Ev 59

52 The Independendent Review of the Community Legal Service, DCA, April 2004, para 1.3.3 (the Matrix Review)

significantly improved its system for ensuring that legislative changes proposed by departments are costed to take into account the full impact on the legal aid budget."[53]

45. When we asked about steps which had been taken towards achieving a more joined-up approach to criminal legal aid, Clare Dodgson told us that "we are working much more closely with the Treasury and with the Home Office, and when we did our spending review for 2004 we had colleagues from the Home Office and the Treasury who worked with us on that to get a much more joined up picture."[54]

46. **We recommend that the Department should ensure that initiatives rolled out by other Departments, especially the Home Office, are properly costed so that their impact on the Criminal Defence Service budget can be taken into account. This is an essential feature of 'joined up Government' and needs to be done so that the Government can consider the causes of rising costs, rather than merely relying on the Department to tackle the symptoms.**

53 *op cit*, HC 391-I, para 15

54 Q 196

4 Transfer of grant of representation

Proposals

47. The draft CDS Bill proposes that the power to grant the right to publicly funded criminal legal representation be transferred from the courts to the Legal Services Commission. The courts, especially magistrates' courts, would cease to be responsible for applying the interests of justice test and for granting representation orders. Neither would they be responsible for applying the proposed means test.

Who would decide about the grant of legal aid?

48. During the course of our inquiry, we have encountered confusion about who, in practice, would decide whether publicly funded legal representation should be granted. The Consultation Paper states that:

> "The policy intention behind the Bill is to enable the power to grant a right to representation to be transferred from the courts to the LSC. The effect of this in operational terms will be that applications for public funding will be made to the Commission. In real terms the LSC will delegate the authority to grant to solicitors with a General Criminal Contract (GCC) in the most simple cases."[55]

Most of our witnesses have taken this to mean that, in practical terms, solicitors would make grant determinations. The LSC's submission, however, explains that:

> "For 'summary only' offences and less serious 'either way' offences, the funding decision would be made by fully trained LSC staff. We anticipate requiring all solicitors to submit their applications through LSC online which is an electronic transfer of data. Provided all the information has been given within the application we would expect to guarantee a decision within 24 hours in all cases except appeals."[56]

49. In oral evidence to the Committee, the Minister sought to explain this apparent inconsistency as follows:

> "I saw some confusion, when I read the transcript last, about, if you like, serious cases in terms of the interests of justice cases: murder cases, rape cases, cases where there had been a riot. Ironically, despite the fact that the public would see those as extremely serious cases, those are the very cases that are easy to administer because it is fairly clear that interests of justice test is met, that those are imprisonable offences, and then to go on to the means question. So that is fairly straight forward for a solicitor. There are, however, more difficult cases, shop-lifting might be one, that might lead to a custodial sentence, or, indeed, may not, and, in those circumstances, the solicitor would be able to move those up to the LSC."[57]

55 *Draft CDS Bill*, para 39

56 Ev 74, para 87

57 Q 216

This does not, however, explain whether the Legal Services Commission would apply both the merits test and the means test in those cases which are most complicated "in terms of the interests of justice."

50. Although the exact role of the LSC in making grant determinations is unclear, the fact that the LSC would have ultimate responsibility for grant is not doubted. Neither is there any doubt that, in some cases, this responsibility would be delegated to solicitors who would be responsible for making decisions.

Who should make grant decisions?

Budgetary control

51. The Department's proposal to transfer responsibility for grant is partly justified on the basis that:

> "Grant of public funding is not the core business of the courts who are rightly focused on the administration of justice. Courts are not and cannot be expected to be responsible for the monitoring and controlling of publicly funded expenditure."[58]

In its 2002/03 Annual Report, the LSC similarly commented that:

> "CDS spend is significantly driven by factors outside of the Commission's control. For example, we are not responsible for the grant of representation in criminal cases. The magistrates' courts make those decisions. Changes recently made to their granting of legal aid contributed directly to an increase in CDS spend."[59]

This general desire to obtain control of grant determinations was also emphasised in evidence to us. We were told that "we should put the responsibility with the accounting officer, not with the judges, who after all, if you like, have not got the fixed budget in front of their eyes."[60]

Arguments against transfer

Expertise of the courts

52. Both the Magistrates' Association[61] and the Justices' Clerks' Society[62] oppose the proposal to transfer responsibility for grant, arguing that the courts should continue to apply the interests of justice test. Lord Justice Judge supported this, telling us:

> "We are supposed to represent the interests of justice in everything we do. That is our job and that is the job of magistrates and justices' clerks when they are exercising

58 *Draft CDS Bill*, para 16

59 *Legal Services Commission Annual Report 2002–03*, LSC, HC 743, para 3.11

60 Q 201 (the Minister)

61 Ev 51, para 4

62 Ev 57, para 3.8

> their judicial functions. I suspect we are a better judge of the interests of justice than anybody else."[63]

53. A number of other witnesses also commented that it is most appropriate for the courts to retain responsibility for applying the interests of justice test. The Bar Council went as far as to state that:

> "the courts—and not an executive agency—must exercise the right to determine what is in the interests of justice. This is, in essence, a judicial function. As a matter of constitutional principle, questions of representation in criminal cases—where the state brings charges against an individual citizen—ought to be determined by the judiciary and not the executive."[64]

54. Roy Morgan of the Legal Aid Practitioners' Group expressed concerns about the transfer, based on the greater experience of the courts:

> "Were the matter to pass to the Legal Services Commission, there are initial concerns with that. The magistrates' court generally uses clerks to deal with the interests of justice test. They are clerks who have either been in private practice in the past at some time or who have day to day experience of seeing defendants and representatives before them, and they have the experience of understanding a defendant and a defendant's case—and the prosecution case, for that matter. The Legal Services Commission would use, to be blunt, an administrator who has probably … never seen the inside of a court room or a police station or a solicitor's office or has never been confronted with a client before, so there are reservations there."[65]

55. The LSC and the DCA sought to counter these arguments on the basis that: (A) most grant decisions are made by administrators within the court, rather than by the courts;[66] (B) the LSC employs "a number of expert lawyers";[67] and (C) solicitors, who would in practical terms apply the test, already have expertise of applying the interests of justice test in the context of civil legal aid.[68] Although solicitors undertaking civil legal aid work have experience of applying a significantly different interests of justice test, most individual criminal solicitors specialise in criminal law. They would not, therefore, do civil work and would not have had personal experience of applying the test.

Multi-defendant cases

56. Cases involving multiple defendants have been used to illustrate the argument that courts are best suited to make decisions regarding the grant of legal representation. In particular because of the overview of cases available to courts, they may decide that there is no conflict of interest between defendants and, accordingly, that a number of defendants

63 Q 68

64 Ev 86

65 Q 146

66 Q 215 (the Minister)

67 Q 215 (Clare Dodgson)

68 Q 236 (the Minister)

can be represented by a single solicitor or barrister. It would be difficult for such decisions to be made by individual solicitors making grant decisions on behalf of individual clients.

57. The Minister sought to counter this argument on the basis that "I am not sure that that is entirely the same point in terms of the multi-handed cases as the granting of legal aid on the issue".[69] It is exactly in the context of deciding whether or not to grant representation orders that courts make decisions about the number of lawyers needed in a multi-defendant case. If responsibility for making legal aid determinations were removed from the courts it is not clear in what context the LSC or solicitors would be able to make such decisions. Accordingly, one result of the proposals would seem to be that no-one with an overview of the case, and an understanding of the possibility for conflicting interests between defendants, would be able to make decisions about the number of lawyers needed in multi-defendant cases. This could, in fact, lead to an increase in the number of representation orders granted, which conflicts with the underlying aim of the transfer.

Controlling court efficiency

58. We have also been told that decisions as to whether or not legal aid is granted can have a significant impact on the courts and on efficient case management (discussed at paragraphs 150 and 176 to 177 below). Robert Brown of the Criminal Law Solicitors' Association explained:

> "It seems to us that the institution which really has the vested interest in dealing with cases efficiently is the court. The court is the body that has to deal with the case and, if they have the power to grant or refuse a representation order, they have an interest in dealing with it efficiently. If there is a problem or a log jam or cases being held up because the application for a representation order has not been dealt with, there is someone in the court that can tell the legal aid clerk in the court to sort it out, which is what has always happened and happens now, rather than place it in some other location away from the court because it is the court, after all, that wants to get on with the case."[70]

The DCA's 2003/04 Annual Report, illustrates how central an efficient court system is to the Government's overall strategies with respect to the Criminal Justice System.[71]

Conflicts of interest

59. The potential for the transfer of grant to give rise to serious conflicts of interest has been cited as a major argument against transfer by a number of our witnesses. JUSTICE explained that "both providers and the funder of services may have a variety of interests contrary to those of individual defendants".[72] We have been told that these conflicts could threaten the rights of defendants and the envisaged savings to criminal legal aid expenditure.

---

69 Q 221

70 Q 122

71 *Departmental Report 2003/04*, DCA, Cm 6210, chapter 2

72 Ev 44, para 4

60. The Justices' Clerks' Society warned that transfer could lead to a potential conflict of interest between the solicitor's duty to act in the best interests of their client and the pressure to reduce public expenditure, imposed by the LSC under the terms of the General Criminal Contract:

> "The Society is also concerned that, if it is intended that solicitors will deal with the majority of all decisions as to the grant of criminal legal aid, it must inevitably lead to a potential conflict of interest for the solicitor. He or she has to act in the best interests of their client and on the basis of the information provided by their client. To impose on a solicitor the requirement to determine whether a grant is in the interests of justice may inevitably lead to a conflict between the duty he or she owes to the client and the requirement to reduce public expenditure. It is not clear from the paper how this system will operate."[73]

61. On the other hand, we have been told that grant determinations by solicitors could be informed by their own business concerns. Lord Justice Judge, for example, commented that "the purse strings … will be involved in the decision"[74] and the Law Society expressed similar concerns:

> "The Consultation Paper suggests that where the interests of justice are not satisfied or the individual's means are such that he or she is ineligible for public funding, the solicitor will be able to advise the individual whether to proceed by privately instructing that solicitor or by representing himself. The Law Society thinks that such a proposal presents an unacceptable conflict of interest between the solicitor and the client."[75]

When asked whether responsibility for grant should be transferred to solicitors, Neil Clarke of the Justices' Clerks' Society explained:

> "it depends what legal aid and representation orders are about. If they are about the protection of the individual's rights under the law…then giving it to the people who are financially involved within it does seem to have a little bit of a flaw, to somebody looking from the outside."[76]

62. When asked about these concerns, the Minister denied the risk of conflicts of interest.[77] Given the weight and consistency of the evidence we have received regarding the danger that conflicts of interest would arise from the transfer, this is not a satisfactory response. In the context of criminal proceedings, the impact of such conflicts could be serious for the defendant.

63. Conflicts of interest are likely to have a significant impact in less serious cases, where it may be unclear whether the interests of justice require a defendant to have legal representation. As discussed at paragraphs 48 to 50 above, it is suggested that the LSC

---

73 Ev 57, para 3.9

74 Q 67

75 Ev 63. See also Q 102 (Evlynne Gilvarry)

76 Q 38

77 Q 224

would make legal aid determinations in such cases. While this would reduce the concern regarding solicitors' conflicts of interest, it could create a perception that the LSC is making these difficult decisions based on a desire to reduce costs.

Public perception

64. The Bar Council has also argued that defendants would have less faith in legal aid determinations if they were made by solicitors: "The court has no financial interest in the outcome of a legal aid application. Accordingly, judicial determinations of the [interests of justice] test currently have the confidence of applicants".[78] The Legal Aid Practitioners' Group commented that the transfer could create the perception that "lawyers were being allowed to 'write their own cheques' with taxpayer's money"[79] and the Bar Council expressed concerns that the proposal "would seriously undermine the solicitor-client confidence which is at the heart of administering justice".[80]

Asylum appeals

65. There appears to be inconsistency within the Department regarding whether the LSC or the courts are best placed to make determinations as to the grant of legal aid. In relation the provisions of the Asylum and Immigration (Treatment of Claimants, etc) Bill, dealing with the unification of the appeals system, the Lord Chancellor has moved an amendment at Committee Stage in the House of Lords, which would introduce a new Section 103D to the Nationality, Immigration and Asylum Act 2002. This would, *inter alia*, give the Government a new power relating to the funding of review applications in the High Court and subsequent reconsideration proceedings. The Lord Chancellor stated that "this will ensure that we are targeting the most meritorious cases. Instead of the Legal Services Commission taking the funding decision, we will provide the judiciary with the power to order that legal aid is paid in these proceedings."[81] This suggests that, in the context of asylum appeals, the DCA considers the courts to be better placed to make legal aid determinations than the LSC, which is contrary to the proposal in the draft CDS Bill.

Current administration

66. In support of its proposals, the Department has cited a number of shortcomings in the administration of the current system by magistrates' courts. These include that magistrates have been "certainly inconsistent, in applying the interests of justice test";[82] that "there is some evidence that courts have been too favourable to defendants";[83] and that "there is also some evidence that the [interests of justice] test has not been applied rigorously in all courts".[84]

78 Ev 86

79 Ev 51, para 50

80 Ev 86

81 HL Deb, 4 May 2002, Col 997

82 *Draft CDS Bill*, para 40

83 *ibid*

84 *ibid*, para 45

67. Both the Justices' Clerks' Society and the Magistrates' Association have denied these criticisms and argued that they are unsubstantiated.[85] We only received anecdotal evidence as to failings by magistrates' courts in applying the interests of justice test.[86] Neil Clarke of the Justices' Clerks' Society told us: "We are quite happy to be tested and have the point established rather than just saying generally 'You are doing it badly because we think you are'."[87] A number of other witnesses told us that they are surprised by the absence of concrete evidence to support the criticism of current court practice. The Legal Action Group, for example, commented that it was "surprised that no concrete evidence has been presented by the DCA in support of this view". [88]

Inconsistency

68. The Consultation Paper states that "transferring to the LSC the power to grant representation will enable the LSC to use modern management tools to control expenditure, ensuring a consistency which does not normally happen".[89] This was reiterated in oral evidence:

> "One thing I could say, though, is that if we do move to the Commission running this we will have more much more consistent and comprehensive management information. At the minute we have got a fragmented system which is operating inconsistently. We would be able to have a grip on the management information and, very quickly, almost live time, we will be saying, 'Hang on a minute, there is a variation here that is inexplicable. Let's go in and understand what is happening here.'"[90]

69. In response to the criticism that the courts have been inconsistent in applying the interests of justice test, the Justices' Clerks' Society commented that:

> "prior to 2001, there was no criticism of the way in which the interest of justice test was dealt with by the courts … the same people were responsible for considering the interests of justice test before and after 2001. If these individuals have been inconsistent since 2001, it is inconceivable that they were not equally inconsistent prior to 2001."[91]

Figures provided by the DCA indicate that the percentage of applications for representation refused by magistrates' courts has remained relatively constant at between 4 and 5% since 2000 (Figure 3: Refusal Rates, below).

85 Ev 56, para 3.5 and Ev 51, paras 2 and 3

86 See, for example, Ev 48, para 24

87 Q 54

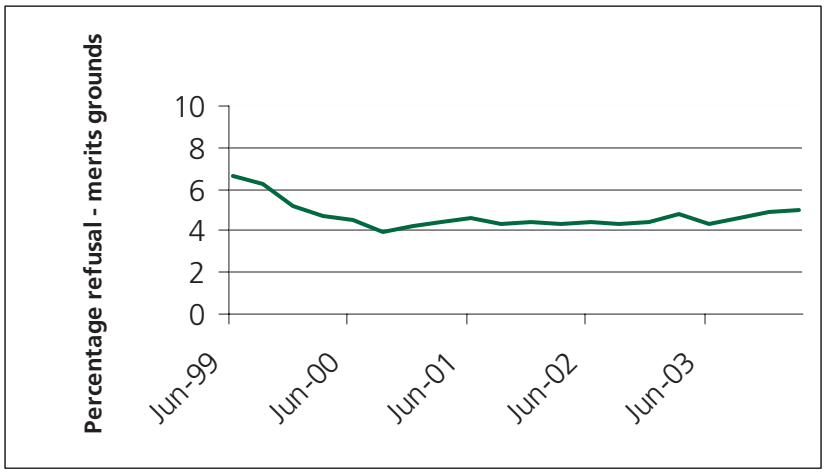
88 Ev 90, para 27

89 *Draft CDS Bill*, para 40

90 Q 207 (Clare Dodgson)

91 Ev 56, para 3.6

Figure 3: Refusal Rates



Source: Compiled from data provided by the Department for Constitutional Affairs.

70. The Judges' Council has questioned the claim that greater consistency will result from the transfer:

> "There is a far greater risk of inconsistency and of decisions unduly favourable to defendants if responsibility for the grant of legal aid is transferred, through delegation by the LSC, to a large number of solicitors with General Criminal Contracts. The greater the number of decision-makers, the greater the scope for variations of approach."[92]

Lord Justice Judge told us "I do not see solicitors—will there be 1500 of them—are going to produce anything more consistent than is produced in magistrates' courts up and down the country".[93] The Bar Council also commented that it is "far from obvious how it will cost less in the hands of those thousands of solicitors rather than 150 court centres. We fear that it would have the effects of even greater inconsistency".[94]

71. When asked about the risk of greater inconsistency arising from the transfer, the Minister told us that "this will effectively be under contract. You strike a national contract, as it were, with individuals. There is much more accountability, much more auditing."[95] Clare Dodgson explained that "we will have strict criteria and protocols for taking these decisions. We have regularly issued guidance because there has been inconsistency, and we know that."[96]

72. Other witnesses have questioned the meaning of the "modern management tools", which the Consultation Paper argues could be applied to solicitors to improve consistency.[97] It is also unclear why these modern management tools could not be applied equally to courts.

---

92 Ev 80, para 10

93 Q 67

94 Ev 85, p 2

95 Q 226

96 Q 226

97 Q 50 (Sid Brighton)

Generosity to defendants

73. The Consultation Paper states that "one of the reasons for the increase has been the apparent willingness of the courts, especially magistrates' courts, to grant representation orders".[98] It also states that "there is some evidence that courts have been too favourable to defendants"[99] and that "the [interests of justice] test has not been applied rigorously in all courts".[100]

74. Mr Clarke of the Justices' Clerks' Society told us:

> "We have been audited regularly and there is no empirical data to say that we are ridiculously generous, just a belief that we are because [CDS spending] is increasing all the time."[101]

Less knowledge of defendants

75. The DCA has commented that solicitors are better placed to make decisions about eligibility for legal aid than courts, which it argues "currently [make such decisions] solely based on the application and the often incomplete case papers available at the time".[102] The Consultation Paper also states that, as a solicitor is instructed to represent their client's interests from the outset, "this gives the solicitor greater insight in considering the question of grant of criminal public funding".[103] The Justices' Clerks' Society responded, that "it is not clear what is meant by the word 'circumstances' in this context" and explained that the circumstances of the case are currently disclosed by the solicitor in the application for a representation order.[104] There is also some inconsistency regarding this justification since, as explained earlier, the LSC has indicated that in less serious cases the interests of justice test will actually be applied by LSC officials. These are precisely the kinds of cases where, according to the argument put forward by the DCA, solicitors would be best placed to make decisions.

Financial and administrative impact

Estimated savings

Reduced courts costs

76. The Consultation Paper explains that the "grant of public funding in magistrates' courts constitutes on average 4.4% of the cost of administering criminal cases through the courts" and estimates that removing this responsibility could save an estimated £9 million a year.[105] It does, however, acknowledge that this figure is not accurate given that it does not

98 *Draft CDS Bill*, para 40

99 *ibid*

100 *ibid*, para 45

101 Q 36

102 *Draft CDS Bill*, para 41

103 *ibid*, para 38

104 Ev 56, para 3.4

105 *Draft CDS Bill*, para 43

include fixed assets, which would not be affected by the transfer of grant, and does not reflect the fact that many individuals involved in the grant are not dedicated exclusively to this task.[106] This was confirmed by the Justices' Clerks' Society who told us that "there is not a great tranche of people who would be subject to TUPE [Transfer of Undertakings (Protection of Employment) Regulations 1981] were this [responsibility] to go elsewhere; it is part of the general administration of the court".[107]

Reduced grants

77. A further point concerns the impact of transferring the interests of justice test on the number of representation orders granted. The transfer is described as "part of a raft of measures aimed at gaining better control over grant because expenditure on criminal representation has been increasing in a seemingly uncontrolled manner".[108] The Consultation Paper does not, however, estimate what impact the transfer would have on the number of representation orders granted and on the overall cost of criminal legal representation. The Legal Action Group commented that it would have expected the DCA to provide "quantification of the impact of the number of orders granted as a result of the transfer of decisions to the LSC".[109]

78. We have received evidence suggesting that the impact is likely to be small. Lord Justice Judge commented that "I do not think this process of changing who decides whether or not legal aid should be granted is, in reality, going to save very much money".[110] The Law Society also made the point that:

> "it is unclear whether or not this will lead to a subsequent reduction in the number of representation orders and therefore reduce the cost to the criminal legal aid budget. The interests of justice test will remain the same and therefore we would predict that there is unlikely to be a significant reduction in the number of representation orders granted."[111]

Downstream costs

Solicitors

79. JUSTICE wrote that "the [Consultation] paper suggests that the courts will make saving of some £9m by transferring this task to solicitors. It would appear somewhat cynical to transfer this to solicitors on the basis that they will undertake it for free." [112] The LSC suggested that solicitors may expect to be paid, depending on the means testing model adopted:

---

106 *ibid*

107 Q 32 (Neil Clarke)

108 *Draft CDS Bill*, para 40

109 Ev 87, para 3

110 Q 76

111 Ev 62

112 Ev 45, para 10

> "The additional work generated for solicitors through models one and three may lead to remuneration issues, with the profession contending that this is new work for which they expect to be paid, so reducing any anticipated savings. We believe that the simplicity of model two would lessen both of these risks."[113]

When asked whether it was intended that solicitors would be paid for making grant decisions, the Minister indicated that this had not yet been decided:

> "We are consulting. They will no doubt indicate how they feel about this. What I would say is that I would expect the scheme that would come forward to be simple in application and to be part of the general contract."[114]

The cost of any payments to solicitors has not been taken into account in the Consultation Paper.

80. The Partial Regulatory Impact Assessment estimates that the cost involved for solicitors from the proposals "will be up to £1,000 per supplier".[115] This seems unrealistically low given the substantial impact means testing would have on the workload of solicitors (discussed at paragraphs 137 to 140 and 143 to 145 below); the fact that collecting contributions would increase the banking and accounting requirements of many firms; and the suggestion that solicitors would need to acquire and maintain IT systems to enable them to submit funding applications to the LSC in some cases. Furthermore, this estimate does not reflect the continuing cost implications of these additional responsibilities for solicitors.

The Legal Services Commission

81. The Partial Regulatory Impact Assessment also accepts that the transfer of grant will have cost implications for the LSC:

> "The Legal Services Commission has estimated that the transfer of grant to their control would cost about £800,000 to set up with the running costs of £400,000 a year. Start up costs include staffing costs, IT development, recruitment, training and equipment."[116]

82. We received evidence about the volume and speed of the work that the Legal Services Commission would be required to undertake if it were to assume responsibility for grant, particularly if it were to make determinations itself in some cases. Rodney Warren of the Law Society said:

> "there is a similar process that operates now in terms of civil law actually for the grant of some types of legal aid order … We are talking here about a much bigger process potentially. I do not know what the numbers of applications would be, but they would be great. Of course court hearings these days come very quickly after charge, so the time available to undertake this process is very limited. Very often a

113 Ev 70, para 60

114 Q 247

115 *Draft CDS Bill,* Partial Regulatory Impact Assessment, para 28

116 *ibid*, para 29

> defendant will be in court within three days of charge and so the time for turnround has to be quick to enable it to operate. I would be very keen to see exactly how they would propose that this would operate effectively."[117]

83. When asked what the LSC would have to do if it assumed responsibility for grant, Clare Dodgson explained that:

> "There are a number of things we would be able to do if … these options were brought in. Firstly, we would propose setting up two dedicated process centres; so that would maximise the use of technology, e-mail, telephones and so on … we could have a team of experts who specialise, say, in family or in different areas of criminal law… We could also invest more effectively in staff training and development… we would say, 'Right, we are going to have seminars."[118]

84. We also received evidence about the additional burden to the LSC of auditing the application of the means and merits tests by the solicitors, including checking that adequate and reliable evidence of means has been collected. When asked about this, Clare Dodgson admitted that this auditing would also involve a set of additional costs.[119] In our report on civil legal aid we concluded:

> "... the current system of auditing solicitors' costs is arbitrary, inaccurate and bureaucratic. Furthermore, it is not linked to quality of advice given. It is clearly punishing competent and honest solicitors and is operated in a way which completely fails to attract the support of the profession. This is the most serious criticism of the current system for managing legal aid work that we have found. A solution is urgently needed."[120]

Clare Dodgson admitted that the current system was not perfect and that changes would have to be made. It would seem a little ambitious for the LSC to attempt to audit solicitors' compliance with means and merits tests, when they have yet to put the basic auditing system in order.

85. The transfer of grant would clearly have substantial implications for the LSC. It would impose significant administrative burdens in terms of consulting with, and the auditing of, solicitors; IT systems would need to be developed and maintained; additional specialist staff would have to be recruited, and their salaries paid on a continuing basis; and many criminal law solicitors would require training. It seems over-optimistic to estimate that this would cost only £800,000 in the first year and £400,000 in subsequent years.

The courts

86. Even though these proposals would remove a responsibility from the courts, it is possible that they would not reduce, but instead increase, court expenditure. The LSC suggests that it would make legal aid determination within 24 hours. Even this apparently

117 Q 121

118 Q 239

119 Q 248

120 *op cit*, HC 391-I, para 87

short time period could cause delays and adjournments given that defendants are generally produced before a court on the next sitting day following charge.[121] As discussed at paragraphs 146 to 149 and 152 to 154 below, the introduction of a means test could cause delays and increase the number of unrepresented defendants. These downstream implications would impact on the efficiency and cost of the court service.

87. **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 evidence the Department has to substantiate its claims that magistrates' courts have been inconsistent or over-generous in applying the 'interests of justice' test; and**
- **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.**

Other options

Guidance to courts

88. The Justices' Clerks' Society argued that, if evidence of inconsistency is produced, practical measures should be taken to ensure consistency in the magistrates' courts, rather than removing responsibility for grant from them. In particular, it called for "improved guidance on the interpretation of the statutory criteria governing grant," explaining that "the Society has already commenced work on these aspects of the process and made a proposal that some courts be used as 'pilots' for testing out the new guidance to see if the rate of application or grant is affected."[122]

89. This option was considered by the Department, as an alternative to the changes proposed in the draft CDS Bill.[123] It states that the DCA already provides guidance to

121 Sections 47 and 47A of the Police and Criminal Evidence Act 1984, taken with Sections 46 and 50 of the Crime and Disorder Act 1998, provide that defendants are required to be produced at the next sitting day of the court where possible if they have been granted bail or to an early administrative hearing, if otherwise. This is commonly interpreted as a period of 24 hours from charge, and is used to facilitate the processing of minor offenders in an efficient fashion

122 Ev 57, para 4.2

123 *Draft CDS Bill,* Partial Regulatory Impact Assessment, paras 20–22

courts on the grant of criminal legal funding but that there remains inconsistency and that the guidance is not binding in any way.[124] Accordingly, it has rejected this option.[125]

Restricting the interests of justice test

90. The Consultation Paper explains that, if responsibility for grant were transferred, the General Criminal Contract would contain binding instructions to solicitors regarding their application of the interests of justice test.[126] Concerns have been expressed about the fact that extra-statutory guidance, issued by the LSC to solicitors, could restrict the application of the interests of justice test. Cindy Barnett of the Magistrates' Association told us that "there is a potential danger in that if it is a question of tightening up or restricting the interests of justice test that would be relatively easy to do through directions to solicitors who are already involved in the General Criminal Contract".[127] She also said:

> "We did not quite understand in what way there would be a restriction, bearing in mind the phraseology of the interests of justice test, but it certainly worried us that there was one suggestion—I am not quoting here—that it should definitely be that the likely effect would be imprisonment."[128]

Witnesses have pointed out that the application of the test must remain flexible and be capable of taking account of a number of factors. For example, a minor offence could have serious implications for a defendant, even if a custodial sentence is unlikely. A person fined for common assault may find the conviction raised in the context of divorce and child contact proceedings.

91. The Joint Committee on Human Rights has highlighted the fact that Section 3 of the Human Rights Act 1998 requires the interests of justice test to be interpreted in accordance with Article 6(3)(c) of the European Convention on Human Rights (discussed at paragraphs 162 to 165 below). The Joint Committee warns that Article 6(3)(c) could be breached if the LSC were to issue guidance that requires solicitors to apply the test in a way which is less favourable to defendants than the current application by the courts.[129]

92. When the DCA and the LSC were asked about these concerns we were told that, while guidance would be issued, the aim of this guidance would be to clarify rather than restrict the interests of justice test.[130]

---

124 For example, it announces the issuance of such guidance in Lord Chancellor's Department, *Delivering Value for Money in the Criminal Defence Service*, para 6.1.3

125 *Draft CDS Bill,* Partial Regulatory Impact Assessment, para 22: "There would be no guarantee that new guidance would achieve the savings required to bring the legal aid budget back on to a sustainable basis"

126 *Draft CDS Bill*, para 17

127 Q 39

128 Q 53

129 Appendix, p 67

130 Qq 235–238 (the Minister and Clare Dodgson)

Statutory amendment to the test

93. The Justices' Clerks' Society commented that "if too much legal aid is being granted, this may indicate that the criteria [set out in the Access to Justice Act 1999] need review".[131] Mr Clarke of the Society also told us that "if the Government wants to issue a new criteria by which we can operate, which is stricter, then that is another issue".[132]

94. **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.**

Necessary safeguards

95. JUSTICE explained in its written evidence that, when the Conservative Government introduced reforms on contracting legal services, it had intended that responsibility for grant would be transferred from the courts to the LSC.[133] In oral evidence, Roger Smith of JUSTICE told us that:

> "What Lord Mackay, to his enormous credit, proposed was that this transfer of responsibility would be done within a structure where there would be a trail of appeal that ended with an independent appeal body of some kind, and with a failsafe power to the courts to grant legal aid. Those parts of his original scheme have been taken out of this Government's proposals, and I would very much hope that you would support their reintroduction because they are necessary to provide some safeguard for defendants against miscalculation and mistake."[134]

Fallback power

96. JUSTICE also commented that "there will be instances where the court considers that legal representation must be granted in the interests of justice and that a miscarriage may follow if this does not happen."[135] It recommends that judges should be given a fallback power to grant publicly funded representation where they consider that this is the case. The current proposals do not contain any such fallback power.

97. In Scotland, both the Scottish Legal Aid Board and the courts have the power to grant publicly funded legal representation for trials involving less serious offences. At present, Scottish courts may grant legal aid where the defendant has not previously been sentenced to imprisonment and where the court is considering a custodial sentence. In these cases, the courts need only consider whether the defendant could pay their own legal costs

131 Ev 57, para 3.8

132 Q 40

133 Ev 44, para 3

134 Q 5

135 Ev 44, para 5

without undue hardship to them and their dependants. The Scottish Legal Aid Board is currently engaged in consultation following a review of summary criminal legal assistance.[136] The review recommended that the existing powers of the courts to grant summary legal assistance should be extended:

> "The powers of the court to make publicly funded representation available, where it is felt desirable for the accused to be represented, should be extended so that a 'safety net' is provided by, for example, appointing a duty solicitor or by the Board employing a solicitor under its powers."[137]

98. When we asked the Minister about the idea of such a fallback power being given to the courts, he commented:

> "I would like to indicate that I am open to that option. I think that is something I would expect to come back in the consultation, and certainly the whole spirit of this consultation is not to be fixed about that position; if there are strong arguments for that then we would want to consider them very carefully … I understand that that is available in Scotland, and, as I have indicated, I would be open to that as a recommendation coming forward. Let's look at the strengths and merits of it, let's look at the costs implications of it and let's come to a decision."[138]

Appeal right

99. JUSTICE has also recommended that the proposals should include an appeal right against grant decisions made by solicitors. Roger Smith has been quoted as saying that: "defendants must not be left without adequate remedies if a decision is wrong".[139] No such right of appeal is proposed in the Consultation Paper.

100. Article 6(1) of the European Convention of Human Rights provides, *inter alia*, that:

> "in the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

When we asked whether this Article would require the establishment of an independent appeal mechanism if responsibility for the grant of publicly funded legal representation were transferred, we were told by Roger Smith "…this is a civil right and obligation and … therefore, you are entitled to a fair and impartial determination …"[140] The Joint Committee on Human Rights has also stated that a right of appeal to an independent court or tribunal is required by Article 6(1) and 6(3)(c) of the European Convention on Human Rights.[141]

---

136 'Proposals for the Review of Summary Criminal Legal Assistance', Scottish Legal Aid Board, June 2004

137 *ibid*, para 1.4

138 Qq 240 and 242

139 JUSTICE, Press Notice announcing the submission of evidence to the Committee, 27 May 2004

140 Q 20

141 Appendix, p 67

101. A number of other witnesses supported the argument that, if responsibility for grant were transferred from the courts, an appeal mechanism would need to be introduced. For example, Sid Brighton of the Justices' Clerks' Society commented that "there needs to be some appeals procedure if it is purely going to be down to a solicitor deciding whether a person should or should not have legal aid and there is no appeal against it. It could be very unfair and lead to a lot of injustices."[142]

102. When we put these comments to the Minister, he told us:

> "Ultimately, I am guided very much by what is already happening on the civil side and has been happening for some time. In that sense there is an appeal mechanism to a binding review committee and…there is of course judicial review. If I look at the amount of challenge, it is small relative to the size of the system and I would not want to reinvent the wheel, but I would certainly want some appeal mechanism. I think it is important."[143]

In the context of civil legal aid, if funding is withdrawn by the LSC, any legally aided individual has a right of appeal to a Funding Review Committee, made up of solicitors and barristers from private practice.

103. Although the Judges' Council agreed that an appeal process would need to be introduced if responsibility for grant were transferred, it has highlighted some potential difficulties. Lord Justice Judge told us that he "would much rather not get involved in having to hold the case up while the appeal process was afoot."[144] This illustrates the need for any appeal mechanism to be simple, economic and expeditious. If the only appeal mechanism were judicial review, this would exacerbate the risk of delays, as judicial review is a time-consuming and expensive process. Mr Justice Richards also told us:

> "It is not clear to me who would bring the appeal. The hypothesis, as I understand it, is that the solicitor has said, 'This is not in the interests of justice', and has refused legal aid. Is the defendant therefore meant to bring the appeal in person? Of course, he is not going to be very well able to set out the reasons why an appeal should be allowed."[145]

104. **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.**

142 Q 56

143 Q 243

144 Q 71

145 *ibid*

5 Means testing

105. The Department proposes that, in addition to the interests of justice test, defendants would be required to satisfy a means test in order to be eligible for publicly funded criminal legal representation. The proposed CDS Bill does not contain the features of the means test to be adopted. Instead it would create delegated powers, enabling the details of the means test to be set out in secondary legislation.

106. The DCA has described the purpose of the draft Bill as ensuring "that the taxpayer receives best value for money from the Criminal Defence Service".[146] It states that "means testing would ensure that those defendants who can afford to pay their legal costs do so,"[147] and comments that "it has always been the will of Parliament and a cornerstone of the Department's legal aid policy that those who can afford to pay for their defence should do so."[148]

Abolition of means testing in the Access to Justice Act 1999

107. Means testing for criminal legal aid would not be a new phenomenon. It currently applies in some types of CDS work and also applied to criminal representation until 2001. Means testing for criminal legal representation was abolished under the Access to Justice Act 1999. Two main reasons were cited for its abolition:

- *Cost and Bureaucracy*: The previous means testing regime was described as "ineffective and wasteful" and the "cost of means testing and enforcing contribution orders [was] high in relation to the contributions recovered".[149] The Consultation Paper acknowledges these difficulties with the previous system.[150]

- *Delays to the Legal System*: The Department has also acknowledged that there were indirect costs of the old means testing system "such as delays through adjournments caused by the need to obtain substantial supporting documentary evidence of means before legal aid could be granted".[151]

108. In a paper published in December 2001, Pascoe Pleasence, Head of the Legal Services Research Centre commented that:

> "In relation to Criminal Representation, financial eligibility testing was effectively abolished in April 2001… Given that the vast majority of persons assisted by criminal legal aid were financially eligible under the previous arrangements, such a

146 *Draft CDS Bill*, para 14

147 *ibid*, para 18

148 *ibid*, para 2

149 Explanatory Notes to the Access to Justice Act 1999, paras 30-31. In 1997/98 the value of contributions paid was £6.2 million and the direct cost of assessing and collecting contributions was approximately £5 million

150 *Draft CDS Bill*, para 7

151 *ibid*, para 8. This is also cited in the Explanatory Notes to the Access to Justice Act 1999, paras 30–31

> move involved little cost, yielded substantial administrative savings, and recognised fully the state role in the Criminal Justice System."[152]

109. In its evidence to the Committee, JUSTICE stated that the Consultation Paper "somewhat understates the problems that arose under the [means testing] arrangements that were abolished by the Access to Justice Act 1999".[153] JUSTICE also referred us to a critical Public Accounts Committee Report from 1998, which commented on the lack of sufficient evidence of income and expenses considered by the courts and the inaccuracy of their calculations.[154] The LSC is also concerned about the danger that the reintroduction of means testing could lead to their accounts being qualified. In its submission, it identified Models 1 and 3 as carrying particular risks in this regard.[155]

110. Magistrates' courts were responsible for administering the previous means test, abolished in 2001. The Justices' Clerks' Society commented on the scope for abuse of the old system, including the provision of false information by defendants.[156] The Magistrates' Association has explained that "the verdict on earlier schemes was that they were 'cumbersome and unworkable' and "the models described here may vary in detail but all have to involve means forms and documentary evidence to support claims."[157]

111. This evidence was also supported by the senior judiciary. Lord Justice Judge told us:

> "My concern … is that we got rid of [means testing] in the Act of 1999, the change came into force in 2001 and we really, if we are going [to] introduce a means-test system, have to do a lot better than the system that was thought so inefficient that it was abolished. I do not see that here."[158]

Suggested models

112. The Consultation Paper explains that the major tension in deciding on an appropriate means test is that between fairness and simplicity. It comments that the means test model adopted must balance the following needs:

- ensuring that help is focused on those that need help the most;
- protecting the fundamental rights of the accused;
- ensuring that the means test does not cause delay in the Criminal Justice System as a whole;

152 'Targeting and Access to Justice: An introduction to Legal Aid Reform in England and Wales', Pascoe Pleasence delivered at the Pan Pacific Legal Aid Conference, Tokyo in December 2001

153 Ev 45, para 8

154 *Criminal Legal Aid Means Testing in the Magistrates' Courts*, Thirteenth Report of the Committee of Public Accounts, Session 1997–98, HC 416

155 Ev 65 and 66, para 11

156 Ev 55, para 2.2

157 Ev 52, para 6

158 Q 78

- ensuring that the process does not cost more to administer than it saves and demonstrates value for money; and

- the affordability of contributions to be paid by an assisted person.[159]

113. The Consultation Paper suggests three possible models but explains that:

> "These are not intended to represent a concluded view but are rather a means of exploring the issues. Nor is it suggested that these models represent the only ways in which the means test might be implemented … None of the models should be considered in isolation and it may very well be that the final framework represents a hybrid that borrows thinking from a number of different sources."[160]

There follows a summary of the three suggested models.

Model 1—net income

114. Model 1 is broadly based on the means test that existed prior to the Access to Justice Act reforms. It is, however, designed to reduce the level of bureaucracy that existed under that regime. This model would require defendants to provide evidence of their income, expenses and capital. The means of the defendant and of their partner would be calculated together to determine eligibility.

Magistrates' courts

115. Depending on their "disposable income and capital", a defendant would receive free representation, be required to make a contribution to the cost of his defence or would not qualify for help at all:

- *No Contribution*: If the defendant receives means tested benefit or has disposable income of less than £91 a week and disposable capital of less than £1000.[161]

- *Contribution*: If a defendant is not entitled to free help, a contribution would normally be required, amounting to 10% of the average standard fee for the case.[162] The Department has estimated that the average contribution would be a "little over £50".[163]

- *Help refused*: Where it is apparent that a defendant's income or capital is such that they could pay the costs of the case without recourse to public funds (the Consultation Paper provides no details as to how this would be measured).

---

159 *Draft CDS Bill*, para 50

160 *Draft CDS Bill*, paras 55–56

161 The Consultation Paper states that, prior to the Access to Justice Act, 95% of defendants or their partners were in receipt of means tested benefit or qualified for legal aid without paying a contribution

162 Where a case is simple, the lower standard fee would be £344 and the defendant would be required to pay £34; where the case is more complicated, the higher standard would be £868 and the defendant will be required to pay £87. Non-standard fees are payable in about 6% of cases and the average non- standard fee is £1,800. A defendant would thus be required to pay £180

163 *Draft CDS Bill*, para 83

Crown Court

116. Model 1 could require a defendant to make contributions to the costs of their legal representation in the Crown Court. Where a contribution is required for Crown Court cases, a defendant would be required to pay the lower of 10% of the total estimated costs or £2,000.[164]

Advantages and disadvantages

117. Model 1 is perhaps the fairest of the proposed models as it takes account of outgoings in deciding what a defendant can afford. However, this makes it the most complex model. It would require solicitors to collect information on income, outgoings and capital which could cause delays. Furthermore, solicitors would have the burden of collecting contributions from their clients. The affordability of contributions may also be an issue, especially in the Crown Court, where a defendant could be required to pay up to £2,000.[165] For defendants required to make a contribution, solicitors would have to predict the category of fee claimable from the LSC at the end of the case. They are unlikely to be able to do this accurately.

118. The Consultation Paper estimates that this model could lead to net savings of somewhere between £23.8 million and £61.8 million (median—£47 million). The Department estimates that only £1 million of this would come from contributions in magistrates' court cases and that only £3 million would come from contributions in Crown Court cases. The majority of the savings would come from defendants being denied help altogether or from being deterred from applying for legal aid (see paragraphs 159 to 161 below). It gives no estimate of the cost to either the LSC or defence solicitors of monitoring and applying this means test and of collecting contributions.

Model 2—all or nothing

119. Under this model, either a defendant's legal costs would be covered in full by the CDS or the defendant would have to cover all of their own legal costs. This is decided on the basis of gross household income and capital; it does not take account of a defendant's outgoings. The model does not provide for the payment of contributions.

120. The full costs would be covered if a defendant is in receipt of means tested benefit OR has: A) gross household income of not more than £25,000; and B) gross capital of not more than £5,000. If income or capital exceeds these limits, the defendant would be ineligible for legal aid in the magistrates' court.

121. This model would only apply in magistrates' courts. Cases which may only be tried in the Crown Court would not be means tested before grant and could be subject to a Recovery of Defence Costs Order in the normal way. Cases which may be tried in either the magistrates' courts or the Crown Court would be means tested in the magistrates' court

164 Prior to the abolition of the means test, only 1% of defendants (750) contributed towards the cost of their case in the Crown Court. The Department estimates that, if this model were adopted, "about 7,750 defendants [in the Crown Court] would be required to pay on average £500" (*ibid*, para 85)

165 For example, a defendant with disposable household income of £92 could be required to make an upfront payment of up to £2000

but, if committed to the Crown Court for trial, a defendant who had failed the means test previously would be able to reapply for public funding.

Advantages and disadvantages

122. The main advantage of this model is its simplicity. Solicitors would not be required to obtain either evidence of outgoings or to collect contributions from clients, although it would still require them to obtain evidence of income and capital. As means testing would not apply in the Crown Court, this model would create a perverse incentive for defendants to elect trial in the Crown Court instead of in the magistrates' court. The model is also the least fair for defendants. The cost of representation could substantially exceed a defendant's disposable income and capital and the scheme would particularly work to the disadvantage of defendants whose gross income or capital is only marginally above the limits. This model is the most likely to have adverse access to justice implications.

123. The Department has estimated that this model would lead to about 4,000 fewer grants of legal aid and that it could lead to net savings of between £25 million and £62 million (median—£39 million).[166] It gives no estimate of the cost to either the LSC or defence solicitors in monitoring and applying the test or of any downstream costs which would result from the potential increase in unrepresented defendants.

Model 3—sliding-scale contributions

124. This model would involve a defendant paying a contribution, the amount of which would increase according to the defendant's gross household income. Like Model 2 this model does not take account of a defendant's outgoings.

Magistrates' court

- *No contribution* would be payable where a defendant receives means-tested benefit or where their gross household income is below £10,000 (unless their gross capital is over £5,000).

- A *Contribution* would be payable where gross household income exceeds £10,000. The amount of the contribution would vary according to the level of income.[167] The Government has estimated that the average contribution would be "a little over £150".[168]

- *No Legal Aid* would be payable where gross household income exceeds £30,001 OR the defendant has gross capital of over £5,000.

166 *Draft CDS Bill*, para 91

167 The contributions would work as follows: (A) gross household income £10,000 to £15,500, contribution £75; (B) gross household income £15,501 to £20,000, contribution £150; (C) gross household income £20,001 to £25,000, contribution £225; and (D) gross household income £25,001 to £30,000, contribution £300

168 *Draft CDS Bill*, para 101

Crown court

125. Very High Cost Criminal Cases (VHCCC) would not be means tested but would be subject to a Recovery of Defence Costs Order at the end of the case. For other cases which proceed to the Crown Court, the same means test would apply but there would be no upper gross income limit.[169] Instead, if a defendant's gross household income were between £30,001 and £44,999, he would have to make a contribution of a third of the amount by which his gross household income exceeds £30,001. This would be subject to a maximum contribution of £4,999. The Government has "assumed that the average level of contribution would be £2,000".[170]

Advantages and disadvantages

126. This model is simpler than Model 1 as it is based on gross rather than disposable income and capital. It could be fairer than the other models because the contributions, linked to income rather than the cost of the case, are likely to be more manageable for defendants. On the other hand, the cost of the contributions could still exceed a defendant's disposable income and solicitors would be required to obtain contributions from clients. The contributions payable in Crown Court cases could be considerable, especially if defendants were expected to pay up front.

127. The Consultation Paper estimates that this model could lead to net savings of between £45 million and £93 million (median—£69 million). Of this, the Department estimates that £2.9 million will come from contributions in magistrates' court cases and that £1.5 million will come from contributions in Crown Court cases. It gives no estimate of the cost to either the LSC or defence solicitors in monitoring and applying a means test and collecting contributions.

Analysis of Model 2

128. The LSC suggested in written evidence that Models 1 and 3 are probably unworkable since they rely on the collection of contributions. It concludes that:

> "The additional work generated for solicitors through models one and three may lead to remuneration issues, with the profession contending that this is new work for which they expect to be paid, so reducing any anticipated savings. We believe that the simplicity of model two would lessen both of these risks. It is worth highlighting that legal aid rates have remained frozen since April 2001 and prior to that there was no increase in rates for 7 years. Solicitors contend that rates have not kept pace with inflation. The recent scope cuts have affected the profitability of crime work still further and it would be fair to say that in the current climate, the profession is unlikely to co-operate in undertaking more work without extra payment. Given these risks, it is our view that solicitors are likely to refuse to undertake anything but

169 Either-way cases would initially be subject to the magistrates' courts rules. If the case were committed to the Crown Court, the defendant could reapply for funding and would be subject to the slightly different Crown Court rules. Indictable only cases would only be subject to the Crown Court eligibility rules

170 *Draft CDS Bill*, para 103

> a simple means assessment test and will not be prepared to collect contributions on our behalf. Our preferred model is therefore model 2…"[171]

Roger Smith of JUSTICE, concurred with this view stating that "it seems to me that those drafting this paper have, classically, put in three options and two of them at least do not fly, so the only serious one is the second one."[172]

129. The professions agreed with the LSC's initial statement, the Legal Aid Practitioners' Group commenting that:

> "We are wholly opposed to the idea that solicitors should have to calculate and collect contributions to costs."[173]

The Law Society also confirmed that it is opposed to solicitors being required to collect contributions, noting that: "we think it is unrealistic to expect solicitors to have to chase clients for unpaid contributions, not least because of the additional cost to the firm in so doing."[174]

130. In oral evidence, the Department sought to refute these criticisms and Clare Dodgson clarified the LSC's written submission as follows:

> "… what the Commission has said is it has expressed its preference from where it sits … that …our preference would be for option two; but if the decision were for one of the other options or a hybrid of the three, then, of course, we have made previous options work, we would make whatever the Minister's decision on what the new one would be work."[175]

131. Whilst we agree that, of the three suggested models, Model 2 would be the simplest and easiest to operate, it would also be the least fair for defendants. The Minister has acknowledged that "I do not think we were pulling any punches in terms of Model 2, indicating, as I think we said there, that the model has the benefit of simplicity, but we also went on to say that clearly anyone earning over £25,000 would be cut off".[176]

132. Of the three proposed models, Model 2 is the most likely to raise access to justice and human rights concerns. Given that many of the key details are missing, such as how the "gross household income" test would apply, it is impossible to reach a firm conclusion on whether Model 2 would be human rights compliant. It is, however, likely that many defendants, who live in a household with a number of dependants, could not afford to hire a lawyer privately, even where their household income exceeded the £25,000 threshold.[177] In such circumstances, it is probable that the courts could find a breach of Article 6(3)(c) of the European Convention on Human Rights (the human rights implications of means testing are discussed in more detail at paragraphs 162 to 165 below).

171 Ev 70, paras 60–63

172 Q 12

173 Ev 46, para 5

174 Ev 61, p 10

175 Q 245

176 Q 258

177 Especially given that, if denied legal aid, higher private client rates would apply

133. Many of the practical difficulties with the current proposals in terms of delay and added bureaucracy would apply equally to Model 2.

Household income

134. The proposed models, including Model 2, rely on an arbitrary assessment of household income which has been heavily criticised by witnesses. Roger Smith of JUSTICE complained that the concept of gross household income has not been properly defined:

> "The second [model] is full of problems, if you start picking it apart, because although the income test is in relation to the individual concerned, the capital test is a household capital test. So a solicitor will be required (a) to define who is a member of the household of the defendant and (b) what is their capital. Clearly, the drafters have not had in mind the extended family; a situation where, maybe, it is the grandson who is on trial but the grandparents who have got the money—the grandparents have just retired and they have £26,000—and the grandson has not got anything but he is above Job Seeker's Allowance. It is not a logical test. A person who stands before a court as a defendant stands alone (certainly an adult does) and their parents and background is somewhere in the background. So you have, it seems to me, to have individual tests of capital and income, and once you ask solicitors to decide the rules on a household you get into problems."[178]

The Legal Aid Practitioners' Group also commented on this aspect of the proposals, stating that:

> "A model that cuts off entitlement based on household income, with no consideration of the numbers in the household, does not appear just. A single man on £25,000 would be more able to pay (or at least to pay something) than a married man with two children on the same total household income. Given that many defendants are juveniles or young adults living at home, would the income of parents, brothers and sisters be included?"[179]

135. Neither the Department, nor the LSC has been able to provide a satisfactory explanation of how the "gross household income" definition would work in practice. Clare Dodgson did suggest that her understanding on the household income point was that it was "the income that comes into the household" but went on to admit that "if that is technically incorrect I will come back and clarify the facts immediately".[180] Subsequently, we received a written communication from the Department, which indicated that this definition was not entirely accurate. The letter stated that:

> "Household in the context of means assessment will not mean anyone other than the accused and his/her partner's means or the accused's parents or guardian where the individual is under the age of 17 years old. Household income will in the main be limited to the accused and his or her partner's income. An adult child living with his

178 Q 12

179 Ev 50, para 44

180 Q 258

> or her parents would only have his or her means assessed, and not those of the parents."[181]

This muddle would appear to confirm the view that insufficient thought has been given to a critical element of the proposals. If the written statement of the meaning of "household" were taken to be correct, it would create further problems. Legal aid would be payable to some members of a group charged with a common offence and who were over 16 and denied to others in the group who were below that age. This situation potentially places younger defendants at a disadvantage.

136. **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.**

Practical implications

Evidence of means

137. The Consultation Paper explains that, when applying the means test, solicitors would be required to take reasonable steps to ensure that a defendant's means are such that they are entitled to help. This would include obtaining evidence of the client's capital (such as tax statements or details of savings accounts) as well as evidence of their income (i.e. tax certificates or payslips, tax returns if self-employed, or benefit books for Income Support or Jobseekers' Allowance).[182] Because the tests rely on household income, it may also be necessary to obtain information on the income of a defendant's partner and/or other members of the household.

138. JUSTICE has commented on the difficulties that solicitors are likely to experience in obtaining documentary evidence of their clients' means, including the fact that defendants may not have a regular source of income.[183] The Justices' Clerks' Society explained the difficulties that were experienced with obtaining evidence of means under the previous regime:

> "the courts frequently deal with the socially disadvantaged, those with low educational attainments, who live highly disorganised lives and who are too often afflicted with health problems, including drug addiction. Asking such a person to

181 Ev 94 and 95

182 Model 1 would also require evidence of expenditure

183 Ev 45, para 10

> produce proof of passporting benefit within a reasonable timescale can prove more difficult than many of us may imagine."[184]

They cited, in particular, the following practical difficulties:

- "those, who had just attained the age of eighteen, had claimed benefits but not yet had their application processed;
- those who had recently moved home and had to change benefit office and were again having their application processed;
- those who were self-employed, worked for cash, and whose books and records were wholly inadequate;
- asylum seekers who, at that time, were given vouchers rather than benefit;
- parents, who were at their wits end with their child who had committed yet another offence, and who therefore refused to offer any financial support for their 16 year old son or daughter."[185]

Such problems are likely to be exacerbated if defendants are expected to provide financial information about members of their household who might have no interest in disclosing their level of income. A further problem would be the legal limits on solicitors' ability to access information about their clients' means. This would prevent them from ascertaining the accuracy of any information provided by their client.

Conditional grant

139. It is proposed that it would only be possible to make final grants of legal aid after satisfactory evidence of income and capital has been obtained. Where sufficient evidence has not yet been obtained, it is proposed that solicitors would be able to make conditional grants of representation. This would have a limited duration, after which evidence must be produced or the conditional order withdrawn. This is intended to prevent delays while evidence of means is collected.

140. The Justices' Clerks' Society's response to this proposal suggests that it might not be as effective as the Department expects:

> "It is noted that there is a power for legal aid to be granted 'subject to means', with automatic revocation of legal aid after two weeks if the necessary evidence of income is not forthcoming. Will a solicitor be paid in full for any work done in those two weeks? It is not uncommon under the current system for a case to be dealt with in two weeks; what fee will a solicitor receive if this is the case? What incentive will a defendant have to provide proof of income after the case is dealt with?"[186]

Solicitors may not be willing to undertake the risk involved with working on the basis of a conditional grant.

184 Ev 55, para 2.2

185 *ibid*, para 2.5

186 Ev 56, para 3.3

Contributions

Ability to pay

141. The proposed means testing regime could require defendants to make a contribution to their legal costs. Unlike under the previous regime, where contributions were paid weekly for the life of the case, the draft CDS Bill proposes that any contributions payable under this regime would be payable in full at the outset. This could have a serious impact on a defendant's ability to pay. JUSTICE has commented that:

> "the point of the previous arrangements [where defendants paid in instalments] was precisely that defendants on low incomes with minimal savings are unable to make substantial downpayments of the magnitude proposed, particularly in cases where a defendant fails because he or she is just over the income levels but without income."[187]

It illustrated the practical difficulties as follows:

> "For example, under model 1, a person with a net income of £100 per week would be liable to pay a contribution as they would be £9 per week above the maximum income for free assistance. The extent of their maximum contribution would be for a Crown Court case where their liability would be 10 per cent of the costs capped at a maximum of £2,000. Assuming no savings from which payment could be made, the defendant would have to save for 220 weeks or just over 4 years before accumulating this amount of money."[188]

142. It suggests that any contributions should only be payable in one lump sum at the start of the case if the defendant has exceeded the capital limit. If the defendant has exceeded the income limit only, it comments that a one-off payment "is likely, by definition, not to be acceptable."[189] In such cases it argues that periodic payments should be permitted.[190] Allowing periodic payments could, of course, introduce downstream delays and added administrative costs in the case of non-payment, as were experienced under the old means testing regime.

Collection of contributions

143. The Justices' Clerks' Society commented on the difficulties in obtaining contributions from defendants, explaining that "enforcement procedures were not straightforward and performance was often poor to the extent that some of the amounts due remain uncollected three years after the system of contributions was abolished."[191]

144. It is proposed that, if a defendant is convicted, the LSC would pay the defence solicitor's fees, less the contribution paid by or due from the defendant. The solicitor

187 Ev 45, para 12

188 *ibid*, para 13

189 *ibid*, para 14

190 Ev 46, para 18

191 Ev 56, para 2.6

would, therefore, be responsible for obtaining the contribution from their client. Where a barrister is instructed, the risk of non-collection will be shared between the solicitor and the barrister. Solicitors and barristers are particularly at risk where they have to make a conditional grant because of lack of evidence of means, and the case proceeds to its conclusion in one or two hearings, especially where the client is remanded in custody.

145. The Law Society explained in their written evidence that:

> "…it would be unacceptable for solicitors to bear the losses incurred in any failure of defendants to pay their contributions. Whilst it would be reasonable for solicitors to collect a single contribution at the start of the case and therefore not undertake any work until that was paid, the risk with what is proposed is that a solicitor may have to choose between withdrawing from a case halfway through where a contribution is not paid, or proceeding and having to bear the loss personally."[192]

The Legal Aid Practitioners' Group are also concerned about the proposal that solicitors would be responsible for the collection and calculation of contributions, especially if such work is not remunerated. They commented that:

> "We are wholly opposed to the idea that solicitors should have to calculate and collect contributions to costs, and on the figures so far provided, we believe that contributions are being proposed at far too low a level of income. Contributions are not of themselves objectionable if set at a reasonable level and if the collection is carried out by the State. We would suggest that the cut-off point should be the higher rate tax band, with a tapering of contributions up to that point."[193]

Delays

146. The Department comments that the current proposals will give solicitors greater flexibility and autonomy and that they will have "certainty of knowledge that a decision of grant can be made at a much earlier stage, allowing them to proceed to early preparation of their client's case".[194] It also argues that the revised arrangements would reduce disruption to the courts because decisions about grant would be made before the first court appearance, stating that "individuals will not require adjournments to seek advice and representation" and there "will be no delay in determining an individual's eligibility before the case can proceed".[195]

147. The Justices' Clerks' Society and the Magistrates' Association are sceptical about the ease with which solicitors will be able to make decisions about grants of representation. The Society wonders "will courts see a return to the delays in the system caused by the legal aid problems?"[196] and the Association comments that "there is a real risk that the proposals

192 Ev 61

193 Ev 46, para 5

194 *Draft CDS Bill*, para 41

195 *ibid*, Partial Regulatory Impact Assessment, para 40

196 Ev 56, para 3.2

will involve a great deal of bureaucracy and that there will be difficulties and delays in dealing with the necessary paperwork".[197]

148. The main concern expressed by the judiciary was that the proposals do not take account of the downstream impact of means testing. In particular they identified the potential for delay. Lord Justice Judge commented in evidence that:

> "We are desperately anxious to make the system more efficient, and when you think of some of the proposals that are going on, we are concerned that, for example, under the rules, we want pre-trial cases to be properly prepared; we want the lawyers, advocates or solicitors, in the magistrates' court to be paid to prepare the work well; we do not want cases to be adjourned for any reason unless it is absolutely necessary; we want cases disposed of; we want the witnesses to get their evidence done; we want the defendants to finish; we do not want more people lying in prison waiting for their trials; we do not want more witnesses waiting to come and give evidence. The whole thrust of what we are doing in the Criminal Procedure Rule Committee is to make the system more efficient… it is rather an odd time to be doing this. I could spend quite a long time on the increased efficiency that we want, but I will simply say that if we build in any form of delay at any stage in any part of the process, then this is undermined, and this would be a great loss."[198]

149. The LSC also conceded that establishing financial resources and collecting contributions would lead to delay:

> "In summary, model one is the most difficult test to administer and the one likely to cause the most significant delays. Model three is a simpler test, but the collection of contributions will still cause delay. Model two is the simplest test to administer and the one least likely to cause delay and wasted costs."[199]

Impact on other initiatives

150. The Department is "aware of the need to ensure that initiatives throughout the Criminal Justice System to remove delay are not hampered by any test we introduce".[200] The Magistrates' Association has commented that the proposals give rise to a "genuine risk" of delay in grant, which could impact on the Effective Trial Management Programme.[201] It is axiomatic that if defendants are required to provide proof of means, especially if this could extend to other household members, delays would be introduced to the system. This suggests a real risk in reversing the good practice of trying to make best use of a defendant's first court appearance. As the Legal Action Group has commented:

> "In practical terms, if a defendant is refused bail he or she is usually brought before the court within 24 hours. There is often not enough time for the solicitor to see the client before his or her first appearance in court. If the legal aid application has still to

197 Ev 52, para 6

198 Qq 59 and 61

199 Ev 71, para 68

200 *Draft CDS Bill*, para 49

201 Ev 52, para 6

> be dealt with by the solicitor, the court will have no option but to adjourn the case. Thus, delays will be introduced into the court process."[202]

The benefits of the more efficient management of cases are discussed at paragraphs 176 to 177 below.

Ireland—a comparative example

151. In the Republic of Ireland the legal aid system is means tested. The courts are able to grant legal aid if it appears to them that:

- the defendant's means would not enable them to pay for legal assistance; and
- by reason of the gravity of the charge or of exceptional circumstances, it is essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence.

Although the court does apply a means test, this does not involve strict eligibility criteria of the type suggested in the current proposals. Instead, the defendant completes an evidence of means form, including information on outgoings and dependants, and the court uses this information to weigh up whether it considers that the defendant could afford their own defence costs.[203] A recent review has recommended that a formal means testing regime should not be introduced as it would lead to delays in the processing of criminal business, increased costs to the state and insufficient financial benefits to justify the cost.[204]

Unrepresented defendants

152. The Department considers that "there is likely to be a small increase in the number of defendants appearing without legal representation" and that this is likely to impact on court staff.[205]

153. A number of our witnesses have questioned whether the rise in unrepresented defendants would be small and have told us about the extra work for courts and delays which ensue if defendants do not have legal representation. The Justices' Clerks' Society has predicted that "it must surely be the case that individuals will appear before the court unrepresented and seek an adjournment to enable them to provide the necessary evidence of income to a solicitor."[206] Mr Justice Richards told us:

> "In relation to the present proposals, it is the prospect of having a substantial increase in the number of unrepresented defendants and the potential that has for causing delay and additional cost in the courts that particularly concerns me; and it is not just delay and cost, it is delay in the effect on those who are waiting to give evidence. Every effort is being made to accelerate procedures so as to get trials on quickly and

202 Ev 89, para 17

203 *Final Report*, Criminal Legal Aid Review Committee, February 2002

204 *ibid*, p 11

205 *Draft CDS Bill,* Partial Regulatory Impact Assessment, para 37

206 Ev 56, para 3.2

> ensure that victims and others are able to get their evidence given, get the case passed through the court, as quickly as possible. This would all be impaired by having a substantial increase in the number of those unrepresented before the courts."[207]

The Magistrates' Association also identified this as a problem, noting that:

> "I think we all agree on this, that unrepresented defendants can mean that things last longer. It is essential they understand everything that is going on, and in some cases they say things that a lawyer would warn them off saying which might disqualify the bench, if it is something about a previous arrest or whatever, simply because they do not understand the system. We see an enormous number of people, and whether or not they are innocent or whether or not they are guilty a lot of them are extremely nervous and frightened at the situation, overcome by the system and would benefit from a little guidance. If they do not get that then it is going to take longer."[208]

154. There is also a concern that those who do not have legal representation and who could not, therefore, present an effective defence would be more likely plead guilty. This plea may be made for reasons of cost and to dispose of proceedings as quickly as possible, even if the defendant were innocent. Without legal advice, defendants may be unaware of the indirect consequences of their plea. In a different context, Roy Morgan of the Legal Aid Practitioners' Group warned of the downstream consequences of a criminal convictions:

> "…a minor shoplifting matter [is] an offence of dishonesty which could cause loss of job, with all the inherent costs to the country that that involves and disaster to the family. Domestic violence matters sometimes result in just a binding over. They [the LSC] may regard those as less serious offences but the domestic violence order that results perhaps in a binding over rears its head in contact proceedings or care proceedings and the impact can be immense."[209]

155. **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.**

Calculation of savings

156. The Legal Action Group is one of a number of witnesses that criticised the lack of statistical analysis in the Consultation Paper. It wrote that:

> "LAG is also disappointed that the Consultation Paper contains very little convincing statistical analysis and is not supported by proper research on the wider impact of reintroducing the means test for representation orders. We believe it would have

207 Q 77

208 Q 55 (Cindy Barnett)

209 Q 146

been reasonable to expect the DCA or the LSC to provide the following information in support of the proposals:

- An estimate of the increase in LSC expenditure as a result of the need to change its auditing process for firms with CDS contracts
- Quantification of the costs to solicitors of applying the means test for their clients
- An estimate of the resource implications for the courts and other parts of the Criminal Justice System (CJS) (including the police and the Crown Prosecution Service) resulting from delays caused by the means test having to be completed by solicitors
- An assessment of the impact on victims and witnesses caused by these delays
- An estimate of the number of unrepresented defendants as a result of these changes
- An assessment of the effect of having unrepresented defendants on the courts and on the wider CJS, as well as the impact on victims and witnesses and on defendants themselves
- Quantification of the impact of the number of orders granted as a result of the transfer of decisions to the LSC
- More accurate modelling of the options for means testing, similar to that produced by the Legal Services Research Centre in preparation for the 2000 review of eligibility for Community Legal Services funding."[210]

157. The LSC has acknowledged in oral evidence that a substantial study of 2,600 cases commissioned through the Legal Services Research Centre, working with the Institute for Fiscal Studies, would not be ready for several months.[211] This clearly impacts not only on our ability to assess the cost benefits of the proposals and their likely impact on defendants but also on any contributions from third parties given that the Government's consultation period ends in early August.

158. While there have been few objections in principle to the idea of means testing, much of the research conducted on legal aid does not support the idea that means testing in itself would introduce large costs savings.[212] We understand that the large majority of people given legal aid after the abolition of the means test would in any event have qualified for legal aid under the old means testing system. The main reason for the abolition was to ensure administrative savings, which might be lost if these proposals were adopted. The

210 Ev 87, para 3

211 Qq 187 and 188 (Clare Dodgson). This research is discussed in the Legal Services Commission's written submission which states that the results will be available in July 2004 , Ev 69, paras 42 to 44

212 See for example: 'Targeting and Access to Justice: An introduction to Legal Aid Reform in England and Wales', Pascoe Pleasence delivered at the Pan Pacific Legal Aid Conference, Tokyo in December 2001

Government, in its own White Paper, *Modernising Justice* described the former means test as a "complex and costly procedure".[213]

The deterrence aspect

159. The savings that the Department has estimated would result from the reintroduction of means testing are based primarily on the assumption that the number of applications for representation has increased as a consequence of the abolition of the means test under the Access to Justice Act.[214] It comments that "since the abolition of the means test, many who previously would have been privately represented or who chose to represent themselves have applied for public funding."[215] The Department has assumed, therefore, that the volume of orders applied for would drop considerably if a means test were reintroduced but has produced little evidence to support this.

160. It is clear from the breakdown of the estimated savings that they will be due primarily to people being deterred from applying for legal aid, rather than from contributions paid or people failing the means test. The Magistrates' Association has expressed concerns about this:

> "What worries us about these proposals and the reintroduction of a means test is that the calculations for savings to be made therefore rely on people, in actual fact, being deterred; people who do now meet the interests of justice test because they have been granted legal aid being deterred from applying in the future."[216]

161. **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.**

Other concerns

Human rights implications

162. A number of international human rights instruments provide for a defendant's right to free or subsidised legal representation in certain circumstances. The major principle underlying these obligations is to ensure fair trials for defendants and, in particular, equality of arms between the prosecution and defence:

---

213 *Modernising Justice*, LCD, 1998, Cm 4155, para 6.26

214 *Draft CDS Bill,* para 75: "in order to allow the Department to estimate the impact of re-introducing the means test, we can assume that a sizeable proportion of the increase is attributable to the abolition of the means test. It is likely that between 75,000 and 150,000 grants arose as a result of the abolition of the means test"

215 *ibid*, para 47

216 Q 43 (Cindy Barnett)

> "One of the most prohibitive barriers to access to court is the cost of legal services. Equality before the courts clearly requires equal access regardless of means. The availability of legal aid is therefore clearly relevant to the question of whether a state satisfies the international guarantee to a fair hearing."[217]

163. As mentioned above, depending on how they are implemented, these proposals could contravene the rights under Article 6(3)(c) of the European Convention on Human Rights which provides:

> "Everyone charged with a criminal offence has the following minimum rights: … (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

164. Many of our witnesses were reluctant to comment on the likelihood of this right being breached by these proposals, primarily on the basis that much of their detail remains unclear. Mr Justice Richards, however, told us that he was concerned:

> "For my part, as an Administrative Court judge, in one of my capacities, I see judicial review applications at the moment in relation to refusals of legal aid on the civil side by the Legal Services Commission. There the criteria are different and the number of cases is relatively small. If there were not an adequate role for the court in decision-making in relation to criminal legal aid and refusals were to occur, I do foresee a significant growth in judicial review applications contending that there had been an unreasonable application of the interests of justice test and that the result was that there was a denial of the defendant's right under Article 6(3)(c) … of the European Convention on Human Rights."[218]

165. When asked about the human rights implications of the proposals, the Minister told us that:

> "I think it is important to remember that across Europe, where European countries obviously want to ensure their Article 6 rights, many countries effectively have a *pro bono* system for satisfying those rights… Article 6 rights do not prescribe the right to legal aid. That is very much the historic British interpretation of that. So I am satisfied that this scheme is well within our human rights obligations."[219]

The Minister's comment about satisfying Article 6(3)(c) by means of *pro bono* system for legal representation is misleading. The Department has made no proposal that legal representation should be made available in this way. The scheme which the UK has historically adopted to satisfy this human rights requirement has been legal aid and this must ensure that legal representation is available to those who cannot afford to pay their own legal costs.

---

217 'Current Topic: The Green Paper on Legal Aid and International Human Rights Law', Michael Beloff, QC and Murray Hunt, 1996, *EHRLR*, Issue 1, pp 5–17, p 7

218 Q 87

219 Q 241

Shrinking number of criminal defence solicitors

166. It is important that these proposals do not reduce the number of lawyers who are willing to undertake legally-aided work. The LSC commented in their 2002/03 Annual Report that they:

> "are concerned that in some rural areas and in a number of towns [criminal legal aid] coverage is reaching a point where, if existing contracted suppliers ceased to provide services, it would become increasingly difficult for us to maintain coverage at the level we consider necessary."[220]

167. Despite this, the Partial Regulatory Impact Assessment contains the statement that:

> "It is not possible to state definitively that there will be no impact upon the viability of solicitor's firms—this would depend on the proportion of their income that is derived from publicly funded work and how reliant the firm is on publicly funded Criminal Defence Service work in particular. It is possible that the changes could result in some firms abandoning publicly funded work (and switching instead to work with private clients). It is more likely that solicitor firms doing a range of other work and a relatively small amount of criminal work will make this decision rather than larger specialist firms. This may result in a reduction of supply in some areas."[221]

The Department does not appear to have properly engaged with the profession's concerns. In correspondence with the Committee in respect of the Departmental Annual Report, it commented that:

> "As with civil contracts, if a shortfall were to occur in a particular area, the LSC would identify the reasons, then arrangements would be made to cover such a shortfall by bringing in suppliers from other areas, or by alternative ways of delivering services, such as outreach or telephone advice. In the case of the CDS, the Commission also has the flexibility to open new Public Defender Service offices if cover in a particular area were to collapse, though this is very much a last resort."[222]

168. A number of witnesses have told us that the current proposals could lead to a reduction in the availability of solicitors willing to undertake legally-aided criminal work. Evlynne Gilvarry of the Law Society commented:

> "We have great concerns that the bureaucracy attached to the proposals to introduce the means test would cause a number of solicitors to consider that they could no longer continue to do criminal legal aid work."[223]

She later told us that "the real worry is that new entrants are not taking up this work, and they certainly will not be encouraged to take it up if they have to sign up to a regime that

---

220 *Legal Services Commission Annual Report 2002–03*, LSC, HC 743, para 3.8

221 *Draft CDS Bill*, Annex C, para 30

222 Written answers to the Committee's questions on the Department's Annual Report, Oral Evidence Session 13 July 2004. Given that these proposals are meant to result in cost savings, relying on the yet uncosted PDS service as a last resort seems very surprising

223 Q 95

involves an awful lot more bureaucracy."[224]

169. The LSC expressed the belief that the proposals will allow solicitors to undertake more private client work, which it expects solicitors would welcome.[225] It is surprising that the Department accepted this as a positive step, since where a defendant is acquitted, he would be entitled to the repayment of his costs from Central Funds at the much higher private rate. Nonetheless, Evlynne Gilvarry, who appeared on behalf of the Law Society, commented that this 'benefit' is in any event extremely unlikely to accrue to the professions indicating that:

> "I honestly do not think there will be a lot of extra private client work arising from these. There will be possibly a number of people who will not qualify for legal aid. Whether they will be able to afford to pay for it privately is an unknown question. I somehow doubt it."[226]

Ms Cousins added:

> "Perhaps I can help just a little on that. I run a criminal practice in a busy city centre. I do not have a client account, I take no money whatsoever from anybody, and this change would not make me do it because the people who I service would not be in a position to pay, even if it is the £34 that is being talked about. From my point of view, it will not change the work that I do at all."[227]

170. **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.**

224 Q 96

225 Ev 69, para 46

226 Q98

227 *ibid*

6 Other options

Very High Cost Criminal Cases

171. All parties concerned, including the Law Society and the Bar have identified that these proposals are targeting the cheapest cases in the system, whilst it is the Very High Cost Criminal Cases which have caused the most concern.[228] In particular, the professions admitted that 0.01% of criminal cases (or anecdotally 'half a dozen a year') were responsible for 25% of expenditure in the Crown Court.[229]

172. A number of reasons were ventured for this, including the complexity of fraud and multi party conspiracy actions and the fact that prosecutors did not conduct a proper cost benefit analysis when proffering charges. The Minister noted that the Government was attempting to bring the cost of VHCCCs under control, claiming that:

> "The newly modified very high cost scheme will save £259 million over the next four years and we have made some adjustments to the graduated fee scheme for that. I am very pleased about that, it is a success story. It is bringing barristers under contract for the first time. There were anomalies that we, quite rightly, had to work out and it is right that we had the detailed negotiations we had given that we were asking barristers to take account in a way that has not been the case certainly with the way we have extended contracting with solicitors. We are certainly dealing with the Very High Cost [Criminal] Cases."[230]

173. Nonetheless, the evidence appears to suggest that further savings could be made. In particular, Andrew Hall QC, who gave evidence on behalf of the Bar Council stated that:

> "If you take the top 1% and then slice that 1% up, you will find that the top half dozen cases—the top half dozen—account for about 25% of the criminal legal aid budget. That is where the concern ought to be directed. Those cases which are now visible in the Legal Services Commission data which we have now seen, do reinforce the sort of points which were made earlier about half a dozen or ten major frauds or cases of that sort completely distorting the funding picture for any one year".[231]

174. The Law Society have provided figures demonstrating this rise (Table 2: Rising cost of VHCCC) and claim that:

> "Fees claimed by QCs make up a significant proportion of the costs of these cases. This figure has increased significantly over the last three years and must be brought under control through a system of contracting…
>
> Whereas the maximum rate for solicitors acting in Very High Cost [Criminal] Cases as set out in regulation is significantly below private charging rates, there have been no such controls on the fees paid to QCs. The Law Society believes that the

228 These, otherwise known as VHCCCs, are cases that last 25 days or more or cost over £150,000

229 Q 171 (Andrew Hall QC)

230 Q 263

231 Q 171

government should set fees for QCs, so that the earnings for those working full time on legal aid are broadly the same (after allowing for practice expenses) as a top hospital consultant. This would go some way to achieving a significant cut in expenditure."[232]

Table 2: Rising cost of VHCCCs

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

Source: Law Society evidence

175. The majority of our witnesses agreed that the Department is aiming at the wrong target if it wants to make cost savings to the CDS. Lord Justice Judge summarised the position, when he stated that:

> "I think the Very High Cost [Criminal] Cases are taking up a huge proportion, not merely of the legal aid budget, but they are taking up a huge proportion of the whole of the Department's budget. If I go to a court that is leaking, there is no money to repair the leak unless there is less legal aid. So one has to look at the way in which the budget is spent across the board, and we simply cannot work on the basis, again if I may go back to the point, that there is a tree at the bottom of the garden full of ten-pound notes. There is not, and therefore there has to be some control exercised. My hope is that once we get a better system for organising the length of cases, when the fundamental review in relation to legal aid and the Very High Cost [Criminal] Cases is concluded, savings will be found, but I do not think this process of changing who decides whether or not legal aid should be granted is, in reality, going to save very much money; and you must bear in mind—the point was made by one of my colleagues earlier—if you have a litigant who is not represented you add hugely to the costs."[233]

Trial management

176. We have received evidence from a number of sources that better trial management procedures cannot only speed up the business of the courts, but can also result in cost

232 Ev 60

233 Q 76

savings.[234] In evidence, the Minister was keen to stress the importance of these initiatives, claiming that:

> "I think we are also dealing with the Very High Cost [Criminal] Cases within the Effective Trial Management Programme which is working well. The judges I have spoken to are concerned about cases being adjourned excessively and the preparation time in terms of a prosecution. It is really what we call pre-action protocol-type stuff on this civil side, making our systems work better. Where we are piloting it we are seeing progress. We are seeing a 27% reduction in delay nationally at the moment."[235]

The Judges' Council told us that the Criminal Procedure Rules Committee could make a significant difference to the way in which criminal proceedings are managed, increasing the efficiency of the Criminal Justice System.[236] We support this approach to better management of the trial system.

177. Trial management issues are also directly linked to the issue of representation as we mention above in paragraphs 152 to 154. In oral evidence to us, Mr Justice Richards spelt out the benefits of having represented defendants brings to the process, stating that:

> "if you have got representation there in terms of narrowing, defining the issues, cutting back on the number of witnesses who are required at trial, even achieving a situation in which you can knock heads together and get a lesser charge substituted for the present charge, where the present charge is unrealistic and likely to fail at trial: a lesser one might be likely to succeed, and, if substituted now, would be likely to cause the defendant to plead guilty now. Matters of that sort can be achieved at the case management stage where you have got representation, when, realistically, it is very, very difficult to do them with defendants representing themselves. And when it comes to trial unrepresented defendants cause trials to take very much longer."[237]

The Judges' Council has warned that great care would have to be taken in the implementation of these proposals, since:

> "Experience both in the magistrates' court and in the Crown Court shows that opportunities for effective case management are greatly reduced and that trials take much longer in the case of unrepresented defendants. All this has potentially serious implications in terms of the costs of running the courts and the achievement of performance targets by the courts."[238]

Recovery of Defence Cost Orders

178. A solicitors' firm (T.V.Edwards) has submitted written evidence which makes the point that a more efficient use of resources might be to utilise Recovery of Defence Cost

234 See, for example, 'Targeting and Access to Justice: An introduction to Legal Aid Reform in England and Wales', Pascoe Pleasence delivered at the Pan Pacific Legal Aid Conference, Tokyo in December 2001

235 Q 263

236 Ev 79 and 80, para 4 and Q 59 (Lord Justice Judge)

237 Q 65

238 Ev 81, para 14

Orders (RDCOs)[239] at the end of a trial where a defendant is found guilty, since this would avoid penalising the innocent whose payments would have to be refunded in any event. They concluded that:

> "The better approach is the effective operation of recovery of defence costs orders which now have to be made as a matter of duty at the conclusion of convicted cases in the Crown Court (which includes any related magistrates court work). This has the benefit of avoiding re-cycling money in the event of an acquittal. A more practical course would be to extend the orders in defined cases to the magistrates' courts."[240]

179. Recovery of Defence Cost Orders have not been very successful in the Crown Court. This may be because there is a much higher probability of imprisonment, which would clearly impact upon a defendant's ability to pay. Recovery of Defence Cost Orders could, however, be more effective in the magistrates' court, where imprisonment is a less likely outcome.

180. Mr Justice Richards concurred with this view, commenting:

> "I do think that the experience in the Crown Court is attributable to the fact that so few of the defendants in the Crown Court have means that would justify a contribution. I have made one Recovery of Defence Costs Order when sitting as a judge in the Crown Court in several years, and it is not from want of considering, in the case of each defendant, whether such an order is justified. It is simply that only in one case has there been evidence that warranted such an order."[241]

181. The Minister was fairly dismissive of the use of RDCO's in the magistrates' courts, indicating that "you would want to look at what you are going to save…in the magistrates' courts given the average costs of a case, how it would work and the fact that most defendants go unrepresented anyway".[242] This statement would appear to overlook the fact that it is precisely these modest cases which the Department is attempting to target through this draft Bill.

182. **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.**

239 At the end of a case, the Crown Court may make a Recovery of Defence Costs Order requiring a defendant to pay some or all of their legal aid costs

240 Ev 53, para 3.2

241 Q 91

242 Q 265

7 Conclusion

183. **While we support the overall aims of controlling the rising Criminal Defence Service expenditure and ensuring that defendants who can afford to pay their own legal costs do so, we consider that the current proposals have failed to address a number of important questions and would give rise to serious practical problems. As a next step towards preparing a bill to be put before Parliament, the Government will need to answer the following questions:**

- **How do these proposals address the major drivers of Criminal Defence Service expenditure?**
- **How will the Government ensure that the downstream impacts of other policies on the Criminal Defence Service budget are taken into account?**
- **Why are the Legal Services Commission and solicitors better placed to apply the interests of justice test than the courts; and how could any conflicts of interest arising from the transfer be avoided?**
- **What evidence is there to substantiate the claims that magistrates' courts have been inconsistent or over-generous in applying the 'interests of justice' test; and what impact will the transfer have on the volume of representation orders granted and on Criminal Defence Service expenditure?**
- **Are these proposals compliant with Article 6(1) and 6(3)(c) of the European Convention on Human Rights?**
- **How can means testing be conducted in a way that ensures that, whilst decisions are based on acceptable evidence as to financial circumstances, they do not cause delay to court hearings?**
- **Will any financial savings produced by means testing be outweighed by the likely downstream costs in terms of bureaucracy and delay?**
- **What impact will the current proposals have on other initiatives designed to increase the efficiency of the Criminal Justice System?**
- **How many defendants, who would otherwise be eligible for legal aid, will be deterred from applying for legal aid as a result of the reintroduction of means testing; and how will an increase in the number of unrepresented defendants impact on defendants' comprehension of proceedings and even the way they plead?**

Conclusions and recommendations

Introduction

1. Because the draft Bill does not contain the detail of the current proposals, which would instead be set out in secondary legislation and in the General Criminal Contract issued by the Legal Services Commission, we recommend that prior to the introduction of a Bill a draft of the secondary legislation should be published for consultation. The structure of our inquiry and report has been affected by this lack of detail. Instead of scrutinising a finalised set of proposals, our inquiry and report have focused on posing questions which the Government will need to address before introducing a Bill. (Paragraph 6)

2. We acknowledge that the rising cost of the Criminal Defence Service must be addressed and commend the Department for Constitutional Affairs for attempting to achieve this. We agree with the principle that defendants who can afford to pay their legal costs should do so. Nevertheless, the Consultation Paper leaves a number of key questions unanswered and we are concerned that reintroducing means testing in the ways proposed could give rise to practical difficulties which outweigh any cost savings likely to be achieved. (Paragraph 8)

Rising costs of the Criminal Defence Service

3. We ask the Legal Services Commission to estimate the effects of changes in times of payments and the introduction of a system of payments on account on the figures for the cost of Very High Cost Criminal Cases. (Paragraph 23)

4. We hope that the Fundamental Legal Aid Review will enable the Department to identify the major factors which have caused the increase in Criminal Defence Service expenditure. The financial savings sought by the draft Bill will only be achieved if initiatives target these major cost drivers. We are concerned that the current proposals have not been integrated with the Review. (Paragraph 40)

5. We recommend that the Department should ensure that initiatives rolled out by other Departments, especially the Home Office, are properly costed so that their impact on the Criminal Defence Service budget can be taken into account. This is an essential feature of 'joined up Government' and needs to be done so that the Government can consider the causes of rising costs, rather than merely relying on the Department to tackle the symptoms. (Paragraph 46)

Transfer of grant of representation

6. 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: (Paragraph 87)

- 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.

7. 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)

8. 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)

Means testing

9. 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)

10. 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)

11. 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)

12. 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)

Other options

13. 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)

Conclusion

14. While we support the overall aims of controlling the rising Criminal Defence Service expenditure and ensuring that defendants who can afford to pay their own legal costs do so, we consider that the current proposals have failed to address a number of important questions and would give rise to serious practical problems. As a next step towards preparing a bill to be put before Parliament, the Government will need to answer the following questions: (Paragraph 183)

- How do these proposals address the major drivers of Criminal Defence Service expenditure?
- How will the Government ensure that the downstream impacts of other policies on the Criminal Defence Service budget are taken into account?
- Why are the Legal Services Commission and solicitors better placed to apply the interests of justice test than the courts; and how could any conflicts of interest arising from the transfer be avoided?

- What evidence is there to substantiate the claims that magistrates' courts have been inconsistent or over-generous in applying the 'interests of justice' test; and what impact will the transfer have on the volume of representation orders granted and on Criminal Defence Service expenditure?
- Are these proposals compliant with Article 6(1) and 6(3)(c) of the European Convention on Human Rights?
- How can means testing be conducted in a way that ensures that, whilst decisions are based on acceptable evidence as to financial circumstances, they do not cause delay to court hearings?
- Will any financial savings produced by means testing be outweighed by the likely downstream costs in terms of bureaucracy and delay?
- What impact will the current proposals have on other initiatives designed to increase the efficiency of the Criminal Justice System?
- How many defendants, who would otherwise be eligible for legal aid, will be deterred from applying for legal aid as a result of the reintroduction of means testing; and how will an increase in the number of unrepresented defendants impact on defendants' comprehension of proceedings and even the way they plead?

Appendix

Correspondence between Rt Hon Jean Corston MP, Chair, Joint Committee on Human Rights and Rt Hon Alan Beith MP, Chairman of the Constitutional Affairs Committee

Draft Criminal Defence Service Bill

I understand that the Draft Criminal Defence Service Bill, published in May 2004 as part of a Department for Constitutional Affairs (DCA) Consultation Paper, is currently the subject of an inquiry by your Committee. Since the proposals in the Draft Bill raise issues of compliance with the rights protected under the Human Rights Act 1998, I am writing to advise you of the Joint Committee on Human Rights' preliminary views on the Draft Bill. When more detailed legislative proposals are published by the DCA following the conclusion of this consultation exercise, we intend to comment further on the Bill's human rights compatibility.

Transfer of legal aid grant function to the LSC

Under the Draft Bill, as we understand it, the power to grant legal aid would be formally transferred from the courts to the Legal Services Commission (LSC),[1] but in practice would be exercised by individual solicitors with a General Criminal Contract (although this is not provided for on the face of the Draft Bill). The DCA has stated that this measure responds to "evidence that courts have been too favourable to defendants, and certainly inconsistent, in applying the interests of justice test" in the Access to Justice Act 1999.[2] The DCA Consultation Paper notes in particular that there will be "greater control of grant through the Commission issuing binding instructions to solicitors."[3]

We are concerned at the suggestion that a transfer of grant powers to the LSC would be used to facilitate changes in the application of the interests of justice test in the grant of criminal legal aid. Such changes could have implications for the right to free legal assistance in criminal trials under Article 6.3.c ECHR which guarantees the right of a defendant:

> "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

1 Clause 1

2 Para. 40 Consultation Paper. The interests of justice test is set out in Schedule 3 para5 of the 1999 Act. It requires consideration of whether the defendant is at risk of imprisonment; whether the proceedings involve a substantial question of law; whether the defendant is likely to understand the proceedings; whether the proceedings may require the cross-examination of witnesses and whether representation of the defendant is required in the interests of any other person

3 Para. 41

This right must be read in light of the right to fair hearing and to equality of arms between the parties to a case under Article 6.1, and the right to non-discrimination in the application of the Covenant rights, in Article 14.[4] The severity of the penalty the defendant faces, the need to consider complex legal argument and the capacity of the defendant to present the case are factors which must be taken into account in judging whether the interests of justice require legal aid.[5] Where the case raises complex legal questions, or where the offence may carry a sentence of imprisonment, legal aid will almost always be required.[6]

The interests of justice test applied under the 1989 Act closely follows the Article 6.3.c test, and must be interpreted in accordance with Article 6.3.c.[7] Any instructions to solicitors which form the basis of the new scheme would need to have their basis in compliance with Article 6.3.c criteria. **In the view of the JCHR, a more restrictive application of the interests of justice test would risk breaches of Article 6.3.c ECHR. Regulations made under the Bill should contain safeguards to ensure protection of Article 6.3.c rights.**

Appeals

Rights of appeal from decisions of solicitors on grant of legal aid are not provided for in the Draft Bill. It would therefore appear from the current draft that it is intended that the only right of appeal should be by way of judicial review, possibly following an "internal" appeal from the decision of the solicitor to the LSC (though the Consultation Paper makes no mention of such procedures).

Article 6.1 requires, in cases where civil rights and obligations are determined, a fair hearing before an independent and impartial tribunal. Article 6.1 does not contain any bar to decision making by administrative bodies, but since such bodies cannot be considered to provide an independent and impartial tribunal such as to satisfy Article 6, it requires that such decisions be subject to some form of review by a body that does meet these criteria. Where the decision is primarily one of policy then appeal by way of judicial review is likely to be sufficient to satisfy Article 6.[8] Where, however, the decision directly concerns an individual's personal or economic rights, a full appeal on both the facts and the law is required.[9] Decisions on the grant of legal aid fall into this category. Moreover, the Strasbourg court has held that Article 6.3.c itself requires appeal to an independent tribunal.[10] **In our view, the absence of statutory provision for a full**

4 These rights are guaranteed in similar terms in Article 14 ICCPR

5 *Benham v UK* 22 EHRR 293; *Maxwell v UK* 19 EHRR 97

6 *ibid*

7 s.3 HRA

8 *R (Alconbury Developments) v Secretary of State for the Environment* [2001] UKHL 23; Holding and Barnes v UK App No 2352/02

9 *Albert and Le Compte v Belgium* 5 EHRR 533; *Bryan v UK* 21 EHRR 342; *W v UK* 10 EHRR 29

10 In *Granger v UK* 12 EHRR 469 it was held that in order to satisfy Article 6.3.c read in conjunction with Article 6.1, a decision of the Scottish Law Society's Legal Aid Committee, refusing legal aid to the applicant, should have been open to appeal, including to the High Court of Justiciary which was hearing the proceedings in issue

appeal from decisions of the LSC (or solicitors acting under the authority of the LSC) to an independent court or tribunal is likely to breach Article 6.1 and Article 6.3.c ECHR in failing to provide a sufficient appeal to an independent and impartial tribunal.

Means testing

The Consultation Paper proposes three alternative models for implementation of a means test, which are not, at present, contained on the face of the Bill, but which are to be provided for in secondary legislation.

There is no provision of human rights law which would prevent the introduction of means testing. Article 6.3.c ECHR permits, in principle, the use of means testing to determine eligibility for criminal legal aid. It also permits a State to require contributions from a defendant to the cost of the defence, where this is within the defendant's means, and where the level of contribution is not arbitrary or unreasonable.[11] Such a scheme must, however, be structured so as to ensure the provision of legal aid to those who cannot afford representation.

Any means testing scheme must also meet the standards of non-discrimination in Article 14, read in conjunction with Article 6.3.c and Article 6.1, and ensure that payment or contributions are required of defendants on terms of equality. The principle of non-discrimination in Article 14 requires not only that like cases be treated alike but that different cases be treated differently.[12] The means test model used should therefore not be a blunt instrument that precludes consideration of an individual's particular circumstances. **The JCHR notes that any means testing scheme introduced under the Bill will need to allow decision making on payments or contributions to be sensitive to individual circumstances, in order to ensure compliance with the Convention rights in the application of the test.**

Trial within a reasonable time

We note that concerns have been voiced in evidence to your Committee that the requirement for solicitors to conduct detailed inquiries into what may often be complex matters of income and capital of a defendant may delay proceedings, and undermine the gains in the efficient processing of cases which are hoped for under new case management systems.[13] Although any such delays are likely to be relatively short and would be unlikely in themselves to breach the Article 6.1 requirement of trial within a reasonable time, there must be concern that they could combine with other delays in the system (including, potentially, appeals from decisions of solicitors or the LSC on complex calculations of income) to result in delays that would breach Article 6.1. **The JCHR notes that Article 6.1 ECHR requires any system of means testing to be**

11 *Croissant v Germany* 25 Sept 1992; *Morris v UK* App No 38784/97

12 *Thlimmenos v Greece* 31 EHRR 15

13 CAC Transcript of Oral Evidence, Lord Justice Judge and Mr Justice Richards, Q65–66; Q77

structured so as not to impair the efficient administration of cases, in order to best ensure compliance with the right to trial within a reasonable time under.

I hope that these observations will be of assistance to your Committee in its consideration of the Draft Bill. I am copying this letter to David Lammy MP.

Rt Hon Jean Corston MP
Chair
Joint Committee on Human Rights

Formal minutes

Tuesday 20 July 2004

Members present:

Mr A J Beith, in the Chair

Mr Peter Bottomley
Mr James Clappison
Ross Cranston
Mr Clive Soley
Keith Vaz

The Committee deliberated.

Draft Report [Draft Criminal Defence Service Bill], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 183 read and agreed to.

Conclusions and recommendations read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Fifth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

A paper was ordered to be appended to the Report.

Ordered, That the Appendix to the Report be reported to the House.

Ordered, That the provisions of Standing Order No 134 (Select Committees (Reports)) be applied to the Report.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence be reported to the House.

[Adjourned till Tuesday 14 September at 9.15am

Witnesses

(See Volume II)

Tuesday 22 June 2004

Roger Smith, JUSTICE Ev 1
Rachel Lipscomb and **Cindy Barnett**, The Magistrates' Association, **Sid Brighton** and **Neil Clarke**, Justices' Clerks' Society Ev 5
Rt Hon Lord Justice Judge, Deputy Chief Justice for England and Wales and **Hon Mr Justice Richards,** Chair of the Judges Council work party on the Draft Criminal Defence Service Bill Ev 9

Tuesday 29 June 2004

Rodney Warren, Evlynne Gilvarry and **Helen Cousins**, The Law Society, **Robert Brown**, Criminal Law Solicitors' Association Ev 16
Roy Morgan, Legal Aid Practitioners' Group Ev 23
Stephen Irwin QC and **Andrew Hall QC**, Bar Council Ev 27

Tuesday 6 July 2004

Mr David Lammy MP, Parliamentary Under-Secretary of State, Department for Constitutional Affairs, **Clare Dodgson**, Legal Services Commission Ev 31

List of written evidence

(See Volume II)

JUSTICE	Ev 44
Legal Aid Practitioners Group	Ev 46
The Magistrates' Association	Ev 51
T V Edwards, Solicitors	Ev 52
Justices' Clerks' Society	Ev 55
The Law Society	Ev 57
Legal Services Commission	Ev 64
Criminal Law Solicitor's Association	Ev 76
Judges' Council	Ev 79
Danny Simpson, Howells Solicitors	Ev 82
Bar Council	Ev 84
Legal Action Group	Ev 87
Department for Constitutional Affairs	Ev 91
Legal Services Commission	Ev 93
Department for Constitutional Affairs	Ev 94

Reports from the Constitutional Affairs Committee

The First, Second and Third Reports of Session 2002–03 were published by the Committee under its previous name, Committee on the Lord Chancellor's Department

Session 2002–03

First Report	Courts Bill	HC 526
	Government response	*Cm 5889*
Second Report	Judicial Appointments: lessons from the Scottish experience	HC 902
	No Government response expected	
Third Report	Children and Family Court Advisory and Support Service (CAFCASS)	HC 614
	Government response	*Cm 6004*
Fourth Report	Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work	HC 1171
	Government response (Second Special Report, Session 2003–4)	*HC 299*

Session 2003–04

First Special Report	Protection of a witness – privilege	HC 210
First Report	Judicial appointments and a Supreme Court (court of final appeal)	HC 48
	Government response	*Cm 6150*
Second Special Report	Government Response to the Fourth Report on Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work	HC 299
Second Report	Asylum and Immigration Appeals	HC 211
	Government response	*Cm 6236*
Third Report	Work of the Committee 2003	HC 410
Fourth Report	Civil Legal Aid: adequacy of provision	HC 391
Third Special Report	Further Government Response to the Second Report on Asylum and Immigration Appeals	HC 868