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Ministry of Justice Consultation: Transforming legal aid: delivering a more credible and efficient system

Thank you for the opportunity to comment on the proposals for legal aid reform identified in the consultation paper. This response focuses on the proposals in respect of criminal legal aid only, where the Crown Prosecution Service (CPS) has an interest.

The CPS is the principal prosecuting authority in England and Wales. The CPS prosecutes around one million defendants per annum, the majority of whom are legally aided but some are privately represented and a small number unrepresented. The CPS prosecutes almost all criminal defence cases funded by legal aid and, as such, is uniquely placed to comment from a perspective of being an interested party reliant upon effective and efficient services provided by defence practitioners for legally aided and privately funded clients.

CPS does not propose to respond in relation to the non-crime aspects of the consultation such as prison law and civil matters. Furthermore, the CPS will not comment on the detail of the proposals which are better left to discussion and negotiation between defence practitioners, their representative bodies and the Ministry of Justice. The CPS response will focus on matters of principle, which underpin the fair and efficient delivery of criminal justice in England and Wales.

The CPS acknowledges the difficult financial position currently faced by the Ministry of Justice and other government departments including, of course, the CPS itself and recognises that savings have to be made. The CPS accepts that difficult decisions have to be taken if limited public funds are to be prioritised in a way which provides the greatest benefit to the wider community. In that context the objective of reviewing criminal legal aid so that it delivers a more credible and efficient system is welcome, but there must be a realistic expectation that any reforms arising out of this review will actually deliver those outcomes.

Fundamental Principles

The CPS believes that any reforms arising out of this review of legal aid should only be made where they are consistent with, and support and enhance, the following fundamental principles, which underpin a fair and effective criminal justice system:

- 1. The delivery of a just and efficient criminal justice system relies upon high quality representation from the prosecution and defence and any reform must serve to maintain or improve existing quality standards.**

A fair and efficient criminal justice system is dependent upon having good quality prosecution and defence representation coupled with effective judicial case management. This is now the position to which we have become accustomed and it works in the vast majority of cases. Defence practitioners, for their part, must be able to represent the best interests of their client: good quality, timely advice from defence practitioners can often lead to an efficient and timely disposal which benefits all participants in the criminal justice system.

Any reform of legal aid must be underpinned by mechanisms to ensure that quality standards continue to be met and quality outcomes continue to be delivered otherwise the fair and efficient delivery of criminal justice is likely to be diminished.

- 2. There should be a viable, sustainable, high quality self-employed criminal Bar.**

For over 25 years the CPS has relied upon the self-employed Bar to provide prosecution advocacy. By and large the quality of that advocacy has been good, sometimes outstandingly so. The self-employed Bar has always endeavoured to provide an effective and responsive service to the CPS, as well as the defence community and the courts. The implementation of the CPS quality assured Advocate Panel arrangement in 2012 was an

important step in putting the CPS relationship with the Bar on a sustainable footing, underpinned by a simple yet effective quality assurance process. The CPS expects to rely on the self-employed Bar in the future. Therefore, it is fundamentally important that a viable self-employed criminal Bar is maintained, albeit that it will need to adapt and modernise and may be smaller in size than it is now.

3. An adversarial system requires broad parity in representation and remuneration between the prosecution and defence.

The prosecution service and a large part of the criminal defence function are funded by the state so it is right that a broad balance is maintained between the two in terms of representation and remuneration. That is not to say that the levels of representation and remuneration should be exactly the same in every case. There are important but subtle variances between the two roles which can be reflected in differences in representation and remuneration, but they should be broadly similar. This is an important statement of principle.

Although efficiencies should be encouraged, remuneration for work necessarily undertaken in preparing and presenting a case, whether for the prosecution or for the defence, should be both fair and reasonable (albeit affordable).

The general direction of travel to digital working and electronic communication does provide scope for greater efficiency and for economies to be realised which should be reflected in lower operating costs.

The CPS welcomes the proposal to move away from using pages of prosecution evidence as a proxy for complexity in the calculation of fees under the litigator graduated fee scheme and to replace that with a fixed fee, where pages of prosecution evidence do not exceed 500 pages. The CPS would welcome any initiative to extend that arrangement to the advocates graduated fee scheme.

4. There are predictable types of criminal casework which benefit from specialist prosecutors, defenders and judges.

There are some types of case within the criminal justice system that require a specialist service if they are to be dealt with efficiently and fairly. This even extends to specialist, or ticketed, judges. Terrorism is one example of a case that could arise anywhere in England and Wales but there are others and the criminal justice system benefits if suitably

experienced professionals deal with those cases. This could manifest itself through client choice where niche providers have developed a reputation for assisting certain types of defendants or types of offending or it could rely on having specialist counsel. The CPS is very aware of the benefit that defence providers with specialist skills or specialist areas of representation bring to the criminal justice process.

5. The criminal justice system must continue to evolve and modernise so that it is as efficient as it can be, in particular realising the benefits of modern digital working.

It is essential that defence providers have the skills, capability and organisational capacity to deal with cases quickly and efficiently, maximising and exploiting the benefits of digital working, electronic transfer of material and instant electronic communication. It is the CPS view that too many defence providers have been too slow to embrace modern methods of electronic working, with some hindering its progress.

The CPS welcomes legal aid reforms which support and actively encourage speedy progress to digital working.

6. A high majority of criminal casework in magistrates' courts and the Crown Court is resolved by way of guilty plea and the criminal justice process should be geared-up to identify and resolve those cases at the earliest opportunity.

If steps can be taken to adjust criminal legal aid to facilitate appropriately timely and efficient disposals it will benefit not only the legal aid fund but also courts, prosecutors, police, defendants and victims and witnesses. With that in mind the CPS would welcome adjustments to legal aid which encourage (proper) guilty plea outcomes to be secured in magistrates' courts in either-way matters or, at worse, at early guilty plea hearings in the Crown Court. For indictable only matters, guilty plea outcomes should be secured at the earliest possible occasion in the Crown Court.

The CPS is concerned that the proposals for the early guilty plea fee in the Crown Court under the advocates' graduated fee scheme may create a perverse incentive for those either-way cases which currently plead in magistrates' courts to escalate to an early guilty plea in the Crown Court. This would be a retrograde step and would reverse the recent trend of an increasing rate of defendants entering guilty pleas to either-way matters in magistrates' courts.

Conclusion

The CPS acknowledges the difficult financial position facing the Ministry of Justice and that savings have to be made, however any reforms must be consistent with, or support and enhance, the six fundamental principles set out above, if they are to maintain the fair and efficient delivery of criminal justice.

Crown Prosecution Service

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