Bar Council and Criminal Bar Association response to the Crown Court means testing: the design of the scheme on implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) and the Criminal Bar Association (CBA) to the Ministry of Justice's (MoJ) consultation paper entitled Crown Court means testing: the design of the scheme on implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.[1]

2. The Bar Council is the governing body and the Approved Regulator for all barristers in England and Wales. It represents and, through the independent Bar Standards Board (BSB), regulates over 15,000 barristers in self-employed and employed practice. Its principal objectives are to ensure access to justice on terms that are fair to the public and practitioners; to represent the Bar as a modern and forward-looking profession which seeks to maintain and improve the quality and standard of high quality specialist advocacy and advisory services to all clients, based upon the highest standards of ethics, equality and diversity; and to work for the efficient and cost-effective administration of justice.

3. The Criminal Bar Association represents around 3,600 employed and self employed members of the Bar who prosecute and defend the most serious cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by the British criminal justice system owes a great deal to the professionalism, commitment and ethical standards of members of the criminal Bar. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

Overview

4. The Bar Council and CBA accept that procedures should exist for defendants to make proper and appropriate contributions to their publicly funded defence costs where they have the means to do so. The costs of running, and difficulties of enforcing, a contributions scheme, though, are not new problems.

5. We welcome the MoJ's commitment to maintaining the policy commitment of ensuring defendants are liable under Income Contribution Orders (ICOs) and Capital

[1] Ministry of Justice (2012) Crown Court means testing: the design of the scheme on implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Contribution Orders (CCOs) for an amount that properly and accurately reflects their true income and capital asset status.

6. We are, however, concerned that the current consultation is a lost opportunity to examine how restrained assets of wealthy defendants could be unfrozen to meet criminal defence costs. Allowing the release of funds to cover legal representation would save a significant amount of expenditure in the overall legal aid budget. This is particularly important as a small minority of very expensive criminal cases account for a significant proportion of the criminal legal aid budget, and many of these involve instances of very wealthy defendants receiving legal aid for defence costs that could be covered by restrained assets. While these assets are likely to be subject to confiscation orders following conviction, previous experience clearly shows that recovering confiscated assets is complex and it is not guaranteed to be successful. According to published Crown Prosecution Service figures, there is currently £1.017 billion owed in outstanding confiscation orders.

7. Unfreezing assets for legal representation is not unknown to the courts, and could be provided for in a similar manner to the civil courts where restrained assets can be released to cover legal representation under judicial discretion. This would remove an unnecessary burden on the legal aid budget and provide wider coverage for those really in need of publicly-funded legal representation. While we welcome the Secretary of State's announcement that plans are being developed to ensure that wealthy defendants cannot draw on legal aid funds, we are eager understand the details of the policy and its proposed implementation.

8. We are disappointed that the MoJ do not intend to undertake a consultation on the draft regulations made under sections 23, section 24 and schedule 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Bar Council believes that the decision not to consult should not to be taken lightly and is concerned that urgency alone is not a good enough reason for not consulting because it is precisely when policy or legislation are made in haste that errors are likely. We would welcome clarification as to why these regulations are not being consulted upon and why MoJ believe limited consultation on the regulations would be of little value to the policy-making and implementation process.

Question 1 – Do you agree that the Income Evidence Sanction (IES) should operate as set out above?

9. We agree that defendants should be deterred from failing to provide evidence of income in a timely fashion. The accurate calculation of contribution liability is important to ensure that means testing operates efficiently. Clarifying the operation of an IES will assist both providers and defendants to better understand the consequences of failing to provide the required evidence.

Question 2 – Where a defendant fails to comply with a request for further information or evidence in relation to their capital assets, do you agree with our proposal to apply a sanction which allows the LSC to deem that the defendant has sufficient capital resources to pay all of their outstanding defence costs?

10. We agree that defendants should be deterred from failing to provide additional requested evidence of their capital assets in a timely fashion following conviction. As noted above, the accurate calculation of contribution liability is important to ensure that means testing operates efficiently and fairly.

11. However it should be borne in mind that some defendants who are in custody for serious offences may face very real difficulties in complying with the requirement to provide evidence. The circumstances of conviction may have led to a breakdown in family relationships with those therefore potentially in a position to assist a defendant in custody provide such evidence, unwilling to do so.

12. Guidance should be in place to ensure that the sanction is in fact only applied in the circumstances outlined in paragraph 16 of the consultation paper, namely:

> *If the LSC has reason to believe that the defendant has capital assets to cover this amount [100% of outstanding defence costs] and the defendant has failed to provide a reasonable excuse for not submitting the necessary information or evidence. The LSC recognizes the increased difficulties presented to a defendant in custody in supplying this evidence. No deeming should take place where the consequences may result in injustice to the defendant.*

13. Applying the sanction outside these circumstances would be entirely unwarranted and could lead to significant injustice for dependants of the defendant. In addition, the overriding policy position of ensuring that defendants are only asked to pay a CCO that properly and accurately reflects the value of their capital assets should be always be kept in mind by decision-makers.

Question 3 – Do you agree that the above approach provides sufficient flexibility in light of the situations where a defendant's liability under or to an ICO may change?

14. As previously noted, the continuing commitment to only making defendants liable under ICOs for an amount that accurately reflects their true income status is welcome. The commitment to understanding the true financial position of the defendant is key, and this should always be the focus of determining appropriate amounts payable under ICOs. Accordingly the imposition of a one month time limit for defendant's notifying a change of circumstances is illogical. If the principle is to reflect a contribution based on true income status, and evidence is provided, albeit late, of a reduced income, it cannot be right that the defendant is required to pay a contribution based on an inaccurate higher income at all. It is noted that the LSC does not propose to impose any such time limit for correcting its own errors.

Question 4 – Where a defendant's financial circumstances change, is one month a reasonable period of time in which to expect the defendant to submit the relevant application form supported by evidence in order for any potential revision of liability to take effect from the date of the change, rather than the date of notification of the change?

15. We believe that one month is a reasonable amount of time in which to expect the defendant to submit an application form with evidence where there is a change in their financial circumstances. This is an appropriate extension of the 14 days that evidence must be provided within when making the original application for legal aid. However we do not accept that a failure to provide the evidence within that time should result in a bar to the defendant's contribution being re-assessed if the true position means that they will be required to pay a disproportionately high percentage of their income.

Question 5 – In what sort of special circumstances should the LSC extend the proposed one month rule regarding the deadline for submission of an application in respect of a change in financial circumstances in order for any potential revision of liability to take effect from the date of the change, rather than the date of notification of the change?

16. We consider 'reasonable excuse' is a more appropriate test than 'special circumstances'.

17. Guidance should be given as to what amounts to a reasonable excuse and may include situations where delays in making an application and/or providing evidence are entirely outside the control of the defendant, where paperwork from a new or previous employer is not forthcoming, where other government agencies are delayed in providing appropriate paperwork or a defendant is affected by family bereavement. In addition the fact that a defendant is remanded in custody is a relevant consideration. Ultimately, if a defendant establishes that they did not have the income that formed the basis for assessing their contribution it cannot be just nevertheless to require them to pay that contribution.

Question 6 – In this situation, do you agree with our proposal to refuse 'pro rata' refunds?

18. We do not agree that pro rata refunds should be refused where a defendant has made a lump sum payment. To deny pro rata refunds is entirely contrary to the overarching commitment expressed in the consultation paper that defendants should only pay contributions under ICOs for an amount that accurately reflects their true income status.

19. Denying a defendant a refund where they would otherwise be entitled to it will also act as a disincentive to make lump sum payments. This should be avoided. Lump sum payments should be made as attractive as possible as this will ensure prompt payment of contributions and lessen the enforcement burden of the MoJ. This is something clearly recognised by the MoJ as timely payment of contributions and a single lump sum payment means defendants are exempt from making a sixth monthly payment.

20. Additionally, the view that it would be administratively burdensome for the MoJ to hand back pro rata refunds when they would only seek to recover those sums through capital assets, fails to recognise that CCOs are only available where a defendant is convicted, and only where a defendant has sufficient capital assets for a CCO to be made. Paragraph 29 of the consultation paper notes that only one in seven defendants convicted at the Crown Court are estimated to have eligible capital assets and that enforcement against capital assets is complex and expensive. Therefore, in the majority of cases, it is assumed

that while defendants may be subject to an ICO, they are not necessarily subject to a CCO on conviction.

21. The MoJ would therefore receive an unfair windfall by denying a pro rata refund where people who had made monthly contributions would be able to take advantage of any change in circumstances. This is even more so in light of the fact that, as outlined in paragraph 30 of the consultation paper, the MoJ would require further payment from a defendant who has made a lump sum payment when they are liable to a higher ICO due to a change in circumstances. Ultimately, the MoJ should ensure that their overriding commitment is that defendants should pay contributions under ICOs for an amount that accurately reflects their true income status.

Question 7 – Do you agree with our proposal to require a defendant to make an additional single payment under an ICO in order to cover any shortfall between the amount a defendant has paid or was liable to pay under an ICO and the amount they should properly have been asked to pay from the outset?

22. As noted throughout, we believe that the MoJ's overriding commitment should be ensuring that defendants only pay contributions under ICOs for an amount that accurately reflects their true income status.

23. There should, however, be sufficient flexibility to ensure that additional payments can be paid through different payment options where defendants are unable to pay the additional liability in a lump sum. Additionally, review processes, including a hardship review process, should be available to defendants where there are concerns about how the decision was made, where there are extenuating circumstances explaining delays in the defendant providing required information, and where there is evidence of the inability of the defendant to pay the required amount.

Question 8 – Do you agree with our proposal to require a defendant to make an additional single payment under an ICO where that additional liability is established following a re-assessment arising from an administrative error or mistake in undertaking the original financial assessment of the defendant?

24. While we believe that defendants should be liable for contributions that reflect their true income position, where an additional liability arises because of an administrative error or mistake there should be greater flexibility available to allow defendants to meet any additional contribution.

25. We welcome the commitment to ensuring that the defendant will still have the benefit of the exemption from the sixth monthly payment if they have paid promptly or paid a lump sum. For this to be appropriately implemented, though, we believe that the defendant should only be liable to pay the lesser amount of difference between the original ICO and the re-assessed ICO, and the difference between that would have actually been payable if had the exemption from the sixth monthly payment was enforced. For example, if the original ICO amounted to £600 in total, and the re-assessed ICO amounted to £1,200, the

defendant should only have to pay £500 (as opposed to £600) as this is the difference between what would have been paid if the ICOs were each divided into five monthly contributions.

Question 9 – What are your views on retaining the option to collect further income contributions from a defendant's income earned following their conviction?

26. Once again, the overriding consideration should be ensuring defendants are liable for contributions that properly and accurately reflect their true income status. If a defendant continues in employment following their conviction, further contributions should be sought from them to meet the costs of their defence.

Question 10 – Do you agree with our proposals for the operation of the change in a defendant's financial circumstances in relation to liability under a CCO?

27. We believe that one month is a reasonable amount of time in which to expect the defendant to submit an application form with evidence where there is a change in their financial circumstances. This is an appropriate extension of the 14 days that evidence must be provided within when making the original application for legal aid. Giving the defendant an opportunity to provide information about any changes to their financial circumstances also lessens the administrative burden that may arise if the CCO was enforced before fully understanding the defendant's current capital situation. We repeat that the test for failure to comply should be that of 'reasonable excuse'.

Question 11 – Do you agree with our proposed approach to the operation of the MVO scheme?

28. We welcome the MoJ's approach to the operation of the Motor Vehicle Order (MVO) scheme. There is a high standard to be met before an MVO can be made – willful refusal or culpable neglect to pay – and there are safeguards in place to ensure vulnerable defendants and their dependants are not adversely affected.

29. Further information about what is done with any funds recovered in excess of the amount owed by the defendant would be welcome. It would seem improper for any excess amount to be retained by MoJ in light of the overarching policy commitment to ensure contributions properly and accurately reflect a defendant's true income and capital asset status.

Question 12 – In what situations should we consider safeguards for dependent family members and how could this be evidenced?

30. Where a vehicle is used by dependant family members for transport, an MVO would rarely (if ever) be proportionate and appropriate in all the circumstances. Written formal evidence from family members or dependents in the form of a letter could be acceptable evidence.

Question 13 – Do you have any additional or alternative proposals to improve collection and enforcement rates more generally?

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Question 14 – Do you agree that any impact on legal aid providers arising from our proposals is likely to be negligible?

31. We disagree that the impact on legal aid providers is likely to be negligible. Defendants and their families are likely to require their solicitors' and legal representatives' assistance in completing forms and providing evidence. This will take time. In the case of defendants who are remanded in custody, this is likely to require prison visits. Defendants will expect their representatives to contact (in writing) employers, banks or building societies, pension holders, benefits agencies, the land registry etc. They will require their solicitors to obtain property valuations, to liaise with the LSC and a court in relation to an MVO. An increasing proportion of defence solicitors' time is going to be spent dealing with legal aid.

32. Defence firms who have already had to endure considerable cuts in funding ought to be properly remunerated for the extra work they will have to undertake. There ought also to be provision for solicitors to continue to assist their clients post-conviction in relation to legal aid queries that arose from that case, particularly where there is to be a further assessment of a defendant's capital assets.

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