Ministry of Justice

Proposals for the Reform of Legal Aid in England and Wales

Response from Thompsons Solicitors

February 2011

About Thompsons

Thompsons Solicitors is the UK's most experienced trade union law firm. It operates a specialist criminal law unit from seven regional centres providing national coverage for union members accused of work-related crimes.

The Thompsons criminal law unit achieves enormous success, with 95% of referrals either dealt with as "no further action" (NFA) or our clients are acquitted.

In responding to this consultation we address only those questions which will impact on our criminal law unit clients. However, we consider that the overall proposals create a "double whammy" for access to justice for vulnerable people when coupled with the proposed reforms to civil litigation funding which was launched alongside this consultation.

Introduction

Criminal practitioners have been the target of a raft of changes since the Carter review in 2007. Legal Aid in the field of criminal defence appears seems to be an easy target for constant change and cutbacks.

We accept that the defence of criminals is not as attractive in terms of public opinion as other areas of the law such as social welfare. However, not all those accused or charged are the same and the right to be defended and to have a fair trial underpins a fair society.

The clients that Thompsons' specialist criminal law unit will deal with are almost all being exposed to the criminal legal system and even the legal system itself for the first time. 95% of our clients either have a decision of NFA by the police or are acquitted at trial. They are active, often professional members of society to whom even a caution can spell the end of their career.

The government has made much of its commitment to ensure that the teacher accused of a school related incident is not named until charged. And yet, under these proposals, the quality of the defence they can expect in the lead up to that charge and after being charged will be severely compromised. The two approaches are in direct conflict.

The questions

Q24: Do you agree with the proposals to:

- **Pay a single fixed fee of £565 for a guilty plea in an either way case which the magistrates' court has determined is suitable for summary trial;**

- **Enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way cases; and**

- **Remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee?**

We disagree with the proposal to pay a single fixed fee of £565 for a guilty plea which the magistrates' court has determined is suitable for summary trial.

The proposal provides a perverse disincentive for cases to go to Crown Court which will encourage a poor standard of client care and deliver poorer quality justice.

The right to a trial before a jury of peers is a long established principle of our law and the proposals significantly erode that right. The proposals make the decision in respect of trial venue a financial one for the lawyer. By skirting around what is the appropriate venue for a case and keeping the case in the Magistrates' court, a lawyer can avoid the risk of costs (in the event of a guilty plea in the Crown Court) being limited to £565.

There is nothing in the consultation paper that addresses this risk and reform that serves the pocket of the lawyer whilst freeing up (presumably expensive) Crown Court time is, in the absence of a reasonable explanation, endorsement of a denial of justice.

We face the prospect of either:

- Lawyers putting less effort into cracking Crown Court trials where summary jurisdiction has been accepted by the Magistrates' court, notwithstanding the evidence or the best interests of the client. The risk is that lawyers will encourage clients to hold out with a not guilty plea in order to be able to get a higher fee.

Or:

- Lawyers doing very limited work on a file and putting pressure on a client not to use their right to a Crown Court trial by jury as not doing so will make the case more profitable since trials in the Magistrates' court which require significant preparation will be paid under a non standard fee. Lawyers will receive a higher fee from the LSC than would be recoverable under the Litigators' Graduated Fee Scheme.

The decision as to trial venue is made at the first hearing in the Magistrates' court. In our experience, disclosure is very often provided by the Crown at that stage, is limited and decisions are made about trial venue without the benefit of all the essential evidence.

Magistrates may well accept jurisdiction in difficult and complicated cases - a teacher prosecuted for an alleged breach of section 7 of the Health and Safety at Work Act for example - based on sentencing rather than any other feature of the case. The decision ignores the significance of the offence and the fact that it is only after primary disclosure is complete and expert evidence obtained that definitive advice can be given.

The preparation for such a case - wherever it is heard - is considerable. If, after the case is prepared, the appropriate advice is that a guilty plea should be entered, all that work will attract a fee of just £565. That reflects a lower fee for the time spent on the case than even the lowest hourly rates. And yet if we fail to take appropriate steps before providing our advice the interests of the client would not be served.

Impact of the proposal

The proposed system would increase the need for adjournment of early hearings in order to allow time for sufficient disclosure. It would also require an early triage of the case between the Crown and the defence.

Early triage would require a major shift in CPS procedure away from the initial decision being entrenched and back to the CPS officers having ownership of files and being sufficiently familiar with it to overrule the original charging decision. The current pooling of files means that we deal with someone who may well have picked it up for the first time, making it very difficult for defendant lawyers to get anyone at the CPS to have a meaningful discussion on a case.

Suggested modifications to the proposal

1. The proposed system can only be effective if the Crown Prosecution Service is sufficiently resourced to be able to provide complete disclosure at an early stage. A failure to do so will leave lawyers taking essential steps in the case whilst at risk that the work will go unrecognised when they are later penalised by a lower fee.
2. "Guilty plea" needs to be properly defined. A failure of the consultation to do so means that it is unclear what fee would be awarded if, should the complexion of a case change as it progresses, as it often does, it becomes clear to both sides that a guilty plea to the original charge on the indictment is inappropriate. Should there be a plea to a different offence on an amended indictment would that result in a lower fee? We cannot conceive that this is the intention of the proposals as it would be unjust and against the best interests of the client.
3. There would need to be an early discussion about pleas to the original indictment to avoid plea bargaining at the door of the Crown Court which would then lead to a last minute guilty plea.

Q25: Do you agree with the proposal to harmonise the fee for a cracked trial in indictable only cases, and either way cases committed by magistrates, and in particular that:

- **The proposal to enhance the fees for a guilty plea in the Litigators' Graduated Fees Scheme and the Advocates Graduated Fees Scheme by 25% provides reasonable remuneration when averaged across the full range of cases; and**

- **Access to special preparation provides reasonable enhancement for the most complex cases?**

Please give reasons.

We welcome any enhancement of fees in this area. However, the proposed fee does not reflect the work that a solicitor must do on an indictable or either way case in the Crown Court that gets to the door of the court before a guilty plea is entered.

Due to the inefficiency of the CPS additional evidence is often not served until late in the proceedings. CCTV evidence or additional important statements are too often, and through no

fault of the defence team, only produced on the day of the trial. That new evidence can result in a guilty plea at a late stage and, under the proposals, entirely appropriate and necessary trial preparation work would effectively have to be written off.

The only "get out" – of 10,000 pages proposed at paragraph 6.28 is far too high.

Case example

Thompsons represented a teacher charged with historical allegations of Indecent assault. The matter was listed for trial and all necessary trial preparation was undertaken including third party disclosure of school and medical records, obtaining of expert advice and two full case conferences with counsel. The day before the trial was due to commence the Crown served notice of additional evidence comprising 5 witness statements from former pupils which had a devastating effect on the defence case and the defendant followed our advice to enter pleas of guilty.

Impact of the proposal

In the example above we would be paid a fee for a guilty plea when we had properly undertaken substantial work based on the evidence provided and obtained.

The risk is that solicitors will screen out difficult cases which are not clear cut to avoid not being paid for work done. This is a denial of access to justice.

The "swings and round about" approach to providing representation - a fee which is "averaged across the full range of cases" - is simply not acceptable. It assumes that there is a basket of cases, that the cases are varied and that from those the lawyer is paid if there is sufficient profit to cross subsidise to those where they aren't paid. The reality is that none of this may be the case. Businesses will not be able to plan for the future, build and develop staff and provide a high standard of service on this basis.

Suggested modifications to the proposal

The government should identify a structure that rewards all work properly and legitimately done:

1. A more accurate measure of what reflects "significant work" on a "complex case" would be 5,000 pages;

2. There should be an "escape clause" which allows arguments to be put to the trial judge about the complexity of the case, the work that was done on it and the reasons for the change in plea.

3. The "swings and round about" approach to providing representation should be abandoned.

Q26: Do you agree with the Government's proposal to align fees paid for cases of murder and manslaughter with those paid for cases of rape and other serious sexual offences? Please give reasons.

No.

As a firm we have a great deal of experience acting in both these type of cases.

We cannot see any justification for the suggestion that the fee for such cases should be aligned. Neither is "easier" than the other. The trial preparations cannot be aligned.

Individuals facing the most serious of charges should expect the highest standard of representation.

The issues in murder and manslaughter cases involve particularly complex matters of law and/or fact and the investigation of gross negligence manslaughter cases, work-related deaths and corporate manslaughter cases which arise from breaches of health and safety law are equally but uniquely complex.

The government is sending a message that murder and manslaughter cases are less important - that solicitors in them should be paid less for their work - than those in rape and serious sexual assault cases.

The implication is that the nurse accused of gross negligence manslaughter - a charge where the law is highly complex and the implications for the individual are life changing - should expect a lower level of representation than someone accused of rape.

Case examples:

We represented a nurse who was charged with Gross Negligence Manslaughter following the death of a child in her care. It was alleged that the nurse wrongly injected the child with a muscle relaxant which caused the child to lose the ability to breathe. The case preparation was substantial and the law complex. The nurse was acquitted.

We have also represented a diver who was charged with Gross Negligence Manslaughter arising from the death of a colleague. The preparation took over 250 hours and the trial collapsed because of issues of credibility surrounding a key prosecution witness. The outcome was an acquittal.

Impact of the proposal

There would be a 40 % reduction in fees for the preparation of murder/manslaughter cases.

Q27: Do you agree with the Government's proposal to remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100.000? Please give reasons.

No.

At Thompsons it is our extensive experience that representing people accused of work-related fraud of less than £100,000, involving as it does small amounts of money at a time being stolen (which is how the perpetrators often conceal their actions for so long), makes investigation much more complex than a single theft of a far larger amount than £100,000.

In our experience there is no correlation between the complexity of a case and the size of the fraud.

Case example

Our client was a senior civilian police officer who was charged with fraud in the sum of £22,000 The allegation was that over 5 years she made fraudulent claims for over payment. The electronic exhibits run to in excess of 100,000 pages.

Further comments

We are surprised to read, at paragraph 6.55, that the government is considering re-introducing the proposals of the previous administration, and in particular that there should be a more limited form of competition under which providers would bid against existing administrative fees.

This appears to hark back to the original Carter reform proposals.

Impact of the Proposal

The proposal will undermine competition and access to justice. Firms will bid very little in order to secure a monopoly in an area but will then only be able to operate on a business model that assumes limited work and low level skill.

Significant numbers of small businesses will be driven out of the market. At a time when the economy is in need of stimulation and stability the government is proposing reforms to the criminal justice system that will shut firms down and cut jobs.

Competition will be stifled because come the next round there will be limited others against which to compare the monopoly provider.

Niche firms such as Thompsons, which specialise in certain types of crime, will also be excluded. This will deny access to justice for those whose case requires specialist, experienced legal representation and will force clients like ours, almost all of whom have a finding of NFA or are acquitted.

Hard working individuals who have never been involved in any criminal activity in their lives and who should be back at the school, hospital or police station where they work and make an important contribution to society will be processed as common criminals. They are unlikely as a result to return quickly, or at all, to their former positions.

Again the proposal suggests confusion within government. If on the one hand the intention is to protect teachers facing false allegations, why take away with the other the specialist and sensitive representation they need and deserve?

The LSC administration costs for such a system would far outweigh any benefit gained. In order to implement the proposed system the LSC would need to introduce new electronic systems and staff training, provide suppliers with education. literature and training, This will result in an escalation in LSC costs and expenditure.

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