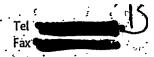
Department for Culture, Media and Sport Creative Industries

4th Floor Cockspur Street



To

1.

2. Secretary of State

From

File Ref

Date

1 May 2002

c Dr Kim Howells Sue Street Andrew Ramsay

Paddy Feeny

Bill Bush

LCD CONSULTATION ON PAYMENTS TO WITNESSES - PRESS COMPLAINTS COMMISSION (PCC) RESPONSE

You will be aware of the Lord Chancellor's Department's (LCD's) consultation exercise on a proposed criminal offence of making payments to witnesses in criminal trials (substitution) submission of 19 December is attached at Flag A, for background reference).

We have just received the PCC's response to this consultation (Flag B), which is due to be published tomorrow, (2 May). You will see that it is highly critical of the proposals, arguing with some force that they are disproportionate to the level of mischief identified, and would not in any case prevent such cases from occurring in the future.

During interdepartmental discussions on the proposals, we warned the LCD of the likely critical response from the newspaper industry, but the strength of the arguments contained in the PCC's paper will clearly be of concern to them in deciding how to respond to the consultation exercise. Of particular concern is that the consultation sought views on the detail of the proposed legislation, rather than on whether such legislation should be introduced in the first place, and LCD may, therefore, have difficulties in deciding how to proceed.

Separately, we have been working with the LCD in opening a dialogue with the PCC with the aim of strengthening the industry's Code on pre-trial publicity. We have held an exploratory meeting with the PCC on this issue, but it is looking likely that they will be equally critical of this proposal. We will, of course, continue to work closely with both LCD and the PCC on this, and the issue of payments to witnesses, and will keep you informed as the issues progress.



To 1. CC Dr Kim Howells
Sue Street
2. Secretary of State Andrew Ramsay
From
Paddy Feeny
Date 20 May 2002 Bill Bush

Department for Culture, Media and Sport

Creative Industries

PAYMENTS TO WITNESSES CONSULTATION: SUMMARY OF PRESS COMPLAINTS COMMISSION (PCC) RESPONSE

Further to my submission of 1 May on the above, you have asked for a summary of the PCC's response to the consultation exercise, which proposes to establish a criminal offence of making, or agreeing to make, or receiving, payments to witnesses or potential witnesses in criminal proceedings.

The PCC's response is based on the argument that the proposal is disproportionate to the nature and extent of the problem. It looks at four areas which it claims underpin the rationale for the proposal:

- whether there is a proven need for legislation
- whether self regulation can be seen to have failed
- whether the proposal is practical and effective
- whether an alternative approach can be considered.

The PCC's case on each of these areas is as follows:

Is there a proven need for legislation?

The PCC states that there is no clear evidence to demonstrate that legislation is needed to deal with this issue, arguing that in only one of the five cases cited in the consultation paper (over the course of fifty years) was there shown to be any mischief in paying witnesses for articles. The five cases were:

- Brady and Hindley the Attorney General at the time agreed that there had been no evidence that any testimony had been affected by payments.
- Thorpe the then Press Council censured the Sunday Telegraph for payments (contrary to what the LCD's consultation paper states) but agreed that the cumulative actions by newspapers was in the public interest, and no action was taken at the time by the Attorney General.
- Sutcliffe this was not an issue of witness payments, but of payments to associates of criminals, on which the Press Council instituted new rules.

Department for Culture, Media and Sport

West - as the Consultation Paper states, the Court of Appeal concluded that there was no evidence that witness payments had caused mischief. Nevertheless, the PCC strengthened its Code in response to the case. Gadd (Gary Glitter) - there was evidence of mischief due to a conditional payment (which the newspaper claimed was made inadvertently), which the PCC agreed had breached the Code, and on which it sought to ban conditional payments in future.

The PCC's response also cites the case of Gehring, which occurred after publication of the Consultation Paper. Although payments to some of the witnesses in the trial were made, no evidence of mischief has been substantiated, and the PCC has ruled that there was no breach of the Code.

Is there evidence that self regulation has failed?

The PCC's argument here is that the industry's Code has been successful in stopping virtually all witness payments by newspapers. Since the Code's creation in 1991, there have been only three cases of witness payments brought under it, only one of which was judged to have breached the Code (Gadd). It also makes the point that the Code was set up to control, rather than ban, witness payments, so the consultation paper is wrong in stating that self regulation failed to prevent payments in the cases cited above.

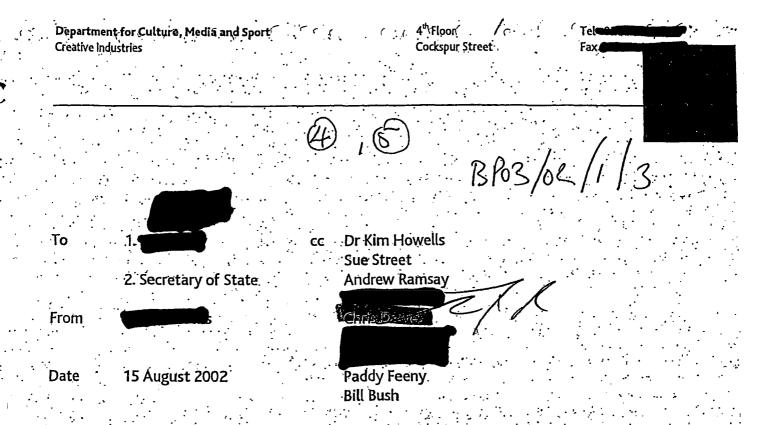
Are the proposals practical and effective?

The PCC argues that even if the LCD's proposals had been implemented at the time of the Gadd trial (the only case where it agrees mischief had been caused), they would not have prevented the witness payment from being made. The LCD proposals are intended to apply from the time that a trial is 'imminent or pending' to its conclusion. In the Gadd case, however, the contract for payment was made before a trial was being considered, so the individual concerned was not a witness or potential witness. This would also not have prevented payments made after the trial in the Gehring case. The PCC suggests that this time limit could actually encourage witnesses to exaggerate stories (as the consultation paper claims), in order to get a better price for their stories once the trial had been concluded. The PCC also makes the point that the proposals make no attempt to ban police payments, yet these can have just as much effect on witness statements (as has been shown in the Damilola Taylor trial).

Is there an alternative approach?

The PCC's response concludes that witness payments are as much a moral question as a legal one, acknowledging that whilst some people find them objectionable, this does not necessarily make them wrong. It repeats the argument that self regulation has been shown to have stopped virtually all payments anyway, and that the industry would be prepared to amend the Code to ban, rather than control, payments if it felt a robust case for doing so had been made. If the Government insists on proceeding with the legislative route, however, it urges that the proposals in their current form be reconsidered, for the reasons set out above.

We understand that the Lord Chancellor has asked his officials for advice on the PCC's response. We have suggested to our counterparts in LCD that if the Lord



IDL Case 10937: PAYMENTS TO WITNESSES & SECTION 19 PROSECUTION OF OFFENCES ACT 1985

Issue:

Whether to agree with the Lord Chancellor's proposed course of action (his letter of 8 August to the Deputy Prime Minister is at Flag A) in response to the consultation exercise on establishing a criminal offence for making payments to witnesses in criminal proceedings. The Lord Chancellor proposes to:

- proceed with legislation to introduce a criminal offence of making, or agreeing to make, or receiving, payments to witnesses or potential witnesses in criminal proceedings in the Autumn, but only if the newspaper industry fails to come up with satisfactory proposals to strengthen self regulation in this area in the interim (submissions of 1 and 20 May are attached at Flag B for background reference); and
- amend Section 19 of the Prosecution of Offences Act 1985 to extend liability for costs as a result of improper or unnecessary acts in criminal cases to third parties (following the collapse of the trial of the Leeds United footballers due to articles published by the Sunday Mirror).

Recommendation:

That you agree with the proposed course of action on both payments to witnesses and amending Section 19, but express your hope that improved self regulation on the former will make legislation unnecessary.

Timing:

URGENT. The Lord Chancellor is seeking responses by 22 August.

Department for Culture, Media and Sport.

Background:

The PCC and other newspaper bodies have vigorously opposed the introduction of legislation relating to payments to witnesses, arguing that such a step would be disproportionate to the level of mischief identified, and would in any case be ineffective against similar cases occurring in the future. In the face of these concerns, and following a suggestion from industry bodies, the Lord Chancellor has agreed to give them an opportunity to come up with satisfactory proposals to improve self regulation in this area before the Government proceeds with legislation.

The relevant section of the PCC's Code of Practice states:

16 *Payment for articles

i) Payment or offers of payment for stories or information must not be made directly or through agents to witnesses or potential witnesses in current criminal proceedings except where the material concerned ought to be published in the public interest and there is an overriding need to make or promise to make a payment for this to be done. Journalists must take every possible step to ensure that no financial dealings have influence on the evidence that those witnesses may give.

(An editor authorising such a payment must be prepared to demonstrate that there is a legitimate public interest at stake involving matters that the public has a right to know. The payment or, where accepted, the offer of payment to any witness who is actually cited to give evidence should be disclosed to the prosecution and the defence and the witness should be advised of this).

The clause was strengthened in 1996, following controversy during the Rosemary West trial, and the PCC has shown a willingness to look at amending it further to address the LCD's concerns.

We believe that the newspaper industry has produced some persuasive arguments against the proposals as originally envisaged, particularly in regard to whether they are proportionate to the extent of the problem, and why payments by the press should be seen as a greater danger to the administration of justice than payments made by other bodies such as the police (eg. as demonstrated by the witness statements made during the Damilola Taylor case). We have been involved in discussions at official level between the LCD and the newspaper industry at the PCC over the last couple of months, and have encouraged the LCD to pursue the industry's proposal to look at strengthening its Code of Practice in this area, if it can be proved to be effective in preventing future mischief.

We have received through official channels a draft letter which the Lord Chancellor would send to the PCC explaining his proposed course of action if he secures colleagues' approval to the proposals outlined in his letter of 8 August. It is clear from the draft (attached at Flag C), that LCD intend to take a very robust line on all these issues. There may well be a sticking point over the issue of the public interest defence, however, which the PCC would like retained in some form, and the LCD would want to see removed from the point when 'active criminal proceedings' have begun.

Department for Culture; Media and Sport

Whilst newspapers have been identified by the LCD as the chief culprits on witness payments, the proposals, whether pursued through self regulation or legislation, would cover the media in general, and we have ensured that the relevant information on broadcasting regulations in this area has been passed to LCD officials.

If the legislation were to prove necessary, then the LCD intends to include its proposals in the Home Office's Sentencing and Criminal Justice Bill in the next session, subject to two changes of detail from that originally outlined (extending the offence to include offers of payments as well as agreements to make payments, and narrowing the period of the offence from when a trial is 'imminent or pending' to when it is 'active' as defined under the Contempt of Court Act 1981).

The draft reply agrees to the Lord Chancellor's proposed course of action, but	•
expresses the hope that improved self regulation will make legislation unneces	

Department for Culture, Media and Sport

DRAFT REPLY FROM SECRETARY OF STATE TO THE LORD CHANCELLOR

The Rt Hon The Lord Irvine of Lairg House of Lords London SW1A OPW

Thank you for copying to me your letter of 8 August to the Deputy Prime Minister, seeking colleagues' agreement to your proposed course of action on payments to witnesses and extending liability for costs in criminal cases to third parties.

I agree with your proposed course of action on both these issues. I recognise the crucial importance of ensuring that evidence given in criminal proceedings is not seen to be tainted by financial reward from any source, and in ensuring that media coverage, either before or during a trial, does not adversely influence the deliberation of juries. As a matter of principle, however, I very much agree that we should give the media an opportunity to come up with proposals to strengthen their own regulations in the area of witness payments, before taking the legislative route. The PCC's Code of Practice was previously strengthened in this respect following the Rosemary West trial, and I would hope that it would prove possible to strengthen it further, to minimise, or indeed eliminate, the risk of future mischief.

From the media's reaction to the consultation proposals, legislation would clearly be controversial, and would not necessarily be more effective at preventing mischief than strengthened self regulation in this area, if the latter can be achieved to our satisfaction in the coming months. As you state, pursuing the self regulatory route would also establish a broader period for the offence than would be likely under legislation, and it would also avoid the Government having to defend making a distinction between witness payments made by the press, and those made by other bodies, such as the police.

Department for Culture, Media and Sport

I would, however, be content for you to proceed with the legislative option, if we are unable to persuade the media to strengthen self regulation satisfactorily.

TESSA JOWELL

FROM THE RIGHT HONOURABLE THE LORD IRVINE OF LAIRG



HOUSE OF LORDS,
LONDON SWIA OPW

The Rt Hon John Prescott MP Deputy Prime Minister & First Secretary of State Cabinet Office 70 Whitehall London SW1A 2AS

Department for Culture, Media and Sport								
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Dear Deputy nine Mine

PAYMENTS TO WITNESSES

SECTION 19 PROSECUTION OF OFFENCES ACT 1985

On 11 January 2002, you gave me DA agreement (i) to issue a consultation paper about outlawing payments to witnesses in criminal proceedings with a view to publication, and (ii) to amend section 19 Prosecution of Offences Act 1985 to empower the criminal courts to order a third party to pay costs which his or her improper or unnecessary act has caused a party or parties to incur.

This letter seeks:

- (i) DA agreement that we should proceed with the legislation banning payments to witnesses, subject to two changes of detail to the proposals in the Consultation Paper; but only if the Press Complaints Commission (PCC) and other media regulators do not come forward by the Autumn with satisfactory proposals to achieve the same effect through self-regulation; and
- (ii) LP agreement to include the section 19 amendment in either my own Courts Reform Bill or David Blunkett's Sentencing and Criminal Justice Bill in the next Session; and if necessary to include the payments to witnesses legislation in David's Bill.

I would be grateful for a response by 22 August.

Payments to witnesses

The Payments to Witnesses Consultation Paper stated that the Government intended to make this practice a criminal offence, and sought views only on the details. The response was predictable. Media respondents were strongly opposed in principle, but had no significant new arguments, and

made few comments on the details. Others were generally supportive. I will publish a full analysis of the responses in due course.

I propose two changes of detail as result of consultation.

- The offence should include 'offers of payment' as well as agreements to make payments and the payments themselves. The recent Amy Gehring case illustrated that a distinction between offers and agreements could be difficult to draw in practice. The PCC already regulates offers in its Code of Practice to some extent. I do not propose that mere 'requests' for payments by witnesses should be a criminal offence. Witnesses are less likely to be conversant with the law than the media and may well offend unwittingly.
- The period in which payments are banned should be when proceedings are 'active' as defined in the Contempt of Court Act 1981. This means the ban on payments would begin at the time of arrest or charge. The Consultation Paper proposed that the prohibition period should begin when proceedings are 'imminent or pending'. This would include the period shortly before arrest or charge. But the term 'imminent or pending' is not defined in detail which may make it difficult for witnesses and journalists to understand and adhere to the law.

Self regulation

Following the PCC's response to the Consultation Paper, I instructed my officials to discuss with them their proposal to tackle the issue by strengthening their Code of Practice. The Code currently provides that payments should not be offered or made to witnesses or potential witnesses in current criminal proceedings, unless the material concerned ought to be published in the public interest and there is an overriding need to make or promise payment for this to be done. The definition of public interest is open-ended, but is said to include the prevention or exposure of crime, the protection of public health and safety and the exposure of misleading statements.

PCC has now indicated that it is prepared to consider amending its Code so that, in effect, it bans offers and payments during criminal proceedings. It has also agreed in principle to extend the scope of the Code's existing provisions on payments to apply to potential witnesses in possible criminal proceedings, and to make explicit that payments conditional on conviction are unacceptable in all circumstances.

There is a risk that self-regulation will be less effective because it does not carry the same deterrent effect as a criminal offence. Against that, we would avoid the need to carry controversial legislation that the media would vigorously oppose, and we gain the extension of self-regulation to cover the period before proceedings, where it would be extremely difficult to frame workable legislation.

If colleagues agree that we should pursue this option, I would write to the PCC setting out the basis on which the Government would be prepared to withdraw its proposal to legislate. The PCC would have to produce tightly drawn and explicit amendments to its Code to ban any payments during active criminal proceedings and conditional payments at any time, and to extend the existing controls to payments made before potential criminal proceedings. It should complete the process of drafting and consultation on these amendments by the end of October. It would be necessary for all other media regulators to agree to equivalent changes, where necessary, to their own Codes. I would make clear that the Government would be quick to legislate if satisfactory proposals could

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not be agreed, or should there be any future incident in breach of the revised Code. I would copy the letter to other media regulators, and make a Press announcement about it.

In discussions with officials, the PCC has argued that there should remain a limited public interest exception for payments necessary to bring to light information or evidence relevant to the course of justice in the proceedings. They raise the hypothetical scenario that investigative journalism, continuing after proceedings have begun, might bring to light a new potential witness who is only prepared to come forward if paid by the Press. I am not aware of any case where this situation has arisen, and doubt that such a witness would carry any credibility with a jury. Rather such a witness would be cross examined in such a way as would be likely to prejudice the success of the prosecution. My view remains that there is no conceivable public interest in payments to witnesses once proceedings have begun.

Section 19 Prosecution of Offences Act 1985

I announced the Government's intention to amend section 19 of the 1985 Act at the same time as I published the Payments to Witnesses Consultation Paper last March. Section 19 deals with costs incurred by one party as a result of the improper or unnecessary act of another. The amendment would extend it to empower the court to order costs against a non-party. The civil courts already have an equivalent power. The power is aimed in particular at the situation where prejudicial publicity causes a trial to be abandoned, as last year in R v Woodgate and others (the Leeds Footballers' case), at substantial cost to public funds

I am now seeking LP agreement to include this one-clause provision in either the Courts Reform Bill or the Sentencing and Criminal Justice Bill. I believe it would fit sensibly within the likely scope of either. Instructions to Coursel could be completed very quickly once colleagues agree.

I am also seeking LP agreement, on a provisional basis should the media's detailed proposals on self-regulation prove unsatisfactory, to include legislation on payments to witnesses in the Sentencing and Criminal Justice Bill. (I doubt that the creation of a criminal offence would fit the scope of the Courts Reform Bill.) This will be 6 to 10 clauses and instructions can be ready for counsel immediately should we make a decision to proceed in November.

I am copying this letter to the Prime Minister, members of DA Committee, of LP Committee, First Parliamentary Counsel and Sir Richard Wilson.

Yours Stuce etg

Approved by the Lord Chancellor and signed in his absence by the Private Secretary DRAFT LETTER FROM LORD CHANCELLOR.
TO PROFESSOR PINKER, ACTING CHAIRMAN, P.C.C.

Professor Robert Pinker
Acting Chairman
Press Complaints Commission
1 Salisbury Square
London EC4 8JB

August 2002

Dear

PAYMENTS TO WITNESSES

I have now considered the outcome of the consultation on Payments to Witnesses, and officials have reported to me the outcome of your discussions with them about tackling the problem through self-regulation. I am writing to tell you how the Government intends to take the issue forward. I intend to make an announcement about contents of this letter on 29 August and enclose a copy of the Press Notice embargoed until then.

We remain determined to put an end to the practice of paying witnesses for their stories during active criminal proceedings. I am entirely unconvinced by the arguments that the issue has arisen in only a small number of cases and that there is no evidence of actual mischief. We are concerned here with a practice that creates a plain and inherent risk to the course of justice, and for which there can be no conceivable justification once proceedings have begun. Different considerations apply before someone is arrested or charged. I have no wish to hinder legitimate investigative journalism, which I recognise can play a valuable role in detecting crime and which will sometimes necessarily involve payment. But I do wish to ensure there can be no repetition of the disgraceful events that occurred in the Gary Glitter case.

However, if satisfactory forms of words can be agreed, the Government is prepared to pursue these objectives through self-regulation rather than legislation. It will of course be necessary for all media regulators, that is those who oversee broadcasters as well as the Press, to agree to adopt this approach.

A satisfactory self-regulatory regime would need to go beyond the existing PCC Code in three ways. First, it should make clear that there could no public interest in paying a potential witness in active criminal proceedings. Second, it should state explicitly that payments conditional on conviction are unacceptable in all circumstances. Third, the existing provisions about payments to

witnesses in current criminal proceedings should apply rather to possible future proceedings. That is to say that offers and payments to witnesses of alleged criminal offences should only be made where payment is necessary and publication in the public interest (for example, to expose a crime), and there should be a duty of disclosure if the interviewee later became a witness in proceedings.

It is important that amendments to the Code achieve this (and any accompanying guidance) should be clear and explicit, so that editors are in no doubt what is expected.

In discussions with my officials, you argued that there might be one circumstance in which a payment to a potential witness in current proceedings might be justified in the public interest. This was where investigative journalism, continuing after proceedings had begun, brought to light new evidence in the form of a potential witness who was only prepared to come forward if paid by the Press. I have to say I am not convinced there is a case for making this exception. So far as I am aware, it is wholly hypothetical scenario; and if it did ever arise, I very much doubt that the witness could be used because he or she would carry no credibility with the jury. My view remains that there is no conceivable public interest in payments to witnesses once proceedings have begun.

I appreciate that, should you wish to pursue self-regulation on the basis I have outlined, you would need to draft appropriate amendments to the Code and then consult the industry. I would hope that process can be completed by the end of October 2002.

I should stress that the Government remains ready to legislate, if satisfactory proposals cannot be agreed, or should there be any future incident in breach of the revised Code. That legislation would be based on the scheme in the Consultation Paper, subject to two changes following consultation.

The offence should include 'offers of payment' as well as agreements to make payments and the payments themselves. As you have pointed out, your Code already covers these, and the Amy Gehring case illustrated that a distinction between offers and agreements could be difficult to draw in practice.

The period in which payments are banned should be when proceedings are 'active' as defined in the Contempt of Court Act 1981. This is slightly narrower than the 'imminent or pending' test proposed in the Consultation Paper because it would not include the period immediately before arrest or charge. I am making the change in the light of arguments that the term 'active' is clearer and more familiar, and so should make it easier for witnesses and journalists to understand and adhere to the law.

I am copying this letter to; the Controller of Editorial Policy at the British Broadcasting Corporation; the Director of Programmes, Advertising and Sponsorship at the Independent Television Commission; the Director of Programming and Advertising at the Radio Authority; and on an information only basis to the Broadcasting Standards Commission.

Yours

Department for Culture, Media and Sport Creative Industries 402

Restricted - Policy

Тc

1. 19/12

2. Secretary of State

cc Dr Kim Howells

Andrew Ramsay

Diana Kahn Chris Dawes

Paddy Feeney

Peter de Val Ruth Mackenzie

Bill Bush

File Ref

9/24451

Date

19 December 2001

LORD CHANCELLORS DEPARTMENT - CONTEMPT OF COURT

(1) Consultation on Outlawing Payments to Witnesses

(2) Prejudicial Publicity: Leeds Footballers' Trial - Power to Award Costs Against Third Parties

issue:

The Lord Chancellor is seeking agreement to (1) the text of a consultation paper on payments to witnesses; and (2) amending section 19 of the Prosecution of Offences Act to empower the criminal courts to order a third party to pay costs for creating/causing prejudicial publicity:

Recommendation:

That you agree both the draft text (subject to some minor drafting changes and clarifications to be handled by officials) and the prejudicial publicity proposal. A draft letter for you to send to the Lord Chancellor is attached.

Timing:

Urgent. The LCD have asked for a reply by 21 DECEMBER.

Background:

In the wake of the Paul Gadd (Gary Glitter) case the Lord Chancellor proposed a review of the law of Contempt with a view to introducing legislative proposals dealing with payments to witnesses and pre-trial publicity. There were legitimate concerns about the potentially pernicious impact of payments to witnesses on the course of justice, for instance by influencing witness' testimony (the West case) or by undermining the credibility of a witness (Gadd). The press Code of Practice has been strengthened in this area and seems to have been moderately successful in modifying editors behaviour and curbing incidences of payments. However, the official Working Group set up by the Lord Chancellor has recommended a new

Restricted - Policy

Department for Culture, Media and Sport

offence forbidding payments, or agreements to make payments, to witnesses in criminal trials.

The Lord Chancellor proposed a consultation exercise on these legislative proposals and DCMS has been invited to comment on successive drafts. The final version of the consultation document is attached. While I recommend you agree the main thrust of the draft there are some important points of drafting and clarification to be made and I will pursue these with officials at LCD.

On pre-trial publicity no legislative action is proposed but the Press Complaints Commission will be invited to strengthen the Code of Practice.

The Lord Chancellor also proposes a new power in contempt proceedings to order costs against a non-party. In the trial of the Leeds footballers earlier this year the judge decided that articles published by the Sunday Mirror during the trial gave rise to a substantial risk of prejudice and that there should be a re-trial. Under section 16 of the Prosecution of Offences Act 1985, the court may, and usually does, order that payment be made of some or all of the costs of an acquitted defendant out of central funds. Section 19 of the 1985 Act deals with costs incurred by one party as a result of the improper, or unnecessary act of another but it does not empower the court to order costs against a non-party. This power exists in civil courts and the LC proposes the extension of this legislation to the criminal courts. Although the Lord Chancellor indicates he does not expect a reaction from the press over the introduction of this new power history suggests they will 'react'.

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Head of Music Industry Branch/Press Regulation