REASONABLE LEGAL EXPENSES:
CURRENT POLICY AND PRACTICE*

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LEGISLATION

Section 43(3) of the *Proceeds of Crime Act* provides that a restraining order against a person's property may be made subject to such conditions as the court thinks fit including making provision for meeting out of the property:

(a) the person's reasonable living expenses and reasonable business expenses;

(b) the person's reasonable expenses in defending a criminal charge;

(c) a specified debt incurred by the person in good faith (being a debt to which neither paragraph (a) nor (b) applies).

There is no specific provision covering expenses connected to the proceeds of crime hearing but it has never been suggested that the court's general discretion does not extend to covering these expenses. Section 43(4) provides that the court is not to release funds for expenses unless it is satisfied that the defendant cannot meet the expense out of property that is not subject to a restraining order. Apart from the requirement in section 43(4) the only other guidance given by the Act is that the expenses must be "reasonable". There is provision in section 48A for the court to order that legal expenses be taxed where they are to be paid out of property under the custody and control of the Official Trustee.

It must be recognised that the payment of legal fees out of restrained assets involves competing public interests. The task is to strike a balance between these interests. On the one hand defendants are presumed to be innocent and should have access to their property to enable their defence in a criminal matter to be prepared and conducted as they think appropriate. On the other hand a defendant has no right to illegally obtained assets to spend as he or she likes on a lavish defence of criminal charges. The community has an interest in preserving these assets intact to satisfy any confiscation order.

In Australia these competing interests have been decided very much in favour of the defendant. United States legislation does not exempt legal fees from restraint and forfeiture and it has been found that the failure to provide such an exemption does not breach the sixth amendment right to counsel. It is not suggested that the US model should

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be adopted here. It is suggested that more weight needs to be given to the community's interest in determining what are reasonable legal expenses.

BACKGROUND AND CASES

The Department of Public Prosecution (DPP) first had to consider the issue of the payment of legal fees out of restrained assets in relation to its civil remedies function and Mareva Injunctions. It was decided to deal with matters on a case by case basis. This policy is referred to in the Director of Public Prosecutions Annual Report 1985-86 at page 28:

> Because circumstances vary, the most appropriate way to deal with matters is on a case by case basis seeking to strike a balance between the competing interests involved. The factors to be considered include the strength of the prosecution's case, the circumstances of the particular alleged fraud and whether the defendant has access to other assets either within or outside the jurisdiction.

Commonwealth of Australia v Jansenberger[1] involved the use by the accused of 53 false names in a systematic Social Security fraud which netted the defendant approximately $380,000. Assets secured by Mareva Injunction amounted to some $355,000. In response to the application for the release of funds for legal costs of the criminal trial Southwell J stated:[2]

> In my view, the answer to that is simply this; there is, as I have said, a strong prima facie case that the defendant has obtained by fraud from the Commonwealth of Australia significantly more than the assets which now can be traced to him. In those circumstances, to narrow the injunction and thereby allow him to use part of those funds to pay to the solicitor of his choice is, in effect, to be giving back to him money to which prima facie he has no legal or moral right to enable him to spend as he pleases upon a private solicitor.

Southwell J had earlier referred to the strong prima facie case that the plaintiff would recover more than the assets secured and also the fact that there was no evidence that any of the assets were obtained by lawful means or from lawful sources. He thought it preferable that the Legal Aid Commission should control the expenditure of funds.

The initial approach in relation to the release of funds secured under the *Proceeds of Crime Act* and the *Customs Act* can best be described by reference to an address given by the then Director, Ian Temby QC, to the ACT branch of the Criminal Lawyers Association of Australia:[3]

> Particular difficulties can arise when the assets of alleged criminals are frozen prior to trial. Two principles can then be seen to be in conflict. On the one hand, persons accused of crime should be entitled to defend themselves through solicitors and counsel of their choice. On the other hand, the cost of that representation should not be met by society, as will be the case if stolen property is used for the purpose, or the profits of illegal drug activities — and so one could go on.

1 Unreported, Supreme Court of Victoria, per Southwell J, 3 October 1985.
2 Id at 7.
3 Reported in 23/3 *Australian Law News* (1988) at 10.

> The approach the DPP has adopted is to give a degree of primacy to the first of these principles. As a general rule, if the only funds available to an accused person are those which have been subjected to freezing orders, we will consent to sufficient funds being released to enable proper legal representation. There are many cases in which such consent has been given, before a court or otherwise.
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> On a mere handful of occasions the DPP has resisted a claim for the release of funds to meet legal costs and ordinary living expenses, on the basis that there are other funds available which have not been disclosed or discovered, sometimes in the hands of others, and sometimes overseas. The best we can do is to assure the legal profession that we will always try to be reasonable in circumstances such as this, and we have a track record to rely upon in that regard. If that assurance be insufficient, as it may be, then resort to the courts in always available.

In *Director of Public Prosecutions v Ward*[4] John Henry Ward was charged in Western Australia under section 29D of the *Crimes Act* 1914 with defrauding the Customs Service. While an employee of the service he obtained approximately $394,000 by claiming diesel fuel rebates for non existent farm properties. Ward sought a variation of the restraining order to require the Official Trustee to make provision out of the property restrained for his and his dependents living and legal expenses. This variation was opposed on the basis that Ward had failed to explain what had happened to an investment in Singapore of S$140,000. Ward claimed that he had no property or income not subject to the restraining order out of which he could meet these expenses and the court was satisfied that that was the case. The matter therefore fell to be dealt with pursuant to the discretion under section 43(3) of the *Proceeds of Crime Act.*

Ward had sought the payment of living expenses out of his entitlement to furlough pay owing to him pursuant to his employment with the Customs Service. In rejecting this part of Ward's application Kennedy J referred to three important factors in the exercise of his discretion. The first was that Ward had at all times admitted the offences and there was no suggestion that he would retreat from admissions made. The second was that the funds out of which living expenses were sought were monies due from the Department which had been defrauded by Ward. Third, in relation to benefits obtained there was likely to be a shortfall of some $120,000 even if all Ward's assets were applied to satisfy his liability for the monies defrauded. Kennedy J acknowledged that the consequences of not making the order sought would be that Ward and perhaps his dependents would be forced to live on social security benefits. He did not regard this as incongruous in the circumstances.

In relation to the application for legal expenses the judge took a narrow view of the application in finding that the claim did not come within section 43(3). This section authorises the meeting of "reasonable expenses in defending a criminal charge". Ward had simply applied for his "reasonable legal expenses". Ward had made full admissions and there was nothing before the court to indicate that he was seeking to defend the criminal charges.

4 Unreported, Supreme Court of WA, per Kennedy J, 23 December 1988.

In the matter of *Commissioner of Australian Federal Police v Malkoun and Others*[5] applications to vary restraining orders under the *Customs Act* to allow for the payment of legal fees were opposed.

In the exercise of his discretion Ryan J was not prepared to leave the funding of the defence to the Legal Aid Commission. He was also not prepared to allow the defendants unrestricted access to the assets restrained "so as to allow a hopeless or extravagant defence to be mounted in the expectation that any funds left will inevitably be subsumed by orders for pecuniary penalties under section 243B". He allowed each defendant up to an amount of $30,000 for the costs of the trial. This was a far more restrictive approach than the orders he made in respect of the committal proceedings which consumed some $250,000 in legal costs.

In the majority of cases applicants are successful in having funds released for legal expenses either because the applications are not opposed or the court rules in their favour. Once orders are made the real difficulty is in ensuring that legal costs are reasonable.

Operation Tableau involved the arrest of 12 persons in Queensland in 1987, there were nine US nationals and three Australians. They were charged with various offences arising out of two large importations of cannabis resin that took place in 1985 and 1986. The investigation revealed the existence of a large scale international drug smuggling syndicate led by a number of US nationals residing in Australia. All defendants were committed for trial. A nolle prosequi was entered with respect to one defendant while the remaining defendants pleaded guilty to various drug related charges. The four principals were sentenced to terms of imprisonment ranging from 18 to 25 years.

In September 1987, shortly after the arrests, orders under the *Customs Act* were obtained in the Federal Court placing the property of all defendants under the control of the Official Trustee. The Official Trustee proceeded to collect assets, largely cash, to the value of approximately $160,000. At that stage it was not clear who owned which assets. On 7 December 1987 solicitors for four defendants wrote to the Official Trustee on behalf of their clients authorising the pooling of all funds and the payment of any accounts out of such common fund. On 13 December 1987 the Official Trustee replied to that letter confirming the pooling arrangements for the payment of legal fees. One account was subsequently paid pursuant to this arrangement.

On 24 December 1987 Pincus J found that an amount of more than $1m in Vanuatu was subject to the restraining order. This application related to a claim for legal fees because this sum of money was a fund which Messrs Bailey and Bailey, Solicitors, arranged to be transferred from one account in Vanuatu to another belonging to a company in which they held an interest. When these funds were secured by an action in Vanuatu it was agreed that they be repatriated to Australia subject to any ruling as to ownership. Messrs Bailey and Bailey claimed that ownership of the funds of $1.2m had been transferred to them as payment in advance for them to act for their clients in all matters. Pincus J found that the money was transferred to have it in an account of which the defendants were not shown as beneficial owners and, secondly, to provide a fund out

5 Unreported, Federal Court of Australia, per Ryan J, 1 February 1989.

of which costs might be paid. He found that the money remained the property, beneficially, of two of the defendants and was therefore subject to the restraining orders.

Solicitors for the defendants then applied to the court seeking orders directing the Official Trustee to pay all their clients' legal fees out of property controlled by the Official Trustee in which any of three of the defendants had a beneficial interest, subject to the written authorisation of those defendants or their solicitors.

This variation to allow the pooling of resources was opposed but the order was made. A lengthy committal hearing followed and more than $1.3m was paid in legal fees in respect of this hearing and applications in relation to the release of funds restrained under the *Customs Act*. Issues about the release of funds for legal fees came before the Court on some 17 occasions. There was insufficient restrained property left to fund a trial of the same magnitude as the committal. All defendants pleaded guilty.

In a later judgment, Commissioner of *AFP v Kirk and Others*,[6] Pincus J found that there was no power in the *Customs Act* to allow the payment of one defendant's legal fees out of the restrained assets of other defendants. In commenting on the case he said that he felt "obliged to say that those who framed the legislation might not have contemplated the funds taken into control being so rapidly expended in litigation, as has happened in this case." He went on to say as follows:

> It should be added that if there were power to do so, I would, as a matter of prudence, require some evidence that those defendants whose property is proposed to be expropriated have given what might be called an informed consent to that course. It has been clear to me that some of the applications to this court have been in the interests of the solicitors as well as the clients, a point which has been commented on by counsel. In view of the history of the matter, I would not, if I had power to do so, take away the property of any of the defendants to meet another defendant's costs merely on a statement from the Bar table.

In another matter a number of defendants have been committed for trial on charges under section 233B of the *Customs Act* and sections 81 and 82 of the *Proceeds of Crime Act*. The charges relate to the alleged importation of approximately 10 tonnes of cannabis resin in January 1989 after an off-shore rendezvous between a foreign vessel and a locally owned yacht. It is believed that the sale of the resin ultimately grossed over $77m for the importers.

The money laundering charges relate to sums totalling more than $5.5m found in cash in a number of premises, including approximately $5m in cash found in bags on one premises, and further sums in excess of $6m which were remitted overseas.

Proceeds of Crime Act restraining orders have been obtained over all the property of the defendants. The estimated net value of property presently identified as being subject to the restraining orders is more than $10m and includes cash, real estate, jewellery and interest in race horses. In addition, action was taken in the Royal Court in Jersey to freeze a bank account held by one of the defendants with a balance of approximately $1m.

6 24 FCR 528.

An application was made to vary the restraining orders to allow for payment of a defendant's legal costs. In *DPP v Saxon and Another*[7] the judge was satisfied that the defendant could not meet the legal expenses contemplated out of property not subject to the restraining order. He was also satisfied that section 43(3) of the *Proceeds Of Crime Act* was wide enough to allow the payment of legal expenses in connection with the proceeds of crime application and the examination proceedings.

He found that considerations relevant to the exercise of his discretion to release funds included:

- the presumption of innocence in relation to the criminal charges;
- the scheme of the *Proceeds Of Crime Act* contemplates the payment of legal fees out of restrained property that is prima facie "tainted";
- it is impossible to determine whether the defendant will be convicted and if so how much of the restrained property will be confiscated;
- the defendant was charged with very grave offences and proper legal representation is not only in his interests but in the public interest;
- the defendant is in custody and is not in a position to earn money to provide for his defence.

State Drug Commission v Fleming and Heal[8] involved the release of restrained property for legal expenses under the *Drug Trafficking (Civil Proceedings) Act*. The Act contains a provision that the expenses be taxed. The question was the appropriate scale. The defendants claimed $200 per hour for a principal solicitor, $1200 for junior counsel and $3000 per day for senior counsel. The plaintiff referred to a number of possible scales and submitted that one of the Supreme Court scales was the most appropriate. The Court rejected this submission which involved payment on a party and party basis and held that the appropriate basis was a solicitor and client one.

The decision of Mathews J was appealed and in *New South Wales Crime Commission v Fleming and Heal*[9] the Court of Appeal ordered that the matter be returned to Mathews J for further evidence. The Court of Appeal confirmed that the judge releasing funds could set certain rates according to which the reasonableness of lawyer's charges were to be determined on taxation. However the orders for one fixed hourly rate for solicitors costs and fixed daily rates for counsels' fees were arbitrary and not "reasonable legal expenses" as provided by the section.

Different rates should apply according to the seniority of the solicitor and the type of work being performed. The charge for example, for a junior solicitor travelling to and from jail to interview a prisoner should not be the same as for complex legal research by an experienced practitioner. The matter was referred back to Mathews J to take further evidence about the market rate for legal services and independent evidence that charges of the kind in question were usual and not excessive.

7 Supreme Court of New South Wales, per Studdert J, 3 August 1990.
8 Unreported, Supreme Court of New South Wales, per Mathews J, 16 May 1991.
9 (1991) 24 NSWLR 116.

Reference was made to the Supreme Court Rules which provide that costs shall not be allowed if they are unreasonably incurred or for an unreasonable amount, unless the approval of the client has been obtained. The court found that in the case of restrained property an agreement between solicitor and client would not be conclusive on the question of reasonableness because of the public interest in maintaining assets to meet any possible confiscation order.

Kirby P examined the competing policies of the Act. It contains very strong civil based forfeiture provisions in relation to drug activities. This was recognised in the provisions of the Act and the second reading speech. The provisions allowing for the release of legal expenses fall within the class of provisions designed to qualify the severe consequences of the operative sections of the Act. It was not intended that an accused person should have unrestricted use of property which is the proceeds of drug-related activity to engage a team of expensive private lawyers paid at the full market rates of the private Bar. On the other hand the Act was enacted against a background of civil rights including the presumption of innocence and the right to use one's own property as one decides. He thought it unfortunate that the Act made provision for the compulsory taxation of legal expenses without providing the criteria by which such taxation would be determined by the taxing officer. There is no scale of fees, either for barristers or solicitors in criminal cases.

At the request of all parties Kirby P set out a number of criteria for determining "reasonable legal expenses". These include:

- The issue of what is reasonable remains ultimately for determination by a judge. The opinion of the Commission, the person effected, their legal representatives or other witnesses called by them on the issue may be relevant but cannot be conclusive.
- If the Commission and the accused agree on the provision to be made for reasonable legal expenses the judge will normally be entitled to accept that agreement.
- Where there is no agreement, evidence should be called to address the costs incurred or likely to be incurred in the actual proceedings for which provision may be made for reasonable legal expenses.
- Ordinarily legal expenses of proceedings in the Local Court will be lower than in the District Court which in turn will be lower than those in the Supreme Court. The Legal Aid Commission scales and the amounts which an average barrister or solicitor accepts as daily fees will not be a sufficient basis to determine the reasonable legal expenses of a person under the Act. Average fees are set by market and other considerations.
- In the normal case, detailed evidence should be placed before the court concerning the anticipated duration of the proceedings, the issues that may be raised, the steps taken to retain counsel, the costs likely to be incurred by their solicitor and the opinion of the solicitor as to whether, in the circumstances of the particular cases, such charges represent reasonable legal expenses.
- A court will be hesitant to determine, in advance, with precision, all of the expenses to be incurred which will constitute reasonable legal expenses.
- However some major items may properly be so determined to provide some certainty that certain expenses will be met. A later taxation will conform to any special provision made by the judge in the order providing for reasonable legal expenses.

In concluding, Kirby P noted that the role of the judge and taxing officers in determining reasonable legal expenses as a matter of fact or opinion is an unwelcome one. He thought it possible that substantial justice would be achieved if a scale of fees were provided by reference to which the discretion to release funds could be readily determined. He thought that the desirability of adopting a more arbitrary criterion of reasonable legal expenses in order to avoid protracted litigation of that issue before a judge or taxing officers was a matter for others to decide. This matter has been listed for hearing before Mathews J on 28 February 1992. The New South Wales Law Society has intervened to make submissions on fees.

In a matter of *Sharma*, Carruthers J expressed dissatisfaction in having to make orders which would effectively be sanctioning legal costs as reasonable when he was not in a position to make any judgment on the issue.

REASONABLE EXPENSES

There are *three aspects* to reasonableness of legal expenses. These are the rate charged, the time taken to complete any action and the merits of the action itself.

(i) Rates

- In relation to rates the DPP experience is that these are normally ordered on a flat rate hourly or daily basis. As was pointed out in *Fleming and Heal*, it may not be appropriate to have a flat rate covering all aspects of the work performed. It is also apparent from *Fleming and Heal* that any disagreement as to the appropriate rate may lead to substantial litigation to resolve it.
- Developing an appropriate scale of fees for criminal matters would be of assistance. There would be considerable administrative work in developing and maintaining such a scale particularly if it was done in consultation with the various representative legal bodies. Options would include adopting a derivative of the present Federal Court scale or some other scale or a derivative of the Legal Aid scale.
- If the system for the release of legal expenses is to retain in its present form then it is important that far more guidance be given to the courts in determining what are reasonable legal costs and developing an appropriate scale would be a good start.

(ii) Time taken

- The second aspect of reasonableness is the time taken to complete any action. This is a more difficult aspect to control as it involves questions of judgment and opinions as to what is appropriate. It is also obviously affected by the way in which the prosecution is conducted. This problem may be improved if the courts took more control over proceedings before them. The main examples of large amounts of funds being expended have occurred where there has been free access to substantial funds combined with the open ended nature of committal proceedings.

- The court releasing the funds is usually different to the court before which the hearing occurs. The court releasing the funds is unlikely to make any judgments about what is reasonable in terms of the way the action is conducted in another forum.

These first two aspects of reasonableness are not unrelated. The higher the rate the more incentive to continue the action. It is not suggested that a rate should be set so low as to provide a disincentive in terms of time taken to conduct the litigation. However in looking at this problem it needs to be recognised that there is a relationship between these two aspects.

(iii) The Merits

- The third aspect of reasonableness is a particularly difficult area. It is not an unnatural reaction that a person facing serious charges will want to explore every possible avenue of avoiding conviction, regardless of how futile some actions may seem on any objective analysis. Combined with the knowledge that conviction may lead to the loss of all restrained property, the incentive to exhaust this property on even the most helpless of defences is great. The property would be lost in any event. Why not spend it on legal fees rather than leave it to be recovered?
- The question of merit is of course a matter of opinion which may vary depending on what side the issue is viewed from. The DPP as prosecutor is not in a position to comment and most courts would be reluctant to do so.
- Under the *Proceeds Of Crime Act* the DPP is charged with responsibility for recovering proceeds. As the prosecuting authority it is placed in an invidious position to represent the community's interests on the question of defence legal costs. There is a need for a body independent of the prosecution and defendant to be involved in this process.
- It may be that if the first two aspects of reasonableness are satisfactorily resolved, this third and most difficult aspect will be of less significance. Apart from the more bizarre defences it will always be difficult to decide on the reasonableness of proposed action and defendants should not be excluded from testing the prosecution case.

CURRENT POLICY

The DPP has developed guidelines for its approach to the payment of legal fees out of property restrained under the *Proceeds of Crime Act*. I refer to three principal guidelines:

> 2.2 Under the *Proceeds Of Crime Act*, the DPP is charged with responsibility for protecting the community interest in preserving the assets. In addition the DPP has a general interest in ensuring the proper administration of justice. It is also in the interests of the DPP as prosecuting authority, that defendants facing serious charges are properly represented. Trials where there is competent legal representation for the accused result in a more efficient use of resources, both of the courts and the DPP. Because circumstances vary, the most appropriate way to deal with matters is on a case by case basis seeking to discharge, in a fair and just manner, the responsibility to protect the community interest in

preserving the assets while recognising that the court has to draw the line between the competing interests.

5.1 The court is only empowered to release funds to meet "reasonable" legal expenses. Uncontrolled access by the defendant to restrained funds to spend on legal representation as he or she pleases would not be reasonable. Regard must be had to the circumstances that the property from which the costs are to be paid is to be otherwise preserved against the possibility that it may later become the subject of a confiscation order. This warrants a conservative approach to what should be considered "reasonable expenses"

5.2 The reasonableness or otherwise of the expenses should be for the court to determine. Expenses should be reasonable in that the particular legal services are warranted, and the rate at which they are charged are reasonable. As the prosecuting authority the DPP is in a difficult position to comment on the merits of defence action. The DPP should seek in appropriate matters to have incorporated into the order some mechanism aimed at ensuring that only funds for reasonable expenses are released.

The guidelines recognise the competing interests involved and that it is the function of the court to draw the line between these competing interests. Matters are to be approached on a case-by-case basis. The DPP's response to an application for legal expenses is to be determined after examining all available information including material put forward in support of the defendant's application.

The guidelines suggest some factors that may be relevant to the exercise of the court's discretion. These have been taken from cases as there is no criteria laid down in the Act. The guidelines suggest a conservative approach to what should be considered "reasonable expenses" and suggest ways in which attempts may be made to restrict funds to what is reasonable. They address the sequence in which restrained property should be released for legal expenses, beginning with overseas property with tainted property being left until last. These guidelines attempt to address this very difficult problem in a fair and equitable manner. They do not provide any panacea for the difficulties caused by the present legislative provisions.

REFORM

The present system for the release of restrained property for legal expenses does not work satisfactorily and changes need to be made. These include:

- To assist in determining what are reasonable legal costs, an appropriate scale of fees needs to be set. This might be done by reference to a current scale of fees or a variant thereof or a scale provided by regulation. Consideration might be given to the Federal Court scale which applies Australia wide. Some provision will need to be made for counsel's fees.
- Allowance needs to be made for actions taken in the different levels of courts. This could be done by allowing a different percentage of the scale depending on the level of court. Adopting a scale of fees would allow greater use of the taxation of costs provisions.
- The position following *Fleming and Heal* is that every time there is a dispute about the reasonableness of the rates of fees, evidence from practitioners will have

to be brought before the court as to what is reasonable. This one off approach will be cumbersome, time consuming and expensive.

- Combined with a scale of fees there needs to be an independent body to arbitrate on the reasonableness of proposed action and possibly provide a certificate as to the appropriate amount of funds that should be allocated.
- Section 43(4) of the *Proceeds Of Crime* Act should be amended so that it is not rendered ineffective as soon as a global restraining order is obtained.
- The court should be required to distinguish property technically subject to the restraining order and property effectively subject to the restraining order.
- Effectively restrained property should be property disclosed by the defendant so that it can be placed under the control of the Official Trustee or property subject to the jurisdiction of the court. Overseas property, although technically restrained, should not be included unless it is subject to effective mutual assistance action.
- It should be an express requirement that a court be satisfied that a defendant has made full disclosure of the nature and location of all of his or her property before it can make an order for the release of funds for legal expenses.
- There should be a prohibition on access for legal expenses to property reasonably believed to be tainted in relation to the offence charged. There is a provision to this effect in the *Crimes (Confiscation of Profits) Act* 1989 (Qld).
- In the case of serious offences, consideration should be given to requiring a defendant to make an application under section 48(4) of the *Proceeds of Crime Act* as a precondition to any restrained property being available for the payment of legal expenses. If property is shown to be from a lawful source then it will be unrestrained for the purposes of section 30 and will then have to be used first in the payment of legal fees. This will ensure that illegally acquired property is not used first in paying legal fees with the remainder of restrained property being able to pass the section 48(4) test.

The present arrangements for the release of funds are very much in favour of the defendant. The scope for abuse means that the present arrangements may be exploited to the extent that they endanger the whole proceeds of crime initiative. More weight needs to be given to the community's interest. There is no easy answer or perfect solution. However the problem has reached the stage where it is imperative that changes be made.