

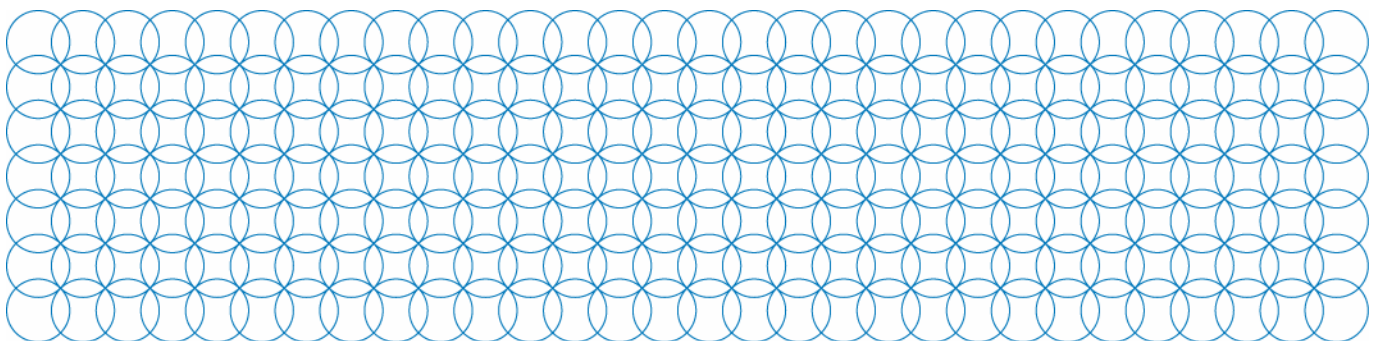


Crown Court means testing

Consultation Paper CP27/08

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Ministry of
JUSTICE



Crown Court means testing

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**This information is also available on the Ministry of Justice website:
www.justice.gov.uk and the Legal Services Commission website:
www.legalservices.gov.uk**

Contents

Foreword	3
Executive summary	5
Introduction	8
The proposals	10
Questionnaire	35
About you	37
Contact details/How to respond	38
Impact Assessment	40
The consultation criteria	81

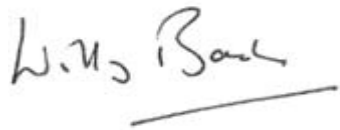
Foreword

The legal aid system in England and Wales is the best funded in the world, but against the current economic backdrop, it is essential that the taxpayer is assured that we are using their money effectively and targeting the limited resources available at those who need them most. If anything, the Government's obligation to help those who need it is increased by the current economic situation, and we need to explore ways of getting more out of the significant commitment of resources we make to legal aid, ensuring both that taxpayers get value for money and that those most in need get legal help. In addition, the legal aid budget is under pressure in future years. We believe that this reform may significantly help ease those pressures. We have considered other options for means testing and believe this is the most appropriate option to take forward.

We believe that the scheme set out in this consultation paper will fairly and effectively require all those defendants who can genuinely afford to pay all or some of their legal aid costs - on the basis of their income and capital - to do so. At the same time, it ensures that all those who would genuinely be unable to pay a contribution continue to have access to free legal aid, for example, by passporting youths and defendants on some benefits and by having generous cut-off points for income and capital.

Legal aid plays a vital role in the effective working of the wider criminal justice system. In developing these proposals, we have sought regular input from court staff, the judiciary and representatives of other criminal justice system bodies. We have designed a new scheme that minimises any negative impact on the court system and we propose to pilot the new scheme in a number of courts to test this further.

We are confident that this proposed scheme will ensure that legal aid resources are better targeted at those who need them most, will deliver value for money, will be straightforward for defendants, solicitors and courts and will support the effective working of the Criminal Justice System. We look forward to your views on our proposals.

Handwritten signature of Lord Bach in black ink, consisting of the letters 'L. Bach' in a cursive style, with a horizontal line underneath.

Lord Bach

Handwritten signature of Sir Bill Callaghan in black ink, with 'Bill' written in a cursive style and 'Callaghan' written in a more formal cursive style, enclosed in a circular flourish.

Sir Bill Callaghan

Executive summary

1. This paper sets out for consultation the Government's proposals for re-introducing means testing for legal aid in the Crown Court.
2. It has been a longstanding principle of our criminal legal aid system that those who can afford to pay all or some of their defence costs should do so. This enables the Government to help as many people as possible within the available resources for legal aid. It also provides value for money for the taxpayer and reassures the public that offenders are being properly held to account for their actions.
3. So that our proposals only target those who can genuinely afford to contribute towards their case costs, Government researchers have built a detailed socio-economic model of the Crown Court defendant population. This research has improved our understanding of the social status, income and wealth of defendants that appear before the Crown Court. It has persuaded us that there is an overwhelming case for re-introducing a Crown Court means testing scheme.
4. We believe that our proposals fairly and effectively safeguard the Government's commitment – and obligation under the European Convention on Human Rights – to help every citizen who is accused of a crime. Each of the options we have considered is underpinned by the principle that every person who is sent to the Crown Court for trial should have access to publicly funded defence representation.
5. Crown Court cases are serious cases and a conviction can have a far-reaching impact on an individual's life. It is therefore fundamental that every person who is tried before the Crown Court has access to quality legal assistance and advice. We are proposing that we assess a defendant's ability to pay and set their contributions accordingly. Some defendants will be required to pay 100% of their defence costs and others may be required to pay only the proportion according to the level that they can afford.
6. This means that the majority of defendants, who cannot afford to pay anything towards their publicly funded defence, should continue to receive this service at no expense. Some however, should be required to regularly contribute towards their defence costs during the course of their case, on account of their high disposable income. Others should be required to contribute towards their defence costs at the end of their case, because they possess significant levels of capital. For some defendants, both types of contribution might be appropriate.

7. The greatest challenge for the Government with means testing regimes in the criminal courts is to ensure that the effective working and efficient delivery of justice and timely progression of a case is not adversely affected.
8. In designing our proposals, we have undertaken to minimise any risk of disruption – through an increase in unrepresented defendants, adjournments, ineffective and vacated trials and a decrease in timeliness – to the courts, to other organisations within the wider criminal justice system, and to initiatives that are delivering a more effective and responsive justice system for victims and the public.
9. We have therefore committed not to make use of our power to withdraw a defendant's representation for the non-payment of a contribution because of the detrimental impact this would have. We have also looked at how we can incentivise compliance with a new legal aid system and create a stake for defendants in the timely progression and disposal of a case.
10. This approach needs to be backed up by an effective system for assessing, collecting and enforcing contributions. Although a new Crown Court means testing scheme will encourage and help wealthy defendants to contribute towards their publicly funded defence costs, some individuals will inevitably do everything they can to avoid paying.
11. In these circumstances, the Government has a clear responsibility to make sure that contributions are collected and we are proposing to take fast, effective and firm action to enforce payment. Sanctions will include: distress warrants; freezing injunctions; charging orders; third party debt orders; and subject to securing the necessary legislation, clamping orders. Resources that defendants have deliberately deprived themselves of will also be treated as still belonging to the defendant for the purposes of calculating their liability for contributions.
12. There will be a clear hardship process and a unit in place to support any defendants who believe that they genuinely cannot afford to meet any contributions or comply with their payment plan. Those defendants who neglect to comply with their plan, however, will face debt recovery sanctions before as well as after a conviction. Defendants who are acquitted will almost always be refunded any contributions in full, unless they have incurred recovery sanctions.
13. It may be the case that some defendants involved in Crown Court cases choose to exercise their right not to claim legal aid and pay privately for their defence. Where these individuals are acquitted, they are currently entitled to reclaim their 'reasonable' costs and expenses from Central Funds. This means that, in these cases the taxpayer is compelled to subsidise far higher private legal advice rates than those available under legal aid. A separate consultation paper has set out proposals for reforming the way in which central funds are awarded as we believe that it

is unnecessary to pay privately funded rates in Crown Court cases when the defendant could have chosen to take up a legally aided defence.

14. We believe that the proposals contained with this consultation paper set out the fairest way of ensuring that all those defendants who can genuinely afford to contribute or pay towards their legal aid costs, do so. They focus legal aid spending in the Crown Court on those who need it most: by exempting youths and those on passporting benefits (income support, income based job-seekers allowance, guaranteed pension credit and income based employment and support allowance), from making any contribution; and by having generous contribution thresholds for disposable income and capital. The public can therefore be assured that wealthy, convicted defendants will be liable for their own defence costs, and that the Government is delivering value for money.

Introduction

1. In October 2006, a new means testing scheme was introduced in the magistrates' courts. Courts and court users are now accustomed to working with this new scheme. The design and implementation of an effective Crown Court means testing model is a natural next step for controlling a Crown Court legal aid spend of approximately £680 million per year and ensuring that defendants contribute towards part or all of their defence costs in the Crown Court if they can afford to do so.
2. The consultation is aimed at members of all professional groups and bodies who work within the justice system in England and Wales, including the legal profession and the judiciary.
3. This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out at page 81 have been followed.
4. An initial Impact Assessment has been completed and can be found at page 40.
5. Copies of the consultation paper are being sent to:

General Council of the Bar
Criminal Bar Association
The Law Society
The Judges' Council
Council of Her Majesty's Circuit Judges
The Association of District Judges
National Bench Chair Forum
The Lord Chief Justice
The Senior Presiding Judge
Judicial Communications Office
Institute of Legal Executives
Magistrates' Association
Justices' Clerks Society
Criminal Law Solicitors' Association
Legal Aid Practitioners' Group
Legal Action Group

Association of Chief Police Officers
Advice Service Alliance
Law Centres Federation
Society of Asian Lawyers
Association of Muslim Lawyers
Black Solicitors Network
Group for Solicitors with Disabilities
Equalities Commission
Local Government Association
National Association for Care and Resettlement of Offenders
Citizens Advice
National Consumer Council
AGE Concern
MIND
Liberty
Justice
National Debtline
Youth Justice Board

6. However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

Part 1 – The Case for Reform

The Case for Reform

1. Legal aid is an integral part of the modern welfare state and underpins the success and fairness of our justice system. The legal aid system in England and Wales is the most generous and best funded in the world. Spending on legal aid has risen faster than any other area of public funding since the early 1980s. Expenditure on criminal legal aid rising in real terms by 20% between 1997/98 and 2007/08 from £943 million (in today's prices) to almost £1.2 billion.
2. In 2007/08, the Government spent over £680 million on legal aid in the Crown Court and provided representation to approximately 117,000 defendants. Approximately £125 million was spent funding defendants in Very High Cost Cases (VHCC). These are cases that are likely to have trials which last for more than 40 days.¹
3. The Government spent approximately 80% of all Crown Court legal aid expenditure – approximately £540 million – on core Crown Court (non-VHCC) work. These are indictable offences that can only be heard by the Crown Court or 'either way' offences in which the defendant can elect to have their trial at the Crown Court or the magistrates' court can commit the trial to the Crown Court.
4. Nearly £17.5 million was spent on work that came up from the magistrates' court, for either a sentence or an appeal hearing. The table below sets this all out.

Figure 1: Crown Court spending in 2007/08 ²

2007/08	Expenditure (million)
Core Crown Court Work	£539
Committals for Sentence	£13
Appeals	£4
Very High Cost Criminal Cases	£125
Total	£681

¹ The full definition of a VHCC is set out in Regulation 4 of The Criminal Defence Service (Funding) (Amendment) Order 2007.

² Source CLAT. Figures provided by Legal Aid Finance and Forecasting Unit, MoJ. CLAT is a management information tool which draws on information from the Crown Court IT system. Volumes and average case costs are identified from payments made on cases where at least one solicitor determination is paid. Note that some cases include more than one defendant, some defendants may have changed their solicitor during the course of the case, and some solicitors may have helped more than one defendant.

5. Over the past few years, the Government has embarked on a series of legal aid reforms, to encourage the legal profession to work in a way that supports a more efficient and effective criminal justice system. We have also re-asserted a longstanding principle within criminal legal aid that those individuals who can genuinely afford to pay for their defence costs should be required to do so.
6. The Access to Justice Act 1999 was amended by the Criminal Defence Service Act 2006 to provide for the reintroduction of means testing (paragraph 3B of Schedule 3 to the 1999 Act) and the collection of contributions (section 17A of the 1999 Act). On 2 October 2006, a new means testing scheme was introduced in the magistrates' courts. Following the success of this scheme, the Government is now proposing to introduce a new means testing scheme in the Crown Court.

Objectives

7. The Government's proposals for Crown Court means testing have been developed in the context of the following four guiding principles:-
 - **Providing access to justice**, particularly for the most vulnerable groups and individuals in society.
 - **Ensuring that those individuals who can afford to contribute** towards part or all of their publicly funded defence costs do so.
 - **Supporting an efficient and effective justice system** by minimising any risk of disruption to the courts and other parts of the criminal justice system.
 - **Delivering a cost effective and professional service** for the granting of a Representation Order and the assessment, collection and enforcement of a Contribution Order.

Providing access to justice

8. The Government has an obligation to ensure that every citizen who is accused of a crime has access to a fair trial. Ensuring that those who cannot afford to pay for their defence representation have access to State funding is integral to a fair and equitable justice system.
9. We believe that our proposals safeguard this principle because every individual who is sent to the Crown Court for trial will have access to publicly funded defence representation. No one will be ineligible for legal aid on the basis of their means. Instead wealthier defendants will be required to contribute towards the costs of their publicly funded defence.

10. We are also proposing that every defendant who is sent to the Crown Court for trial should automatically pass the Interests of Justice (IoJ) test, set out in Schedule 3 to the Access to Justice Act 1999. This proposal recognises the gravity of cases that are heard before the Crown Court and demonstrates the Government's commitment to providing access to justice for all of its citizens.

Question 1: Should individuals who are committed, sent or transferred for trial before the Crown Court be automatically passported through the Interests of Justice Test?

Ensuring that those defendants who can afford to contribute towards part or all of their publicly funded defence costs do so

11. Any means testing scheme in the criminal courts needs to fairly and accurately assess a defendant's ability to pay all, or contribute towards, their publicly funded defence costs.

The new means testing scheme in the magistrates' court

12. The means testing scheme in the magistrates' courts has demonstrated that it is possible to design a test that reaches a fair and accurate assessment. The assessment process adopts the principle of 'equivalisation', which allows an applicant's income to be weighted to reflect family and household circumstances. This overcomes the arbitrary nature of those means testing models where eligibility is based solely on a series of gross income cut-off points.

13. The means test in the magistrates' courts is made up of an initial filter test which compares an applicant's adjusted income with a lower and upper threshold (currently £12,475 and £22,325 but this rises annually) in order to determine whether a defendant is financially eligible or not.³ Where the applicant's adjusted income falls between the two thresholds, a more detailed assessment is carried out to assess their disposable income. This takes into account actual expenditure on mortgage or rent, council tax and childcare costs and a cost of living allowance based on the Expenditure and Food Survey conducted annually by the Office for National Statistics, to cover expenditure on items such as food, clothing and footwear, as well as education and transport.

³ We raise all our income eligibility limits every April in line with the general up-rating of welfare benefits by DWP in line with inflation.

14. After all of these costs are accounted for, only if the defendant's annual disposable income exceeds £3,398, is the defendant held to be capable of paying for privately funded defence costs, estimated at £1,500.
15. Since the implementation of the new scheme in October 2006, over one million representation orders have been granted whilst only 2,400 appeals have been submitted to the hardship unit. This strongly suggests that the eligibility levels are set in the right place. In 2007/08, the LSC received approximately 570,000 applications for legal aid and granted just over 530,000 Representation Orders.⁴ This demonstrates that the test is clear and transparent, and that defendants and solicitors understand and can predict who will be eligible for legal aid in the magistrates' court.
16. The re-introduction of means testing in the magistrates' court has delivered in excess of £65 million in net savings to date.⁵ This has enabled the government to maintain its commitment to re-balance legal aid funding in favour of the civil scheme.

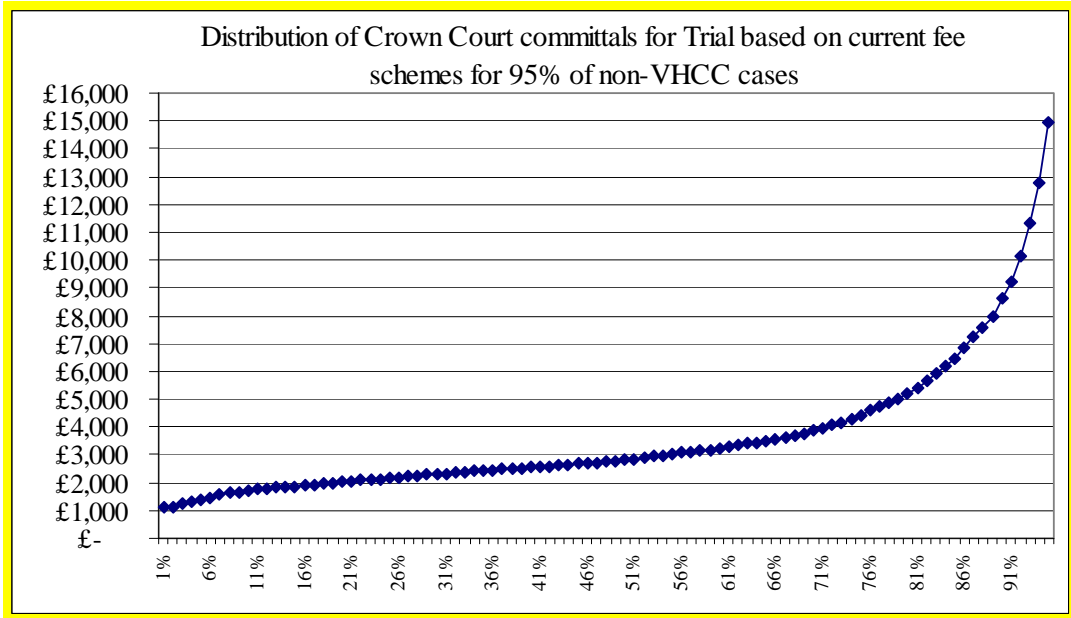
Defence costs in the Crown Court

17. The perception exists that publicly funded and privately funded defence costs in the Crown Court are considerably higher than those in the magistrates' court. For some cases that perception is true but in other cases, it is not.
18. For example in 2007/08, the median cost of a publicly funded appeal against sentence in was approximately £320; the median cost of a publicly funded appeal against conviction was £650; and the median cost of a publicly funded committal for sentence was £470. These costs are all broadly similar to the cost of a publicly funded case in the magistrates' court. Most cases that are sent for trial to the Crown Court have considerably higher costs though, as the graph below sets out.

⁴ Figures Provided by National Courts Team, LSC.

⁵ Based on figures recorded between start October 2006 and end August 2008.

Figure 2: Distribution of legal aid costs for 95% of Crown Court cases in 2007/08.⁶



19. What is interesting to note is that 55% of cases cost less than £3000. This suggests that a significant proportion of cases in the Crown Court would be affordable to some groups of defendants, especially, if they were only required to pay for their defence costs at legal aid as opposed to private rates.

20. Even without the most expensive 5% of cases, Figure 2 demonstrates that case costs for a trial in the Crown Court can vary hugely. The most influential factors are the offence type and the point at which the case ends.

⁶ Source Clat. Excludes VHCC, Committals for Sentence and Appeal hearings. Figures provided by MoJ Researchers.

Figure 3: 2007/08 Crown Court spend broken down into offence type.⁷

Offence type	Trials	Cracks	Plea
Murder	£ 54,985	£ 18,883	£ 5,159
Serious violence/drugs	£ 5,500	£ 3,425	£ 2,327
Lesser violence/drugs	£ 2,939	£ 2,018	£ 1,592
Sexual offences	£ 6,097	£ 4,085	£ 2,532
Burglary	£ 2,934	£ 2,551	£ 2,249
Lesser fraud	£ 1,767	£ 1,356	£ 1,084
Serious fraud	£ 16,341	£ 9,726	£ 3,260
Other offences	£ 2,480	£ 2,011	£ 1,668
Revenue/public order offence	£ 5,182	£ 2,645	£ 2,096

21. These figures suggest that whereas the full costs of some types of cases – such as lesser fraud or violence – would be affordable to wealthier groups within the Crown Court population; those same groups of defendants would only be able to afford part of their defence costs in the more expensive Crown Court cases.
22. We have therefore decided that whilst the ‘in or out’ model for legal aid works well for magistrates’ court means testing and is well suited to Committal for Sentence hearings and Appeals, it is not the best model for means testing legal aid in all other areas of Crown Court work.

Which defendants can afford to pay some or all of their legal aid costs?

23. The criminal justice system (CJS) does not gather information to enable us to directly model the relationship between the individual defendant’s level of affluence and the probability of a particular offence type. Operational researchers have therefore built a statistical model from the details of 200,000 defendants that were committed, sent or transferred to the Crown Court for trial from 2003 to 2007 (from the Crown Court IT system) and used their postcodes, age and sex to model their financial, domestic and socio-economic circumstances.⁸ We intend to publish this modelling alongside our consultation response and full impact assessment.

⁷ Source Clat. Figures provided by MoJ researchers.

⁸ The modelling is based on a detailed analysis of Crown Court defendant profiles based on the details of over 200,000 defendants extracted from the Crest IT system over the past 5 years. The first phase of his modelling involves linking the defendant post-codes to 1 of 32,482 Lower Super Output Areas. These are small geographic areas defined by the Office of National Statistics, typically comprising 400 households. These LSOA are then further linked to the index of Income Deprivation which is developed by the Department for Communities and Local Government. Phase 2 links the derived information collected within CREST about income

24. Our modelling indicates that there is a wide spread of incomes within the Crown Court population.

Figure 4: Crown Court population – Gross annual income distribution

Annual gross income	Less than £10,000	£10,000 - £19,999	£20,000 - £29,999	£30,000 - £39,999	Over £40,000
% Crown Court defendants	41.9%	31.6%	14.5%	6%	6%

25. It is perhaps not surprising that so many defendants earn less than £10,000 per year. Indeed, our database of defendants suggests that the Crown Court population is heavily concentrated amongst the most income deprived households. For example there are 7 times as many defendants found in the 1% of most income-deprived households compared to the richest 1% of households.

26. Whilst there are a great many defendants who cannot afford to contribute at all towards their defence costs, at the same time, there are some that clearly can. This is supported by Figure 6, which looks at the benefit, income and capital status of defendants who were committed, sent or transferred for trial to the Crown Court in 2007. Key points that emerge from this table are:

- Over 1 in 4 Crown Court defendants would not be eligible for legal aid in the magistrates' court because of their high levels of disposable income;
- Unsurprisingly, there is a high correlation between income and other financial assets such as property and savings;
- Approximately 1 in 4 defendants might own a property;
- Approximately 1 in 3 defendants may have liquid capital, mainly in the form of savings accounts;
- Home ownership is a useful indicator of other capital assets: nearly 2 in every 3 home-owning defendants has savings;
- Of those that would qualify for legal aid in the magistrates' court because of their lower levels of disposable income, nearly half have savings and or own a property.

deprivation above, together with the age and sex of the defendant to the Family Resources Survey sponsored by the Department for Work and Pensions, which collects detailed information about the financial, domestic and socio-economic circumstances at an individual, household and benefit unit level. Phase 3 links up each of the defendant profiles to the Graduated Fee database through a unique case identifier to match up each defendant with their actual case costs and case outcome. This has enabled MoJ researchers to estimate exactly what proportion of the defence costs might be recoverable in each case.

Figure 5: Capital status of defendants who were committed, sent or transferred for trial to the Crown Court in 2007 (volumes and %)⁹

Categories of eligibility in the magistrates' court	All defendants	Defendants with no capital assets	Defendants with capital assets other than property	Defendants with property and no other capital assets	Defendants with capital assets and property
Defendants on passportable benefits	16,791 18.6%	13,797 15.3%	1,957 2.1%	635 0.7%	402 0.5%
Would qualify for legal aid in the magistrates' court	48,556 53.7%	28,908 32.0%	9,493 10.5%	4,612 5.1%	5,435 6.0%
Would not qualify for legal aid in the magistrates' court	25,035 27.7%	6,376 7.0%	6,011 6.7%	3,298 3.7%	9,459 10.4%
Total	90,382 100%	49,081 54.3%	17,461 19.3%	8,545 9.5%	15,295 16.9%

27. These findings suggest that there is a small group of defendants who can reasonably and fairly be asked to pay towards the cost of their defence. What is particularly interesting is that our research suggests that defendants with higher incomes tend to commit more serious crimes, such as: homicide; sexual offences and offences against children; offences involving serious violence or damage; and serious drugs offences. Similarly, their poorer counterparts are far more likely to commit the less serious offences that are heard at the Crown Court: offences against public justice; low value dishonesty cases; and other miscellaneous less serious offences.

28. The challenge therefore is to design a scheme, which quickly identifies all those that cannot afford to pay their costs, or contribute towards them, and effectively and accurately targets these more wealthy defendants. Part 2 sets out what exemptions, disposable income and capital thresholds we are proposing to introduce, to do just that.

⁹ Source CREST. Note that this table does not include youths who will be automatically passported through any Crown Court means testing scheme.

29. In addition to designing a scheme that effectively targets that proportion of the Crown Court defendant population who can readily afford to pay, or contribute towards, their defence costs, key aims have been to ensure an administrative structure which does not represent an undue burden on solicitors or courts and which does not risk delaying court processes or creating perverse incentives. Solicitors will be paid a fee for supporting clients to complete forms and provide the necessary evidence.

Supporting an efficient and effective justice system by minimising any risk of disruption to the courts and other parts of the criminal justice system.

30. In designing our proposals, we have undertaken to minimise any risk of disruption – through an increase in unrepresented defendants, adjournments, ineffective and vacated trials and a decrease in timeliness – to the courts, to other organisations within the wider CJS, and to initiatives such as CJSSS that are delivering a more effective and responsive justice system for victims and the public.

31. If a new Crown Court means test regularly creates additional adjournments or court hearings or impacts adversely on timeliness, it will create indirect costs to the rest of the criminal justice system – e.g. the courts, police, Crown Prosecution Service, the defence, practitioners, prisoner transportation services, interpreters etc. These indirect costs to the Crown Court and the rest of the CJS will swiftly overshadow any potential legal aid savings. For example, the average Crown Court costs per sitting day for the year 2007-08 were £5,080; based on an assumed five hour sitting day, this equates to an average cost per hour of £1,016 per court room.¹⁰

32. In addition to the possibility of creating more additional costs than savings, it is difficult to justify any means testing regime that might have a significantly adverse impact on adjournments or timeliness in light of the seriousness of the crimes at the Crown Court and corresponding impact this has on the victims and witnesses involved in each case.

33. Different practices in each Crown Court meet the different local needs and we are aware that any new means testing scheme will be required to support this. For example, some Crown Court centres have a first court hearing within a fortnight of a case being sent for trial. Meanwhile other Courts might not have their first hearing for up to 17 weeks. For some Crown Courts centres, that first hearing is a pre-Plea and Case Management Hearing (a Preliminary Hearing); for other Crown Court centres, the Plea and Case Management Hearing is the first hearing.

¹⁰ Data provided by HMCS finance. Note that costs comprise all direct Crown Court costs, including depreciation, an allocation of regional support costs, HQ overhead costs and cost of capital.

Notwithstanding when the first court hearing actually takes place, from the moment that a case is sent, committed or transferred to a Crown Court for trial, parties are required to start complying with strict disclosure timetables, to ensure that the case is progressed in a timely and efficient way. Representation Orders will therefore need to be in place quickly.

34. A possible increase in unrepresented defendants is another risk that any means testing scheme will need to manage. While the magistrates' courts are traditionally set up to deal with unrepresented defendants and have qualified legal advisors who can and do assist unrepresented defendants, the Crown Court does not. Furthermore, typical Crown Court work – with the exception of Committals for Sentence Hearings and Appeal Hearings – requires a detailed understanding of complex disclosure rules, case type expertise, etc. Approximately 1 in every 1000 defendants who are committed, sent or transferred for trial at the Crown Court are unrepresented, and any increase in this may expose us to arguments that we are not providing defendants with access to effective justice.¹¹ It may also be the case that unrepresented defendants in the Crown Court create additional costs to the whole of the CJS as the judge has a duty to ensure a fair trial and ensure that the litigant in person understands the legal processes and law, which can involve managing the case and trial at a slower pace.
35. In light of all of these risks, we will pilot and evaluate the impact of any means testing scheme in a number of Crown Court centres before it is rolled out nationally. We have also decided that whilst we have a power to revoke a Representation Order for the non-payment of a Contribution Order, we will not use it because of the detrimental impact this action would have on the courts and our CJS partners. It would also be at odds with the Ministry's Strategic Objective to deliver a more effective and responsive CJS for victims and the public.

Delivering a cost effective and professional service for the granting of a Representation Order and the assessment, collection and enforcement of a Contribution Order.

36. Defendants who have been charged with a Crown Court offence are at a difficult point in their personal lives. Because of this, we need to make sure that defendants are supported through an application and assessment process that is clear, simple, fast and accurate. We are therefore proposing that:
- Defendants who are sent or committed or transferred for trial to the Crown Court will be taken as having passed the IoJ test.

¹¹ Source Crest. Provided by HMCS researchers.

- The application process and disposable income cut-off points in the Crown Court will be exactly the same as the magistrates' court means test so that there is consistency across the criminal courts.
- The application process will rely on self-certification for all defendants in custody but they will be required to provide evidence of their income or provide a National Insurance Number (NINO) within 2 weeks of their application.
- Applicants on bail will have to provide income evidence at the time of their application.
- The initial capital assessment will be completed by the LSC following the granting of the Representation Order. Some defendants will be required to provide further evidence, to confirm their capital position where appropriate.
- We will pay defence solicitors an estimated additional £4 million per year to assist their clients in providing the evidence required in support of their Crown Court legal aid applications. We recognise that while assisting defendants on benefits or with low incomes will not involve a great deal of work, some cases involving defendants in custody, those with high value capital assets and those involving self-employed defendants, will require significantly more effort.
- We will offer a wide range of ways for defendants to pay their Contribution Order such as accepting cash, 24-hour telephone hotlines, pay points in Post Offices, newsagents etc, and support them through the payment process.
- At the conclusion of the case, a final assessment of the total contribution due will be undertaken
- We will be clear with defendants, right from the start, about the implications of failing to either provide evidence or pay a Contribution Order.
- We will review the quality of our services regularly and be open about how we are doing.
- All of our detailed proposals in Parts 2 and 3 reflect discussions with stakeholders and partners, other Government Departments and the devolved administrations.

Part 2 – Detailed Proposals

37. The Government has developed and considered three options for a new means testing scheme in the Crown Court. For the reasons set out in our Initial Impact Assessment, we believe the option we set out here is the best of these options, and indeed the only viable one. We are keen to use this consultation process to refine and hear the public's views on our preferred option.
38. This section focuses on cases that are sent, committed or transferred to the Crown Court for trial, including very high cost criminal cases. As Figure 1 demonstrates, these cases account for the bulk of all Crown Court work, as well as for over 97% of legal aid expenditure in the Crown Court. We also believe that it is reasonable to extend the principle of means testing to those cases that have been committed for sentence to the Crown Court, as well as to appeals to the Crown Court following a conviction at the magistrates' courts. These cases account for the remaining 3% legal aid expenditure in the Crown Court. Proposals governing these Crown Court proceedings are set out in Part 3. Under section 17 of the Access to Justice Act, the Legal Services Commission (LSC) will be the authority responsible for the administration of the schemes described in Parts 2 and 3, although much of the assessment process will be delegated to HMCS.

High level description

39. We are proposing that a Representation Order should be granted to every individual who submits a completed¹² application for legal aid. We are proposing that those defendants who have an annual disposable income in excess of £3,398 and/or capital assets in excess of £3,000 or £30,000 of equity in their primary residence will be issued with a Contribution Order.
40. We are proposing that defendants with sufficiently high disposable incomes be required to make monthly contributions during the life of their case. If a defendant is convicted, they will be expected to pay – towards, or in full – the outstanding balance of their defence costs from capital assets that are over the cut-off points. Acquitted defendants will be refunded any up-front contributions by the LSC, as will convicted defendants who have made any over-payments.¹³ A Hardship Unit will act as an additional safeguard for those defendants who believe that they genuinely cannot afford to meet the terms of their payment plan.

¹² A completed application is one where all questions have been answered and the application has been signed by both defendant and solicitor. The provision of evidence may follow within 2 weeks.

¹³ Exceptions are set out in paragraphs 70-2.

41. We are proposing that defendants who neglect or fail to comply with their Contribution Order should face speedy and effective enforcement sanctions such as Attachment of Earnings Orders, Distress Warrants, Clamping Orders and Freezing Injunctions pre-conviction and Third Party Debt Orders and Charging Orders post conviction.

42. This is our preferred option because:

- It fairly and effectively targets those defendants who can afford to contribute towards part or all of their legal aid costs – on account of their income and/or capital assets. The public can therefore be assured that wealthy offenders will be liable for their defence costs.
- It focuses our legal aid expenditure on the majority of Crown Court defendants who genuinely cannot afford to contribute towards their legal aid costs through its generous income and capital cut-off points, and automatically exempting all youths and defendants on passporting benefits from paying any contribution.¹⁴
- It supports the effective working of the courts and initiatives like CJSSS in the Crown Court by not revoking a Representation Order for the non-payment of a Contribution Order and by creating a stake for those defendants who are paying monthly contributions in the timely progression and disposal of a case.

The Assessment Process

43. Every defendant who appears for trial at the Crown Court will be granted a Representation Order provided they submit an application for legal aid. The eligibility test will determine whether a defendant falls into one of the four following groups:-

- Entitled to free legal aid.
- Exempt from the payment of an income-based contribution **but** liable for their legal aid costs following a conviction because of the high value of their capital assets.
- Required to pay an income-based contribution only.
- Required to pay an income-based contribution **and** liable for the remainder of their legal aid costs following a conviction because of the high value of their capital assets.

¹⁴ Passporting benefits include Income Support, Income Based Job Seekers Allowance, Guaranteed Pension Credit, Income Based Employment Support Allowance.

44. A legal aid application in the Crown Court will require similar information and evidence as a legal aid application in the magistrates' court. As currently happens, Representation Orders granted in the magistrates' courts will be automatically extended to cover related proceedings in the Crown Court. The successful implementation of the magistrates' court means test has proved that the provision of this type of information is proportionate and that 92% of applications can be dealt with within 2 working days and 98% within 5 working days.¹⁵
45. In custody cases there can be real practical problems in securing the evidence required to support a legal aid application, particularly in cases where the first hearing at the magistrates' court may take place within 24 hours. In these cases, we are proposing that all those defendants who are in custody can complete a statement of truth to support their application for legal aid. These defendants will still be required to provide further evidence of their benefit or income status within 2 weeks following the grant of a representation order. Defendants who fail to provide information which show that s/he is in receipt of a passporting benefit will be treated as liable to make a contribution.

Evidential Requirements – income

46. The evidential requirements for outgoings will match the current requirements for the Magistrates' Court test. The income evidential requirements for the following categories of defendant are proposed as follows:
- a. Passporting benefits – NINO, letter from Benefits Agency or bank statement
 - b. Non passporting benefits – NINO
 - c. Employed – wage slip
 - d. Retired on a private pension of more than £1,000 per month – bank statement
 - e. Self employed – tax return or set of business accounts
47. The collection of evidence and assessment of the income contribution for categories a to d above will continue to be done by magistrate court staff. The collection of evidence and assessment of income contribution for the self-employed, other complex and any other high risk applications will be done by the LSC's National Courts Team.

¹⁵ Based on courts receiving a fully completed application and accompanying evidence. Provided by the National Courts Team, LSC.

Evidential Requirements – capital

48. All defendants will be required to state on their application form whether or not they own any property or other capital assets, though they will not need to provide evidence to this effect before they are granted legal aid. Defendants will be required to agree to a wide range of identity and credit checks such as: Equifax; Experian; Land Registry checks; and checks with other Government departments such as the Department for Work and Pensions and Her Majesty's Revenue and Customs.
49. The initial capital assessment will be completed by the LSC following the granting of the Representation Order. Some defendants will be required to provide further evidence, such as a copy of their bank statements, copies of passbooks/share certificates/equity investments or National Savings together with a mortgage statement where appropriate.
50. We believe that this approach is proportionate and consistent and that it will support the timely progression of a Crown Court case by ensuring that the representation order is in place in time for the defendant's first hearing at the Crown Court. The representation order will automatically be backdated to cover the 'sending' hearing or any other preliminary hearing in the magistrates' courts.¹⁶
51. Some defendants will inevitably fail to comply with the evidential requirements once they have been granted a Representation Order. In these circumstances, the Government has a clear responsibility to the taxpayer to incentivise the provision of sufficient evidence of a defendant's income and or capital status. We are therefore proposing that all of these defendants will be required to pay monthly contributions from income as well as the full actual costs of their case following a conviction.

Question 2: Do you have any views on our proposed liabilities for those defendants who fail to provide sufficient evidence of their income and or capital status?

¹⁶ Under section 53 of the Criminal Justice and Immigration Act 2008, all either way cases which are currently committed for trial to the Crown Court will be 'sent' to the Crown Court in accordance with the same procedures governing indictable cases under section 51 of the Crime and Disorder Act 1998. This provision is expected to be implemented in April 2009.

Setting the Contribution Order

52. The Government is proposing that those individuals who would not be eligible for legal aid in the magistrates' court on the basis of their disposable income should contribute towards their legal aid costs in the Crown Court, on a monthly basis.
53. The annual disposable income cut off point in the magistrates' court is £3,398.¹⁷ To ensure fairness, this threshold is adjusted to reflect an individual's ability to pay by taking into account their family and household circumstances. This is achieved by weighting a defendant's monthly income to reflect their number of dependants, as well as taking account of their household expenditure (see paragraphs 13-14).
54. The range of expenditure items covered by this assessment is comprehensive. It includes actual expenditure on mortgage or rent, council tax and child care and also provides a cost of living allowance to cover estimated expenditure on items such as food, utility bills, education, clothing, footwear, transport and other living expenses.

Question 3: Are there any other areas of expenditure that should reasonably be included in the assessment of disposable income?

55. Only if after all of these costs have been accounted for, is the defendant's disposable monthly income in excess of £283 (approximately 1/12th of the annual disposable income threshold of £3,398), is the defendant held to be capable of contributing towards their legal aid costs. Defendants with this level of disposable income in the magistrates' court fund private defence costs of approximately £1,500.
56. We would like to hear your views on how much a defendant should be expected to contribute in the Crown Court. One option would be for the LSC to collect all of a defendant's monthly, truly disposable income as our test is set up to ensure that household circumstances and an extremely wide range of living costs are taken into account. Another option would be that the LSC only collects a proportion of that monthly, truly disposable income. We are mindful of the need to avoid creating perverse incentives, and intend to treat defendants in the magistrates' courts and the Crown Court even-handedly.

¹⁷ This threshold is increased annually in line with DWP eligibility up-ratings which are linked to inflation.

Question 4: Is it reasonable to take account of all truly disposable income above £3,398 when setting the level of the income contribution?

57. We have also considered whether we should cap a defendant's contribution in light of the estimated length and cost of the case, and the level of disposable income available to that defendant. For example, if an extremely well-paid defendant has been charged with a serious assault and the case from charge to disposal is only expected to take six months, it would seem unfair if the calculation of the income contribution did not take this into account. Conversely, there may be some cases, such as very high cost criminal cases, where a higher contribution may be justified.

Question 5: Are there other factors that ought to be considered in determining how to cap the income contribution payable?

Question 6: In cases where a defendant has little or no capital resources, but retains their employment following conviction, is it appropriate that income contributions continue post conviction until all defence costs have been met?

58. In cases where the partner has a contrary interest to that of the defendant, either as a victim or witness, we will not seek to aggregate income or capital assets. This is again in line with our policy implemented in respect of the magistrates' court and civil legal aid schemes where we have sought to protect the interests of partners who find themselves in a particularly vulnerable position.

Completion of application forms – payment to solicitors

59. We recognise that in completing their legal aid application form, some defendants will look to their solicitors for support and assistance. On a practical level, this may involve solicitors contacting family members or friends of a remanded defendant to arrange for the collection of evidence to support the application.

60. We believe that it is fair for solicitors to be remunerated for this role, and are therefore proposing that solicitors should be able to claim a new fee to support their client through the application process and necessary additional evidential requirements.¹⁸ We recognise that in many of the cases, there will be little work to do: for example providing a NINO or a wage slip. Some cases, such as those involving remanded defendants, defendants with capital and savings and self-employed defendants, will require significantly more effort.

¹⁸ The fee for 1 hour of preparation work by a solicitor, legal executive or fee earner of equivalent experience is £45 as set out on page 42 of the Criminal Defence Service (Funding) (Amendment) Order 2007.

61. Modelling the fee for 1 hour of preparation work by a solicitor, legal executive or fee earner of equivalent experience will result in additional payment to solicitors of £4 million per year¹⁹. We are interested in whether you think that this additional money should be allocated differentially depending on the needs of the client.

Question 7: Do you think that we should pay a flat fee to solicitors for supporting the provision of evidence in every Crown Court case or should the £4 million be divided in such a way that it reflects the little and great amount of work at each end of the scale?

Change of circumstances and appeal mechanisms

62. Under our proposals, there will be safeguards to protect those defendants who wish to challenge the level of income contribution that they have been asked to pay if they believe it is unfair or incorrectly calculated.

63. A review mechanism will be available to those defendants who assert that there has been an oversight or administrative error in assessing the income contribution.

64. If a defendant has higher than usual outgoings and is concerned that the assessment does not reflect these, an application can be submitted to the LSC. Higher outgoings might include existing debt repayments, care costs for an elderly relative, medical costs or private school fees. Time taken by the LSC to consider a Hardship application will not be counted for the purposes of the collection and enforcement process below.

65. Defendants whose circumstances change during the course of the trial will also be encouraged to submit a change of circumstance application to a magistrates' court. If a defendant has been remanded in custody pending trial and so is unable to work, we acknowledge that they may not be able to maintain monthly income contributions, although they may be able to afford a single one-off contribution. This is likely to be particularly true of defendants who lose their job or who are "one man bands" whose business cannot continue in their absence.

66. However, some employed defendants and self-employed defendants will receive a high monthly income throughout the period leading up to and including their trial. In other cases, defendants' partners will receive a high monthly income throughout the same period. In these cases, it is reasonable to expect remanded defendants to pay monthly contributions towards their defence costs.

¹⁹ As set out on page 42 of the Criminal Defence Service (Funding) (Amendment) Order 2007

Collecting income contribution orders

67. The scheme needs to be backed up by an effective system for collecting and enforcing contributions. Although our collection process will do everything it can to encourage and help wealthy defendants to contribute towards their publicly funded defence costs, some individuals will inevitably do everything they can to avoid paying. In these circumstances, the Government has a clear responsibility to make sure that contributions are collected and we are proposing to take fast, effective and firm action to enforce payment.
68. Whilst the Access to Justice Act 1999 makes provision for the withdrawal of a representation order, we have decided not to enforce this power in circumstances where a defendant does not comply with an income contribution order.²⁰ To do so would incur an unacceptable risk of delay to trial proceedings, as well as generating a possible increase in the number of unrepresented defendants.
69. We are proposing that the collection and enforcement services have three distinct stages:
- Voluntary Compliance – where an individual requires little or no assistance in complying with their payment plan. To encourage a defendant's compliance, the Government is exploring a range of incentives, including offering a discount to those defendants who choose to make early repayment.
 - Supported Compliance – where the defendant requires assistance to comply with the Order. This might involve, for example, the use of texts, phone contact and correspondence setting out the range of ways in which a defendant can pay off their Contribution Order and setting out what the consequences might be of wilful non-payment.
 - Enforced Compliance – where the defendant wilfully ignores the Contribution Order or the terms of the supported compliance. In such cases, we are considering a full range of enforcement options, including the issuing of distress warrants, attachment of earnings orders, clamping orders and the freezing of assets. Having a range of available options will allow us to target those who refuse to pay effectively.

²⁰ See Paragraph 2(5) of Schedule 3 to the Access to Justice Act 1999.

At the conclusion of the case

70. If the defendant is acquitted at the conclusion of the case, the LSC will refund any income contributions paid with interest. In those cases where the defendant has wilfully sought to avoid payment and enforcement action has been required, the administrative costs of that enforcement process will be deducted.
71. We believe that the other good reason for not refunding all of an acquitted defendant's contributions, is when the defendant's own conduct has brought suspicion upon himself by misleading the prosecution into thinking that the case against him is stronger than it was.²¹
72. If the defendant is convicted, a final contribution order will be issued based on actual case costs. Where a defendant's assets have been restrained, the LSC will wait for the outcome of those proceedings before issuing a final contribution order. In circumstances where a convicted defendant's contributions have exceeded total case costs, the balance will be refunded with interest.

Calculation of the final contribution order

Property

73. If a defendant owns a property or properties, these will be taken into account in determining the final contribution order. Any capital contribution from the main family home will be limited to properties with equity in excess of £30,000. If a defendant has not been eligible to pay an income-based contribution towards their defence costs but does own a property, legal aid costs may still be recovered from that property.
74. In order to recover legal aid costs from the defendant's property, we are prepared to apply for charging orders. It is anticipated that, in some cases, defendants will choose to raise funds sufficient to repay the outstanding balance of their defence costs so that the charging order can be removed, for example by raising a loan secured on the property. As over half of all Crown Court cases cost less than £3,000, this is likely to prove attractive, particularly given that an estimated two thirds of defendants who own properties also have other capital assets. It is important to bear in mind that we are proposing to exempt the first £30,000 of equity from consideration for a capital contribution. Only those defendants with substantial equity in their property will be required to make a contribution on the basis of their property ownership.

²¹ This is in line with paragraph II.2.1 of the Practice Direction on Costs in Criminal Proceedings.

75. In certain very limited circumstances, and where all other options have been exhausted, we may seek to apply for the sale of the property. In weighing up whether to pursue this option, we will of course assess fully the impact such action may have on innocent members of the defendant's family.

Question 8: What factors ought to be considered in deciding whether or not to apply for an order for sale?

Question 9: Applying for an order for sale is very much seen by MoJ as a last resort. What other mechanisms might be adopted to ensure a defendant convicted at the Crown Court meets their defence costs?

76. As we have made clear at paragraph 58, in cases where the partner has a contrary interest to that of the defendant, either as a victim or witness, we will not seek to aggregate income or capital assets.

Other capital assets

77. In calculating the final contribution order, LSC will consider other capital assets held by the defendant. As previously stated, it may also be that defendants whose disposable income was not sufficient to justify payment of an income contribution will be liable for their defence costs on the basis of their capital assets.

78. We do not intend to restrict capital assets for the purpose of a Contribution Order to 'liquid' cash assets held in bank and building society accounts, but will wish to include other items such as stocks and shares, other properties. In calculating a final contribution order, defendants will be able to claim an exemption from their first £3,000 of capital assets.

Question 10: What range of capital assets should be considered for the purposes of the final contribution order?

79. In calculating a defendant's capital assets, we are proposing to include assets jointly owned or owned in common with their partner. This is consistent with the aggregation of resources approach adopted by the magistrates' court income test and civil legal aid means testing schemes.²² However, as with the calculation of the income contribution, we do not intend to aggregate capital assets where the partner has a contrary interest either as a victim or witness. Equally, we will not aggregate capital assets where the partner is permanently separated from the defendant but the asset remains jointly owned.

²² See Regulation 7 of the Criminal Defence Service (Financial Eligibility) Regulations 2006 (S.I. 2006/2492) and Regulation 11 of the Community Legal Service (Financial) Regulations 2000 (S.I. 2000/516).

Review Mechanisms

80. As with the calculation of the income contribution order, defendants will have the same review and appeal safeguards as set out at paragraphs 62 – 64.

81. We are also proposing that where a defendant is found guilty on some but not all of the counts, the defence will be able to make a written request to the trial judge for a determination of what proportion of the final case costs their client should be liable for. We believe that a similar discretion should exist in multi-handed cases as it will not always be fair to split the costs in these cases evenly.

Enforcing capital contributions

82. As with income contributions, we will adopt a similar compliance strategy to enforce capital and property contributions. Where possible, this will seek to create incentives optimising voluntary compliance, including discounts for early repayment.

Question 11: What other types of support can we offer to defendants to help them pay off their contribution order?

Part 3 – Committals for Sentence and Appeals

Committals for Sentence

83. The Government proposes that the magistrates' court means test should be extended to Committal for Sentence hearings in the Crown Court. Those defendants whose annual disposable income exceeds £3,398 will be held to be capable of paying for privately funded defence costs, estimated at approximately £1,500 for a Committal for Sentence Hearing.
84. Given that the cost of representation at the sentencing hearing in the Crown Court is comparable to the estimated costs of the average magistrates' court trial, this change may increase some defendants' financial liability to nearly £3,000. Defendants who have privately funded their trials in the magistrates' court will therefore be able to have these costs deducted from their disposable income. This will ensure that defendants are fairly assessed when applying for legal aid to cover their sentence hearings.
85. As cases are currently adjourned for approximately four weeks following the committal of a defendant for sentence to the Crown Court,²³ we are confident that this provides sufficient time to resolve issues of representation ahead of the sentencing hearing, and so preserve business continuity.
86. Under existing arrangements, a Representation Order granted to a defendant to cover trial proceedings at the magistrates' court will be extended to the Crown Court if the defendant is committed to that court for sentence.²⁴ Under our proposals, this position will not change. However, if they paid privately for their representation in the magistrates' court, they will be required to pay privately for the sentencing hearing in the Crown Court, unless either a hardship review or a private funding review is successful.

Question 12: Do you have any views on our proposals for committals for sentence?

²³ Whilst the average adjournment is for approximately four weeks, this period varies from region to region.

²⁴ See Regulation 4 of the Criminal Defence Service (Representation Orders and Consequential Amendments) Regulations 2006/No. 2493

Appeals

87. In cases where the defendant has been granted a representation order for a magistrates' court trial, the order does not extend to appeal hearings against conviction or sentence at the Crown Court. Appeals are treated as separate court proceedings for which the appellant has to apply for a new representation order. As with all applications for criminal legal aid, applicants are required to pass the 'Interests of Justice' test.

88. During the financial year 2007/08 the Crown Court heard 12,751 appeal cases from the magistrates' courts. In 7,166 (56%) of these, the appellant was granted publicly funded representation.²⁵

Figure 6: Publicly funded appeal cases heard by the Crown Court (2007/08)

	Appeals v. conviction and sentence	Appeals v. conviction	Appeals v. sentence	Total
Volume	1,563	1,462	4,141	7,166
Outcome: successful	596 (38%)	520 (36%)	2,027 (49%)	3,143 (44%)
Outcome: unsuccessful	967 (62%)	942 (64%)	2,114 (51%)	4,023 (56%)

89. Under our proposals, all appellants will still be granted a representation order provided they satisfy the 'Interests of Justice' (IoJ) test. This will help to support business continuity in the Crown Court and avoid unnecessary delays.

90. However, as part of the application process, appellants will also have to agree to a financial assessment of their disposable income. The assessment of disposable income will be based on the test used under the magistrates' court means testing scheme. As with the proposals for committals for sentence, this assessment will take account of any defence costs incurred by an appellant who was not financially eligible for legal aid at their trial. Appellants will also be required to provide details of any property and/or capital assets and to consent to Equifax and Land Registry checks.

²⁵ Source CREST and CLAT. Provided by MoJ researchers.

91. This financial assessment will seek to identify whether the appellant has annual disposable income above £3,398 and/or equity in excess of £30,000 and/or other capital assets in excess of £3,000. If so, the appellant will be notified that if their appeal is unsuccessful, they will be liable for their full legal aid appeal costs. These costs will be recovered at the conclusion of the proceedings.

92. At the conclusion of an unsuccessful appeal, appellants who are liable for their legal aid costs will be issued with an order for their repayment. The range of enforcement options and proceedings identified at page 27 will also be available to ensure the successful recovery of appeal costs. Those defendants, who felt that they genuinely could not afford to pay for their appeal costs because, for example, the costs were unusually high, will continue to have the safeguard offered by the review provision.

Question 13: Do you have any views on our proposals for appeals?

Questionnaire

We would welcome responses to the following questions. Please support all of your answers with reasons.

Question 1: Should individuals who are committed, sent or transferred for trial before the Crown Court be automatically passported through the Interests of Justice Test? (p. 12)

Question 2: Do you have any views on our proposed liabilities for those defendants who fail to provide sufficient evidence of their income and or capital status? (p. 24)

Question 3: Are there any other areas of expenditure which should reasonably be included in the assessment of disposable income? (p. 25)

Question 4: Is it reasonable to take account of all truly disposable income above £3,398 when setting the level of the income contribution? (p. 26)

Question 5: Are there other factors which ought to be considered in determining how to cap the income contribution payable? (p. 26)

Question 6: In cases where a defendant has little or no capital resources, but retains their employment following conviction, is it appropriate that income contributions continue post conviction until all defence costs have been met? (p. 26).

Question 7: Do you think that we should pay a flat fee to solicitors for supporting the provision of evidence in every Crown Court case or should the £4 million be divided in such a way that it reflects the little and great amount of work at each end of the scale? (p. 27)

Question 8: What factors ought to be considered in deciding whether or not to apply for an order for sale? (p. 30)

Question 9: Applying for an order for sale is very much seen by MoJ as a last resort. What other mechanisms might be adopted to ensure a defendant convicted at the Crown Court meets their defence costs? (p. 30)

Question 10: What range of capital assets should be considered for the purposes of the final contribution order? (p. 30)

Question 11: What other types of support can we offer to defendants to help them pay off their contribution order? (p.31)

Question 12: Do you have any views on our proposals for committals for sentence? (p.32)

Question 13: Do you have any views on our proposals for appeals? (p. 34)

Question 14: Do you have any views on the initial impact assessment, including any potential adverse impact on any particular group of people, what steps should be taken to mitigate this, and anything else the full impact assessment should cover? (pp 40-79)

Question 15: Do you have any other comments?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 29 January 2009 to:

Stephen Gascoigne
Criminal Legal Aid Strategy Division
Zone 5B
Ministry of Justice
102 Petty France
London
SW1H 9AG

Tel: 020 3334 4232

Email: stephen.gascoigne@justice.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.justice.gov.uk/index.htm>.

Alternative format versions of this publication can be requested from the above contact details.

Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on-line at <http://www.justice.gov.uk/index.htm>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances; this will mean that your personal data will not be disclosed to third parties.

Impact Assessment

Summary: Intervention & Options		
Department /Agency: MoJ	Title: Impact Assessment of Crown Court Means Testing	
Stage: Consultation	Version: Partial	Date: 6 November 2008
Related Publications:		

Available to view or download at:

<http://www.justice.gov.uk>

Contact for enquiries: Stephen Gascoigne

Telephone: 020 3334 4232

What is the problem under consideration? Why is government intervention necessary?

To ensure that all those who can afford to pay for their publicly funded defence costs do so. Defendants in the magistrates' court have been subject to a means test since October 2006. It is now intended to extend means testing to defendants appearing before the Crown Court. Currently, all defendants appearing before the Crown Court receive legal aid. Modelling work indicates that we could recover annually approximately £50 million in net savings against a total Crown Court spend of £680 million per year. In so doing, this would help put the legal aid budget on a sustainable footing.

What are the policy objectives and the intended effects?

To introduce a scheme for legal aid in the Crown Court which fairly and accurately identifies those who can genuinely afford to pay some or all of their defence costs, and targets free legal aid at those who need it. It will deliver estimated savings of around £50m per year, will support court performance by creating a stake for those defendants in the timely progression and disposal of a case, and will ensure consistency with the magistrates' courts.

What policy options have been considered? Please justify any preferred option.

Four options, including doing nothing, have been considered. These are set out in detail below. The preferred option is to introduce a new means testing scheme made up of monthly contributions during the life of the case for all those defendants who would fail the magistrates' court means test. All defendants who are convicted will be assessed to determine whether further payment is required from those defendants who have capital in excess of £3,000 and equity in their primary residence in excess of £30,000.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The policy will be reviewed in light of the responses to the consultation, any findings during the first phase of rollout, and then 6 months after national rollout.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

.....Date:

Summary: Analysis & Evidence

Policy Option:	Description:
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' Includes annual payment of £4 million to solicitors for assisting clients to complete application forms.		
	One-off (Transition) Yrs			
	£			
	Average Annual Cost (excluding one-off)			
	£ 14 million	Total Cost (PV)	£ 14 million	
Other key non-monetised costs by 'main affected groups'				

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' About half of the estimated benefit will come from collections from income, and half from capital		
	One-off Yrs			
	£			
	Average Annual Benefit (excluding one-off)			
	£ 65 million	Total Benefit (PV)	£ 65 million	
Other key non-monetised benefits by 'main affected groups'				
Better use of taxpayers' money.				
Better targeting of the legal aid budget on vulnerable groups and individuals.				

Key Assumptions/Sensitivities/Risks The information and costs contained in this initial IA is the best currently available, but will updated as necessary

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £ 50 million approximately
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What is the geographic coverage of the policy/option?		England & Wales			
On what date will the policy be implemented?		June 2009			
Which organisation(s) will enforce the policy?		MoJ, HMCS, LSC			
What is the total annual cost of enforcement for these organisations?		£			
Does enforcement comply with Hampton principles?		Yes			
Will implementation go beyond minimum EU requirements?		No			
What is the value of the proposed offsetting measure per year?		£ n/a			
What is the value of changes in greenhouse gas emissions?		£ n/a			
Will the proposal have a significant impact on competition?		No			
Annual cost (£-£) per organisation (excluding one-off)		Micro	Small	Medium	Large
Are any of these organisations exempt?		No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)	
Increase	£	Decrease	£	Net	£

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

1. INTRODUCTION

The Government is firmly committed to the principle that those defendants in criminal cases who can afford to pay some or all of their defence costs, should be made to do so. This principle underpinned the policy decision to implement a new means testing scheme for magistrates' court defendants in October 2006. At the time this scheme was introduced, the Government made clear its intention to extend means testing to Crown Court defendants as soon as it was practicable to do so.

Two years on, the magistrates' court scheme is successfully embedded within the criminal justice system and is working effectively. The Ministry of Justice (MoJ) therefore believes the time is now right to consider proposals for a Crown Court means testing model. Details of the proposed scheme are set out in the consultation paper. In exploring the most appropriate way forward, the MoJ investigated a range of options, set out at pages 46-55. This document also sets out the reasons behind MoJ's decision to pursue its preferred model, and an assessment of its likely impact. Alongside its proposals for Crown Court trials, MoJ has also put forward proposals to extend means testing to committals for sentence and to appeals to the Crown Court.

The estimated costs and savings identified in this Impact Assessment are based on the most accurate data currently available. Given the ongoing research to design the detailed business processes supporting the new scheme, and in light of feedback to the consultation exercise, the associated costs and savings will subsequently need to be refined.

Profiling the Crown Court defendant population:

In developing its proposals for a Crown Court scheme, the MoJ has relied on a comprehensive statistical model built by a team of MoJ operational researchers, statisticians and economists. This model brings together data on 200,000 defendants who were committed, sent or transferred to the Crown Court for trial between 2003 and 2007. This work provides us with a valuable insight into the financial, domestic and socio-economic characteristics of Crown Court defendants and establishes a framework within which it is possible to assess the range of

means testing options identified by MoJ along with their impact on different groups of defendants. We intend to publish this model when external peer review has been completed.

In building the socio-economic profile of Crown Court defendants, the statistical model has integrated data and information from several key sources, including principally:

- The Crown Court Electronic Support System (CREST) – this is the computer system that supports the progression of cases through the Crown Court. It records case level and defendant level information about the proceedings, and data about each defendant’s age, sex and post-code.
- The Family Resources Survey (FRS) – sponsored by Department for Work and Pensions (DWP), this survey is conducted annually and involves approximately 28,000 private households in the UK. It collects very detailed information about the financial, domestic and socio-economic circumstances at an individual, household and benefit level.
- Lower Super Output Areas – these are produced by the Office for National Statistics and rank households from 1 to 32,482 according to how income deprived they are. Crucially, the key criterion for defining each area is social homogeneity.
- Index of Income Deprivation – produced by the Department for Communities and the Local Government.
- The Graduated Fee Database – each one of the 200,000 defendant profiles has been linked up to the Graduated Fee database through a unique case identifier to match up each defendant with their actual case costs and case outcome. This has enabled us to estimate exactly what proportion of the defence costs might be recoverable in each case.
- An index of over-indebtedness – produced from research undertaken by the Department for Business Enterprise and Regulatory Reform on “Tackling Indebtedness”. This report defines someone as over indebted if “they are struggling to keep up with payments and are suffering real financial hardship as a result”. This is a useful definition for our purposes as it would suggest that the same individuals will struggle to keep up with mandatory contributions to their legal aid costs.

Conclusions from the modelling exercise

The modelling has demonstrated a wide income spread within the Crown Court population: 41.9% of defendants earn less than £10,000 per year; 31.6% earn between £10,000 and 20,000; 14.5% earn between £20,000 and £30,000; 6% earn between £30,000 and £40,000 and 6% of

Crown Court defendants earn over £40,000 per year. The capital status of Crown Court defendants is highlighted in the table below.

Categories of eligibility in the magistrates' court	Estimated capital status of defendants who were committed, sent or transferred for trial to the crown court in 2007 (volumes and %)				
	All defendants	Defendants with no Capital	Defendants with Capital Only	Defendants with Property Only	Defendants with Capital and Property
Defendants on passportable benefits ¹	16,791 18.6%	13,797 15.3%	1,957 2.1%	635 0.7%	402 0.5%
Would qualify for legal aid in the magistrates' court	48,448 53.6%	28,908 32.0%	9,493 10.5%	4,612 5.1%	5,435 6.0%
Would not qualify for legal aid in the magistrates' court	25,143 27.8%	6,376 7.0%	6,011 6.7%	3,298 3.7%	9,459 10.4%
Total	90,382 100%	49,081 54.3%	17,461 19.3%	8,545 9.5%	15,295 16.9%

The modelling indicates that whilst a significant proportion of Crown defendants have only very modest income and/or capital assets, others could reasonably be expected to contribute towards, or pay for all of, their defence costs.

Risks of using a micro-simulation model:

In relying on a micro-simulation model, we acknowledge that this approach does carry risks. The accuracy of any model will always depend on the relevance and accuracy of the data on which it is built. For example, whilst the Family Resources Survey is a randomized sample of all private UK households, it may not fully capture the full range of financial profiles for the defendant population.

We also recognise that the necessity of merging unrelated datasets to build a profile of defendants may introduce some inaccuracies into the model that remain undetectable because of the absence of actual data for comparison. The model (like all models) also relies upon a number of assumptions, particularly where these relate to variables that are difficult to quantify,

¹ Note that this does not include youths.

such as behaviour. For example, it is assumed that the duration of trials is unaffected by the requirement to make a financial contribution.

That said, this is a very detailed model that has been peer reviewed by members of the LSRC, DWP and relevant Heads of Profession, and is being externally peer reviewed. A pilot will allow us to test assumptions and gather further data.

2. CROWN COURT TRIALS:

Our modelling has estimated that less than 1% of Crown Court defendants have the disposal income to afford the private costs of the average Crown Court trial (approximately £24,000). The simple 'in' or 'out' eligibility test used in magistrates' court means testing is therefore not the right model to obtain the majority of the savings that the modelling has identified.

We have therefore looked at different alternatives through which the principle of means testing might be extended to the Crown Court, and developed and explored the costs and benefits of four different options. We have decided at this stage to consult only on the fourth option, for the reasons set out below.

OPTION 1

Do Nothing – Continue with the Existing Recovery of Defence Costs Order Scheme

Currently all defendants in the Crown Court are eligible for legal aid. They may also be liable for a Recovery of Defence Costs Order (RDCO) at the conclusion of their trial, subject to the discretion of the judge. RDCOs were introduced in the Crown Court in 2001. They were originally targeted at the 1% of defendants who were refused legal aid under the Legal Aid Act 1988 because their means were such that they could afford to pay for their own costs.

Since the introduction of the scheme, and despite a number of initiatives to improve and promote it, the number of RDCOs made has remained low (see table below). This is chiefly because primary legislation does not require an RDCO to be made. This discretion means there is huge variation between what defendants of a similar level of wealth are required to pay towards their defence costs. The low number of RDCOs also reflects the difficulties associated with defendants who fail to provide the court with details of their income and capital status. The RDCO scheme does not have access to the same data gateways with DWP and Her Majesty's Revenue and Customs (HMRC) that we have recently secured to support the new means testing schemes.

Year	Number of RDCOs made	Value of RDCOs made	Actual Recovery In Year
2002-03	384	£413,957	£335,278
2003-04	560	£1,839,104	£684,714
2004-05	451	£1,586,364	£1,269,139
2005-06	371	£1,260,774	£880,142
2006-07	328	£4,169,260	£669,142
2007-08	222	£5,978,686	£1,012,609

On 6 October 2008, regulation changes were introduced to target more effectively those defendants who can afford to pay towards their own costs in the Crown Court (SI 2008/No 2430). For example, the new changes specifically excluded the making of an RDCO if a defendant's income meant that they were eligible for legal aid in the magistrates' court and they had capital assets of less than £3,000 and/or equity in their principal residence over £100,000.

As a result of these changes, it is estimated that approximately 25,000 defendants each year will be liable for an RDCO. If the judiciary are provided with sufficient information about defendants' income and capital status and regularly exercise their discretion to make an RDCO, it is estimated that this scheme could delivering gross annual savings of £8 million. HMCS and the LSC spend approximately £750,000 per year to administer the scheme and collect the Orders. This would suggest that the scheme should deliver annual net savings of about £7 million.

Conclusion:

The primary legislation underpinning the RDCO scheme provides for a discretion, rather than a requirement. As a result, defendants who can genuinely afford to pay for their defence costs in the Crown Court will not always be required to do so. This is the key reason behind our decision not to take this option forwards.

There are a number of other reasons that support this decision. Judicial discretion about the level of an RDCO also inevitably results in defendants of similar means being required to pay costs that can differ hugely. There are difficulties around the quality of information that defendants often provide to the Court. There are insufficient incentives in place for defendants to provide the correct information about their income and capital status and the Crown Court does not have access to data gateways that can verify this information. The collection and recovery of capital can be costly and can take many years to recover, largely because of the lack of detailed information and the need to seek a court order making the debt enforceable.

OPTION 2

Improve the RDCO regime using powers under the Criminal Defence Service Act 2006

Option 2 would build on Option 1 by making it an administrative requirement, instead of a judicial discretion, to make an RDCO following the conviction of a Crown Court defendant. Under this proposal, MoJ would also look to establish more effective means of assessing and validating information about a defendant's means.

Under this option, the rules governing the grant of legal aid would not be changed. However, during the lifetime of the case the Court and LSC would investigate the financial circumstances of all defendants to identify their financial status in terms of capital assets and equity in the principal residence. If a defendant is convicted, s/he will be issued with an order for their defence costs if they have savings above £3,000 and/or equity in their main residence above £30,000. The proposal to lower the equity threshold from £100,000 to £30,000 is intended to bring the legal aid scheme in line with service provision in other parts of the welfare state.

The LSC would not seek to recover any costs until the actual legal aid costs have been determined at the end of the case. If a defendant wilfully neglects or culpably fails to comply with their subsequent order, the LSC would be given a range of sanctions to ensure compliance. These include the use of distress warrants, clamping orders, third party debt orders, charging orders and the imposition of interest charges.

Our modelling of the socio-economic profile of Crown Court defendants indicates that approximately 30% of them own property and/or other capital above the £30,000/£3,000 equity/capital thresholds (see table below): 8% of defendants have capital and property; 19% defendants have property only; 4% defendants have capital only. There is a high correlation between liquid capital, a high income and property ownership: around 57% of the defendants who would not qualify for legal aid in the magistrates' court based on their income, have either a

property and/or capital above the cut-off points. In contrast, it is estimated that approximately 7% of Crown Court defendants who would be on 'passportable' benefits in any income-based means testing scheme, have either a property and/or liquid assets above the cut-off points.

Estimated capital ² and equity above the cut-off points of £3,000 and £30,000 for those defendants who were committed, sent or transferred for trial to the crown court in 2007 (volumes and %)					
Categories of eligibility in the magistrates' court	All defendants	Defendants with no capital above £3,000	Defendants with capital in excess of £3,000	Defendants with equity in excess of £30,000	Defendants with capital and equity above the cut-off points
Defendants on passportable benefits ³	16,791 18.6%	15,663 17.3%	92 0.1%	989 1.0%	138 0.2%
Would qualify for legal aid in the magistrates' court	48,556 53.7%	36,740 40.6%	1,756 1.9%	8,085 8.9%	1,973 2.2%
Would not qualify for legal aid in the magistrates' court	25,035 27.7%	10,766 11.9%	1,526 1.7%	7,884 8.7%	4,859 5.4%
Total	90,382 100%	63,169 69.9%	3,374 3.7%	16,867 18.7%	6,970 7.7%

Our model has estimated that this option could deliver gross savings of approximately £69 million per year (£64 million from property and £5 million from other capital). HMCS and the LSC have estimated that the annual administrative costs would be in the region of £9 million.

Conclusion:

This option has a number of advantages over Option 1. It could deliver significant annual net savings and it would demonstrate to the public that all wealthy convicted defendants will be held liable for their defence costs, which would improve public confidence in the Criminal Justice System.

Nonetheless, following discussions with HMCS and the LSC, we have decided not to take this option forwards for the following reasons. A lack of consistency between our approaches to the

² Capital assets cash held in current accounts, savings accounts, TESSAs, ISAs, bonds, gilts and trusts, as well as Investments including all stocks and shares including ISAs, PEPs and endowment policies not linked to a mortgage. Capital does not include any equity tied up in the defendant's main residence or other properties, or other high value items such as jewellery, cars, boats etc. Capital has been calculated at a benefit unit level, so if a couple (irrespective of their marital status) hold separate savings accounts the value of these is aggregated

³ Note that this does not include youths.

payment of defence costs between the magistrates' courts and Crown Courts creates a perverse incentive for income rich, asset poor defendants (estimated at 1 in 10 defendants) to elect to the Crown Court. This perverse incentive already exists, and HMCS is keen to see it removed as soon as possible. There are also concerns about the difficulties and delays involved in recovering contributions from capital. We have tried to overcome these issues in the 2 options below.

OPTION 3

Introduce a means testing scheme made up of a one-off flat fee of £1,500 for all those defendants who would fail the magistrates' court test and further payment upon conviction from those defendants who have capital in excess of £3,000 and/or equity in their principal residence in excess of £30,000.

This option would introduce an up-front contribution in the Crown Court set at the average cost of a privately funded case in the magistrates' court – estimated at £1,500 - and additional payment upon conviction if a defendant has capital assets above the cut-off points.

The up-front eligibility test in the Crown Court would replicate the test that is currently employed in the magistrates' court. This weights an applicant's income to reflect family size and number of dependents. If the applicant's resultant annual income is less than £12,475, s/he will be financially eligible for legal aid; if it is more than £22,235, s/he will be financially ineligible for legal aid. Defendants whose weighted income falls between these two thresholds are subjected to a more detailed assessment of their disposable income. This takes account of actual housing costs (mortgage or rent, and council tax), actual childcare costs, and a cost of living allowance to reflect expenditure on items such as food, clothing, and utility bills. If following the assessment, the defendant's disposable income is £3,398 or more, s/he will have to fund their defence costs privately; if their disposable income is less than this threshold, s/he will be financially eligible for legal aid.

Under Option 3, those Crown Court defendants who would fail the magistrates' court means test would be required to pay a one-off up-front contribution of £1,500 towards their defence costs. If the defendant is subsequently acquitted, s/he will be refunded any up-front payment. However, if the defendant is convicted, s/he will be liable for any outstanding defence costs in excess of £1,500 if they have equity in their principal property or capital assets above the cut off points. Should their £1,500 contribution already exceed their total defence costs, any balance owed to the convicted defendant would be refunded.

The table below demonstrates shows that if the current financial eligibility test in the magistrates' court were applied to the Crown Court population around 28% of defendants would be ineligible for legal aid. Figures used are for 2007:

Magistrates' courts income categories	On passportable benefits	Eligible for legal aid on the basis of income	Not eligible for legal aid on the basis of income	Total
Number of defendants	16,791	48,448	25,143	90,382
Percentage of Defendants	18.6%	53.6%	27.8%	100%

This option shows that if this group of Crown Court defendants all paid an up front fee of £1,500, a maximum annual recovery would be around £23 million - excluding contributions from defendants who have been acquitted and those defendants who are convicted but have overpaid.

In respect of equity in property, modelling indicates that gross savings would be around £43 million per year, with a further £4 million recoverable from other capital savings. LSC have estimated that the costs of managing this option would be in the region of £13 million.

Key to the success of this option is the ability to effectively recover a contribution from income. As with Option 2, the LSC have estimated that the payment rate will be in the region of 75%.

The table below demonstrates total estimated costs and savings from Option C.

Estimated savings from disposable income	£23 million
Estimated savings from property	£43 million
Estimated savings from other capital assets	£4 million
Estimated costs of managing the means testing regime	£13 million
Estimated net annual savings	£40 million⁴

⁴ The LSC have estimated that the payment rate will be in the region of 60-90% and we have gone with 75% for the purpose of estimating the net savings. The HMCS payment rate target for fine enforcement for the financial year 08-09 is 85%.

Conclusion:

We have estimated that this option would deliver net annual savings of approximately £40 million. It is worth noting that the reason why the estimated gross savings from property and other capital assets have decreased from £69 million in option 2, to £40 million in option 3, is because many of those defendants will have paid an up-front payment. The tables on page 5 and 9 set out the relationship between income and capital in more detail.

The benefits of this option are that there is consistency between the magistrates' and Crown Courts and, subject to the right incentives being in place, a contribution towards a defendant's defence costs is collected at the earliest possible opportunity. The main difficulty we have with this option is that a flat fee of £1,500 is not the most effective up-front contribution because it fails to target those defendants who have a higher disposable income from which they could make significantly larger contributions. It is therefore not the fairest scheme, and fails to deliver the best value for money for the taxpayer.

OPTION 4 – the preferred option

Introduce a new means testing scheme made up of monthly contributions (that are linked to disposable income) during the life of the case for all those defendants who would fail the magistrates' court means test and further payment upon conviction from those defendants who have capital in excess of £3,000 and/or equity in their principal property in excess of £30,000

Our preferred option would involve a means testing scheme which, following the hearing in the magistrates' court, collects a monthly contribution from those defendants who fail the magistrates' court means test and requires further payment upon conviction if the defendant has equity or other capital assets.

The financial eligibility test to determine whether a defendant is eligible to pay a contribution is analogous to the magistrates' court scheme. Therefore those Crown Court defendants whose weighted annual income falls below the lower threshold of £12,475 will be financially eligible for legal aid without paying an income contribution. Only those defendants whose annual disposable income falls outside the £3,398 threshold will be liable to pay an income contribution.

The issue of exactly what level of contribution should be paid by the defendant is one of the questions raised in the consultation paper. We are proposing that it should be directly linked to

a defendant's truly disposable income and our initial modelling has explored the possibility of taking all of this truly disposable income each month, as this is a fairer approach.

Initial estimates show that if the LSC collected a monthly contribution during the life of the case, an estimated 28% of Crown Court Defendants that are ineligible for legal aid in the magistrates' court might generate savings in the region of £44 million. This excludes contributions that are returned for acquitted defendants or those who have been convicted but overpaid.

Defendants who are convicted and have equity above £30,000 in their principal property will be liable for the balance of their defence costs. It is estimated that taking into account property alone could realise savings of around £39 million per year. Other liquid capital assets like savings or ISAs and capital assets would also be taken into account from which modelling estimates a further £3 million could be realised. As in Option 3, a comprehensive enforcement strategy will be required to ensure that contributions from income are recovered.

Incentives such as discounted payments are being considered as part of the wider enforcement strategy to be developed under this option. Where more robust enforcement action is needed, that strategy will consider other possible mechanisms, including the use of distress warrants, clamping orders, and attachment of earnings orders. The LSC have estimated that the costs of administering this scheme are approximately £17 million. As with option 2 and 3, initial savings projections are based on a successful enforcement rate of 75%.

SUMMARY OF ESTIMATED ANNUAL COSTS AND SAVINGS

Estimated savings from disposable income	£44 million
Estimated savings from property	£39 million
Estimated savings from other capital assets	£3 million
Estimated cost of managing the means testing regime	£14 million
Estimated net annual savings	£51 million⁵

Conclusion:

This is our preferred option for the following reasons. It maximises the annual savings from a means-testing scheme and is the fairest way of ensuring that all those defendants who can genuinely afford to contribute or pay towards their legal costs do so. It delivers consistency between the magistrates' and the Crown Court: those defendants who are not entitled to legal

⁵ The LSC have estimated that the payment rate will be in the region of 60-90% and we have gone with 75% for the purpose of estimating the net savings. The HMCS payment rate target for fine enforcement for the financial year 08-09 is 85%.

aid in the magistrates' court would be required to make monthly contributions to the Crown Court. It also supports the timely progression and disposal of a case and will provide improved public confidence in the CJS through the knowledge that wealthy, convicted defendants are liable for their defence costs. We have therefore decided to consult only on this approach with regards to all cases that are committed, sent or transferred for trial to the Crown Court.

3. COMMITTALS FOR SENTENCE

Defendants who are committed for sentence will always pass the 'Interests of Justice' (IoJ) test given the greater likelihood of a custodial sentence, and currently legal aid will therefore be granted without reference to defendants' means. This continues to create situations where defendants pay for their defence privately in magistrates' courts, or do not have representation in the magistrates' court, and are then granted legal aid once the case has been committed for sentence.

In considering how to extend means testing to cover sentencing hearings committed to the Crown Court, MoJ recognises that any viable proposal needs to take into account the costs which may already have been incurred by a defendant who is not eligible for legal aid at the magistrates' court.

Whilst a defendant who is financially ineligible at the magistrates' court is deemed capable of paying up to £1,500 of private defence costs, additional costs generated at the sentencing hearing can double potential liability to nearly £3,000. This is based on estimates that the private costs for a sentencing hearing may be three times the average legal aid rate paid of £425.⁶

Option 1 Retain the current regime

As the current arrangements for the grant of legal aid do not take account of the defendant's financial status, this is not seen as a viable option.

Option 2

Perform a second means test, allowing £1,500 as an additional outgoing to be offset in the assessment of disposable income

⁶ See section 8 on pages 6&7

This option would remove the perceived anomaly that defendants who do not qualify for legal aid in the magistrates' courts on the grounds of their means, but would receive legal aid for a committal hearing. It would also ensure that defendants who have privately funded their defence in the magistrates' court could still afford to pay their costs at the sentencing hearing in the Crown Court.

Modelling of the number of defendants who would fail the current magistrates' court eligibility test, where an additional £1,500 is subtracted from disposable income, shows that 27.8% would be financially ineligible. Given that approximately 22,500 sentencing hearings committed to the Crown Court receive public funding, some 6,300 defendants would be refused legal aid. Estimated gross savings would therefore be in the region of £2.7 million.

In order to implement this option, one-off IT modifications will be required and these are estimated at £100,000.

However, this option is not fair, as it would in effect move the threshold, and increase the liability of all defendants to £1,500, without regard to their financial circumstances. It is therefore not considered a viable option.

Option 3 – the preferred option

Defendants who are refused legal aid at the magistrates' court and believe they are unable to pay for their legal costs at the sentencing hearing can apply for a Private Funding Review

Under this option, the initial means assessment in the magistrates' court would be used to confirm whether defendants would be eligible for public funding if the case is committed to the Crown Court for sentence. A new route would be created for defendants who genuinely felt they could not afford to pay, known as a Private Funding Review. Details would be provided of costs already incurred and predicted costs at the Crown Court. The National Courts Team at the LSC would process the new review.

Estimated savings associated with this option are at least comparable to Option 2 (£2.7 million) and may be higher. This is because Option 3 takes account of the actual privately funded defence costs in the magistrates' court and in some cases these will be less than £1,500.

Whilst annual running costs associated with Option 3 are estimated at approximately £300,000, no IT changes will be required.

For the moment we believe that this option provides us with the best way forwards because it looks at the actual costs incurred by each individual defendant. The pilot exercise will provide us with the opportunity to evaluate the impact of extending means testing to committal for sentence hearings in more detail and inform our decision about whether or not an IT solution is preferable.

4. APPEALS

This section explores the options we have considered for dealing with appeal cases that are brought before the Crown Court, and sets out the preferred option.

Defendants convicted before the magistrates' court are entitled to appeal to the Crown Court against their conviction and/or their sentence. Appeals against conviction can be lengthy, as they involve a complete rehearing of the evidence heard before the magistrates' court. By comparison, appeals against sentence are usually much shorter.

Appeals are treated as a separate set of criminal proceedings. Consequently, representation orders that are granted to a defendant in the magistrates' court do not extend to appeal hearings in the Crown Court. To obtain a new representation order for the appeal hearing, the IoJ test must be passed and current evidence shows that around 44% of appellants to the Crown Court do not pass the test.

If a publicly funded appeal in the Crown Court against conviction is unsuccessful, an appellant may be required to pay back some of the legal aid costs through an RDCO. Following the implementation of regulation changes on 6 October 2008, an RDCO can now also be made in respect of an appeal to the Crown Court against sentence (SI 2008/No 2430).

An appellant who is ineligible for legal aid, or who chooses to be privately funded, is entitled to claim costs back from Central Funds, even if they do not pass the 'Interests of Justice' test. There is no robust data currently available, but anecdotal evidence suggests that private rates may be two/three times the legal aid rates. This means that claims to reimburse privately funded cases create a substantial drain on Central Funds.

During the financial year 2007-08 the Crown Court heard 12,751 appeal cases from the magistrates' courts. In 7,166 of these, the appellant was granted publicly funded representation, at a cost of £3.91 million to the legal aid budget.

The tables below set out publicly funded appeal cases heard by the Crown Court and the cost of publicly funded appeal cases at the Crown Court.

Publicly funded appeal cases heard by the Crown Court (2007-08)

	Appeals v. conviction and sentence	Appeals v. conviction	Appeals v. sentence	Total
Volume	1,563	1,462	4,141	7,166
Outcome: successful	596 (38%)	520 (36%)	2,027 (49%)	3,143 (44%)
Outcome: unsuccessful	967 (62%)	942 (64%)	2,114 (51%)	4,023 (56%)

Cost of publicly funded appeal cases at the Crown Court (2007-08)

	Appeals v. conviction and sentence	Appeals v. conviction	Appeals v. sentence	Total
Average (mean) cost	£824	£788	£359	£553

We have considered four options in relation to appeals:

Option 1

Do nothing and rely on the current RDCO regime

Notwithstanding the reforms implemented in October 2008, this is not our preferred way forwards for the reasons we have set out at pages 5 to 7.

Option 2

Improve the RDCO regime by making it an administrative requirement, instead of a judicial discretion, to make an RDCO following an appeal at the Crown Court

Gross savings in respect of appeals are estimated at £1.05million. This calculation is based on the total number of unsuccessful publicly funded appellants who have capital resources which could form the basis of an RDCO (estimated to be 47% of 4,023; ie 1,891); and multiplied by the average cost of a publicly funded case (£553).

However, assessing and taking contributions from capital can be problematic; there are difficulties and expense in identifying and validating capital, whilst subsequent recovery of capital assets can be a lengthy process. Initial estimates suggest the running costs associated with this option would be approximately £1.4 million.

This option could create an increase in unrepresented defendants, which may have a knock on effect slowing down procedures in the courtroom. It is not believed that this scheme effectively targets all those defendants who can afford to fund their appeal proceedings in the Crown Court, and critically, it is estimated that this option would generate an annual net burden of around £400,000 to the taxpayer.

Option 3:

Extend the disposable income test in the magistrates' courts to all appeal cases in the Crown Court

Under this scheme, appellants who are financially eligible at the magistrates' court are financially eligible at the Crown Court if they confirm that their financial circumstances have not changed. All other appellants will be subject to an assessment of their disposable income as set down under the existing magistrates' court means test. As part of the assessment of disposable income, any private defence costs already incurred at the magistrates' court may also be deducted. Any appellant, who is subsequently found financially ineligible, will not receive legal aid and will be required to pay for all their appeal costs themselves. The safeguard of the Hardship Review would be maintained under this option.

This option could deliver estimated gross savings of approximately £1 million, on the basis that 27% of applicants would be ineligible, assuming that the socio-economic profile of appellants matches that of Crown Court defendants. This scheme would also provide consistency between magistrates' and Crown Court and there would be an improved perception that legal aid funds are targeted on those genuinely unable to pay for their own legal costs. However, there would be additional administrative costs in assessing the disposable income of all appellants who were not financially eligible at the magistrates' court, and these are estimated at approximately £210,000.

Under the existing Central Funds framework, privately funded appellants who are successful on appeal can claim back their costs from Central Funds; typically, private rates may be two to three times those of the legal aid rate. As 44% of appeals are successful, the potential drain on Central Funds is estimated at between £950,000 and £1.4million, so wiping out any projected

gross savings. There is therefore a real possibility that this option may generate a net burden to the taxpayer of around £600,000 a year, and for this reason it is not seen as viable.

Option 4:

Preferred option: grant legal aid but recover costs against financially ineligible appellants at the conclusion of an unsuccessful appeal

Under this option all appellants are granted legal aid subject to the IoJ test. As part of the application process, appellants would be subject to an assessment of their disposable income as set down in the existing magistrates' court means test. This assessment would take account of any defence costs that have already been incurred at the magistrates' court. Appellants would also need to provide details of any capital assets that they owned, including property. The assets would then be taken into account in reaching a final decision about an appellant's financial eligibility. Appellants who are found financially ineligible will be informed that if their appeal is unsuccessful they will be liable to the full extent of their defence costs.

All appellants who are granted a representation order at the magistrates' court will automatically be eligible for public funding at their appeal if they confirm that their financial circumstances have not changed and if they have no capital or property assets against which defence costs could be recovered.

The administration costs of this option could be up to £800,000; this includes assessing the disposable income of appellants, verifying details of property and capital assets, as well as enforcement costs in recovering legal aid costs from unsuccessful appellants at the close of proceedings. However, it is estimated that this option could yield potential gross savings of £2 million. This reflects the £1 million achievable under the preceding option, as well as up to an additional £1 million from targeting those 35% of appellants who are financially eligible for legal aid on the basis of their income assessment, but who hold capital assets.

On balance, this is the most attractive option, as it optimises gross savings. In designing the detailed working of the scheme, however, we will need to mitigate the administration and enforcement burden.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	Yes
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	No	No

Annexes

The information contained in this initial Impact Assessment is the best currently available, and will be updated to reflect business process design and consultation responses. A revised version will be published alongside the Government's response. It considers the impact in the following areas:

- **Public sector**
- **Practitioners**
- **Defendants**
- **Offenders**
- **Competition**
- **Small firms**
- **Legal aid**
- **Equality**

Public sector impact

The table below sets out the best current estimates of the costs associated with administering the preferred option, and the potential savings. These will be refined as work designing the detailed business process continues.

SUMMARY OF ESTIMATED ANNUAL COSTS AND SAVINGS

	Crown Court Trials	Committals for Sentence	Appeals	Total
Gross savings	£86 million*	£2.7 million	£2 million	£90.7 million
Operating costs	£14 million	£0.3 million	£0.8 million	£15.1 million
Estimated net savings	£51 million	£2.4 million	£1.2 million	£54.6 million

(*Recovery of savings from Crown Court trials is estimated to be 75%)

Impact on HMCS

If a new Crown Court means test regularly creates additional adjournments or court hearings or impacts adversely on timeliness, it will create indirect costs to the rest of the Criminal Justice System (CJS). These indirect costs to the Crown Court and the rest of the CJS will swiftly overshadow any potential legal aid savings. For example, the average Crown Court costs per sitting day for the year 2007-08 were £5,080; based on an assumed five hour sitting day, this equates to an average cost per hour of £1,016 per court room.

In designing these proposals, MoJ has undertaken to minimise any risk of disruption to the courts and the wider CJS through an increase in unrepresented defendants, adjournments, ineffective and vacated trials and a decrease in timeliness. For example, the existing power to revoke a representation order will not be used as part of the enforcement process, because of the negative impact on the courts.

To mitigate the risk of any adverse impact on timeliness, MoJ proposals emphasise that the trigger for the grant of a representation order is the submission of a completed legal aid application, and not the subsequent determination of whether the defendant is eligible to pay an income contribution. Where the defendant is being held in custody and is not immediately able to provide the relevant supporting information, defendants can instead complete a 'statement of truth' to accompany the application.

These arrangements should permit representation orders to be granted early in the process, allowing sufficient time for financial eligibility assessments without compromising the timing of the hearing, or causing any need for an adjournment. Furthermore, by collecting regular contributions throughout the life of a case, the proposed scheme gives defendants a stake in the swift progression of their case. MoJ will work closely with HMCS to baseline performance in courts involved in the pilot, so we can accurately measure any impact in terms of timeliness and the number of adjournments.

There is a risk that the introduction of a means testing scheme will result in an increase in the numbers of unrepresented defendants in the Crown Court. Currently, there are relatively low numbers of unrepresented defendants in the Crown Court. Latest statistics shows figures of 0.1% for trials, 4.7% for sentence hearings and 5.5 % for appeals. The complexity of the work in the Crown Court means that any noticeable increase is likely to have a negative impact on

timeliness and possibly fairness. Detailed contingency plans to mitigate this risk are being put in place in advance of the pilot, as well as work to baseline the existing volume and unrepresented defendants, so that any impact is tested as part of the pilot.

It will be essential to understand the potential impact of unrepresented defendants at the different stages in the life of a case. For example, there is a risk that preliminary hearings would be adjourned unless the judiciary can be fully satisfied that the defendant has had sufficient opportunity to file their application, with required evidence, within the required timescale. However, as the evidential requirements will be similar to those in the magistrates courts - with the addition of evidence after legal aid has been granted to show the defendant's capital status - and because there will be agreed targets for the processing of applications set out in a Service Level Agreement, this risk is minimal.

Training for operational staff and the judiciary should also help keep the number of additional adjournments to a minimum, and contingency plans will be in place in case the risk materializes. There is currently no data on the number of unrepresented defendants at preliminary or interim hearings, and we will explore how we can establish a baseline so any impact can be assessed.

In terms of the impact of an unrepresented defendant in a standard trial, it is likely that Case Progression Officers will be aware of individuals who wish to represent themselves well before the beginning of the trial and so should be able to take the necessary action (e.g. list before specific judges) to avoid the need to adjourn the trial. Any significant increase in the number of defendants representing themselves would increase the workload of the Case Progression Officer. Although MoJ believe the risk of an increase in the number of adjourned trials is low, an increase in the number of unrepresented defendants could lead to a rise in the number of cracked and ineffective Trials. HMCS Unit Marginal costs for 07/08 for ineffective trials is £480 and £780 for cracked trials.

Where an unrepresented defendant reaches the view during the course of the trial that s/he does want to be represented, and that trial is for a serious offence, there is a higher risk of adjournment, leading to an increase in the number of ineffective trials. The current rate of unrepresented defendants in Crown Court cases that go to trial is 0.1%. This is lower than it was between 1997-2001 (under the previous contribution scheme) when the figure was about 0.3%. However, the proposed scheme differs dramatically from the old system.

Timely grant of representation orders will be a key factor in avoiding adjournments. The abolition of committal hearings will mean that cases are reaching the Crown Court more quickly

than previously, and is likely to lead to an increase in the number of courts listing cases for preliminary hearings. It is essential that business processes and performance targets take this into account. As noted above, the evidential requirements are consistent with those in the magistrates' courts, to minimize the risk of delays. In particular, any defendant held in custody will be able to sign a 'statement of truth' if unable to provide evidence with their application. Where additional evidence is required to confirm the defendant's capital status, this may be furnished after the grant of the representation order.

Work will continue to identify and manage any further impacts – for example, additional hearings to obtain judicial approval for clamping orders or distress warrants – and will be included in the revised impact assessment.

Impact on practitioners

There will be some impact on practitioners, who will have to familiarise themselves with the new scheme. A training strategy and plans for the project are currently under development, and this will take into account any potential impact on solicitors and firms of attending training sessions. In addition, practitioners will be paid a fee of £45 for time spent assisting clients to complete application forms and provide the requisite evidence, so there should be no additional cost to them. This is in line with Criminal Defence Service Funding (Amendment) Order 2007, which sets the payment level for 1 hour of preparation for a solicitor, legal executive or fee earner equivalent at £45. While some forms will take longer than an hour, others will take much less, so on balance payment for one hour represents a fair level of remuneration. We are consulting on whether this is the best way of sharing the £4 million we are proposing to pay solicitors for supporting their clients through the new scheme. Application forms will be available online and will also be available to order from the LSC.

Impact on defendants

It is proposed that all defendants who choose to apply for legal aid in the Crown Court will be granted representation, and so the proposed scheme will not affect the ability of any defendant to access appropriate defence representation. It aims, however, to accurately and fairly identify those defendants who can genuinely afford to make a contribution towards their publicly funded defence. As explained in the consultation paper and above, the detailed modelling of the Crown Court defendant population on which the proposal is based shows that, while there is a wide spread of incomes, a significant number of defendants do have sufficient disposable income to make some contribution towards their defence costs. The recommended option proposes that all youths and defendants on "passportable" benefits should be exempted from making any income or capital contribution towards their legal aid costs. The high disposable income and

capital cut off points also ensure that only those defendants who can genuinely afford to pay all of part of their publicly funded defence costs should be required to do so.

While the detail of the scheme will not be finalised until the detailed business process design work and consultation responses have been taken into account, the case studies below give an indication of how the scheme would impact on different defendants, depending on their personal circumstances and financial position.

In each of the case studies, the cost of living allowance is weighted to reflect the defendant's family and number of dependents. This allowance is based on the categories of expenditure covered by the Expenditure and Food Survey conducted annually by the Office for National Statistics. It therefore includes expenditure on items such as food and non-alcoholic drinks, clothing and footwear, domestic fuel and power costs, household goods and services, health and transport.

Case Study 1:

Malcolm Harley (aged 22) and Thomas Grimes (aged 17) appear as co-defendants. Mr Harley lives in council accommodation and qualifies for income support. Mr Grimes, a college student, lives at home with his parents.

Both are charged with rape.

Both of these defendants will be exempt from the full means test. Mr Harley is in receipt of a 'passport' benefit. Equally, Mr Grimes will be exempt as he is under 18 years old and so falls within the 'passporting' provisions for youths.

Case Study 2:

David Jones (aged 20) lives with his mother rent-free and has no children. He does a range of casual work that usually earns him between £200 to £300/week (£13,000/year). He has no property or other capital assets. He has one previous conviction.

Charged with aggravated burglary.

Gross income: £13,000

Disposable income assessment:

- Tax deductions - £3,000

- Actual housing costs – ‘zero’ as DJ pays no rent to his mother
- Cost of living allowance - £5,676
- Estimated disposable income: £4,324.
- Property: None
- Other capital assets: None

As Mr Jones’ annual disposable income falls outside the disposable income threshold of £3,398, he will be liable to pay an income contribution to the costs of his defence. The issue of where the level of income contribution should be set is subject to the consultation exercise.

As he owns no property or other capital assets, no further costs will be recovered from him at the end of the trial if he is convicted.

Case Study 3:

Luke Hawkins (aged 27) is separated from his partner who lives with their 3 children (aged 3 months, 2yrs and 5 yrs). He moved out of their flat when their relationship broke down, although the property is still registered in both their names. Equity in the property is estimated at £50,000. Mr Hawkins is currently working as a self-employed roofer, and in the last year for which tax returns are available (2006/07) earned a gross income of £42,000. He contributes £400/month towards the mortgage on the flat and also pays £654/month maintenance towards the children's upkeep. He has latterly been renting a one bedroom flat for his own accommodation (£550/month). Hawkins has one savings account containing £2,600. He has appeared before the magistrates’ courts on 3 previous occasions, when he was ineligible for legal aid.

Charged with assaulting his wife (Section 18 GBH).

Gross income: £42,000

Disposable income assessment

- Tax deductions - £10,500
- Council tax - £500
- Actual housing costs – annual mortgage payment £4,800, rent £6,600
- Maintenance - £7,852
- Cost of living allowance - £5,676
- Estimated disposable income: £5,072

As Mr Hawkins' annual disposable income falls outside the disposable income threshold of £3,398, he will be liable to pay an income contribution to the costs of his defence.

The issue of where the level of income contribution should be set is subject to the outcome of the consultation exercise.

If convicted, we will look to LH's capital assets to seek to recover the balance of outstanding defence costs. This includes:

- LH's property which has equity in excess of the £30,000 threshold. However, since LH's partner is the victim in this case, we would not seek to recover any costs from the defendant's share of their jointly owned property, until the defendant's partner decided to sell the property.
- Although LH has £2,600 in a savings account, this will be exempt as any claim on other capital applies only to assets in excess of £3,000.

Case Study 4:

Michelle Fletcher (aged 32) lives with her husband in a house jointly purchased in 2000. The current equity in the property is estimated at £80,000. They make mortgage repayments of £750/month. She has no children and earns £19,000/year. Her husband earns £26,000/year. Mrs Fletcher recently inherited £12,000 and has invested this money in an ISA (£3,600) with the balance invested in a range of stocks and shares (£8,400).

Charged with Section 20 GBH (glassed the waiter in a restaurant).

Gross income: £45,000.

Disposable income assessment

- Tax deductions - £14,500
- Council tax - £1,100
- Actual housing costs – annual mortgage payment £9,000
- Cost of living allowance - £9,309
- Estimated disposable income: £11,091

As MF's annual disposable income falls outside the disposable income threshold of £3,398, she will be liable to pay an income contribution to the costs of her defence. The level of income contribution is subject to the outcome of the consultation exercise.

If convicted, we will consider MF's capital assets in order to recover the balance of any outstanding defence costs. This includes:

- MF's property which has equity in excess of the £30,000 threshold.
- £9,000 other capital (taking account of the exemption on the first £3,000 of other capital assets)

Impact on offenders

Only those who can genuinely afford to make contributions will be asked to do so, and we do not believe the scheme will tip any defendants into debt. We therefore do not believe the proposals will have any negative impact on offenders and their rehabilitation. It is likely that prolific offenders will not be required to make any contributions, because they will be in receipt of relevant benefits before going into prison, and a high proportion are likely to claim these on release. The overwhelming majority of re-offenders are also unlikely to have any savings or property.

Financial stability and stable family relationships in the period immediately following release are important factors in supporting the effective resettlement of ex-prisoners into the community. The scheme is carefully targeted to ensure it does not undermine existing policies and initiatives to support offenders and prevent re-offending. We welcome views on this as part of the consultation, and will continue to monitor carefully any impact in this area.

Competition Assessment

The Department applied the Competition Filter test, which showed that the proposals are likely to have little or no effect on competition for solicitors' firms. No one firm has more than 10 % of the market, and existing firms will not be at an advantage over new or potential firms. The proposals will not affect set up costs, and practitioners will be paid for time spent assisting clients to complete application forms, so there should be no additional cost to them. The scheme will not restrict the ability of firms to offer a range of services.

Small firms

There is no significant or complex impact on small firms.

Legal Aid

A legal aid and justice impact test has been carried out and is attached at Annex A.

The proposed scheme has also been designed to ensure there will be little or no additional acts of assistance and consequential costs for civil legal aid. We do not believe that our proposals for Crown Court means testing will increase the current incidence of debt, loss of housing or divorce, because we are targeting readily available, truly disposable income above a high threshold.

Currently, no data is held about the impact of a Crown Court conviction on the take up of civil legal aid, and no information is currently collected that would allow a baseline to be established. We will monitor this area closely to identify any changes which could be attributable to the introduction of the proposed scheme.

Equality impact assessment

Name of the legislation, policy or service being assessed

This is the initial equality impact screening exercise for the proposed new Crown Court means testing scheme. A full equality impact assessment will be undertaken in light of responses to the consultation paper and ongoing work on detailed business processes, and published alongside the response to the consultation paper, in advance of the pilot phase.

Statutory duties

Public authorities in Britain have a legal duty to promote race equality. This means that they must have due regard to how they will eliminate unlawful racial discrimination, promote equal opportunities and promote good relations between people from different groups. The MoJ is also under a specific duty to conduct race equality impact assessments of its policies in relation to the public duty to promote race equality and within this, to identify whether there is a differential and adverse impact on particular racial groups.

The Disability Equality Duty came into force on 4 December 2006. The MoJ has published a Disability Equality Scheme, which is available at our website at: <http://www.justice.gov.uk/publications/equality-schemes-2008.htm>.

This sets out the actions that the MoJ will be taking to promote disability equality. When carrying out our functions, the MoJ must have due regard to the duties placed upon us by the Disability Discrimination Act 2005. From 4 December 2006, the MoJ is also under a specific duty to conduct disability equality impact assessments of its policies in relation to the public duty to promote disability equality and within this, to identify whether there is a differential and adverse impact on disabled people and other people.

The Equality Act of 2006 places a statutory duty on all public authorities when carrying out their functions to have due regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity between men and women. The MoJ also has a specific duty to conduct gender equality impact assessments of its policies in relation to the public duty to promote gender equality and within this, to identify whether there is a differential and adverse impact on people of different genders.

What is the aim, objective or purpose of the policy, legislation or service and who will benefit from it?

The proposed scheme aims to deliver:

- access to justice, by providing representation to all those who need it
- a legal aid system which supports the working of the courts and the wider CJS
- more effective use of public resources through the targeting of free legal aid at those who genuinely need it
- improved public confidence in the CJS through the knowledge that wealthy, convicted defendants are liable for their defence costs
- improved joined-up working between the Crown Court, magistrates' court and county court.

What are the intended outcomes?

Successful outcomes will include a scheme which has no detrimental impact on court performance or the wider CJS, and which accurately identifies those who can't afford to pay some or all of their defence costs, and effectively recovers contributions from those who can at a minimal cost.

Do you share responsibility for this legislation, policy or service with another Government Department or organisation (e.g. criminal justice partners)? If so, who defines it and implements it.

MoJ (Criminal Legal Aid Strategy Division) own the overarching policy, but the project is tripartite: MoJ, HMCS and LSC staff make up the project teams and are represented on the Project Board. The LSC has statutory responsibility for administering the scheme.

Who are the key stakeholders in relation to the legislation, policy or service? What outcomes do they want? Does the list of stakeholders include representatives from all relevant/interested groups of people? If not, why not?

Key stakeholders include the legal profession, the judiciary, court and LSC staff, defendants and those working in the wider CJS, including equality bodies and those who act on behalf of defendants, such as the CAB. While there is general support for the principle of means testing,

stakeholders will want to ensure that the scheme is fair to defendants, fair to those operating the scheme, and to the taxpayer.

What data will we use?

The CJS does not currently gather information on the relationship between an individual defendant's financial circumstances and types of offence. Operational researchers have therefore built an extensive statistical model, matching details of 200,000 defendants committed, sent or transferred to the Crown Court for trial from 2003-2007 with data on age, gender, and financial, domestic and socio-economic circumstances (see page 4 for more detail).

Information is recorded on CREST – the courts IT system – about the age, gender and ethnicity of Crown Court defendants. While there has been an improvement in the recording of ethnicity, the data collected is not complete: in around 30% of trials disposed of in 2007-8, ethnicity is 'not stated'. No information is collected about disability, sexual orientation, religious belief, or caring responsibilities.

We welcome any input from consultees on the potential impact of the proposed scheme on the group(s) they represent. In addition, as part of the initial pilot phase, when the scheme will be rolled out to 5 courts, chosen to reflect a range of factors including case mix and volumes and defendant profile, we hope to gather more detailed information about ethnicity, as well as some information about sexual orientation, religious belief, disability and caring responsibilities. The pilot will allow us to test the underlying assumption that there will be no adverse impact on any group.

Assessment of impact on defendants

Age

CREST data shows that there is a concentration of younger people in the Crown Court defendant population than in the population at large: nearly a quarter of all defendants whose trials were disposed of in 2007-8 were in the 20-24 age group. There is a positive impact, in that the proposed scheme would passport all those under 18. Furthermore, even those over 18 are likely to be concentrated in lower income groups, and are less likely to own property. This would mean that it is likely they would be 'passported', because they receive the relevant benefits, or would not be liable for any contribution orders because they would fall below the disposable

income threshold and/or they have no significant capital assets. We therefore believe there would be no negative impact.

Gender

CREST data shows that the majority of defendants are men: 83% of defendants in Crown Court trials disposed of in 2007-8 were male. Because all defendants will be granted legal aid, and liability for contributions based solely on financial circumstances (weighted to reflect the individual domestic situation, including the number of dependents), we believe there will be no negative impact. However, we will seek to gather further information as part of the pilot scheme to inform the full assessment.

Ethnicity

CREST data shows that all BME groups have a higher representation as users of the CJS when compared to their representation as members of the population as a whole. They are likely to be concentrated in lower income groups, and are less likely to own property, which would mean that it is likely they would be 'passporting', because they receive the relevant benefits, or would not be liable for any contribution orders because they would fall below the disposable income threshold and/or they have no significant capital assets. We therefore believe there would be no impact on BME groups generally. However, we will seek to gather further information as part of the pilot scheme to test this assumption and inform the full assessment.

Disability

There is no evidence base in relation to defendants with a disability.

Religious belief

There is no evidence base in relation to defendants' religious beliefs.

Sexual orientation

There is no evidence base in relation to defendants' sexual orientation.

Annex A Legal Aid and Justice Impact Test

Please answer as many questions as possible on this form before you contact the Ministry of Justice (MOJ). It covers possible impacts on courts and/or Tribunals, the judiciary and legal aid. Please provide best estimates where exact figures are not yet known. Forward the completed questionnaire to the Better Regulation Unit in the Ministry of Justice using the email address: consultation@justice.gsi.gov.uk

If you have any queries about this form, please e-mail or telephone:

Julia Bradford: 020 7210 0669 julia.bradford@justice.gsi.gov.uk;

Gabrielle Kann: 020 7210 1326 gabrielle.kann@justice.gsi.gov.uk;

Laurence Fiddler: 020 7210 2622 laurence.fiddler@justice.gsi.gov.uk

Section One – General Information

In brief, what is your proposal?

To introduce a means testing scheme for legal aid into the Crown Court which fairly and accurately identifies those who can genuinely afford to contribute towards their defence costs, and targets free legal aid at those who need it.

What is your proposal intended to achieve, over what geographical area (e.g. England, England and Wales) and in what timescale?

To make more effective use of public resources through the targeting of free legal aid at those who genuinely need it in the Crown Court in England and Wales.

To make estimated net annual savings of approximately £50m per year.

To pilot the scheme in 5 Crown Courts from June 2009. If the pilot goes well, we intend to implement

the scheme across England and Wales during the course of 2010.

What public commitments have been made and to whom?

The Criminal Defence Service Act 2006 provided for the reintroduction of means testing and contributions. Means testing was reintroduced in the magistrates' courts in October 2006, and the Government has always made clear its intention to introduce a similar scheme in the Crown Court.

How does the proposal change what happens now?

At present a defendant convicted in the magistrates' court is entitled to appeal to the Crown Court against conviction and/or sentence. If a representation order has been granted in the magistrates' court it does not extend to appeal hearings and a new representation order will need to be applied for. Currently in the Crown Court, as long as a defendant passes the Interests of Justice test (IoJ) s/he will receive legal aid.

Under the proposed scheme every defendant who is committed, sent or transferred for trial to the Crown Court will be entitled to legal aid through a representation order provided s/he passes the IoJ test and they provide information and evidence of their means alongside their application. Following the first hearing in the magistrates' court, defendants who have sufficient disposable income will be required to make monthly contributions during the life of the case, with a further payment upon conviction from those defendants who have capital in excess of £3,000 and equity in excess of £30,000.

Who will be affected and in what numbers?

We estimate that 1 in 3 Crown Court defendants will make some contribution towards their publicly funded defence costs, depending on their individual financial and family circumstances.

Section Two – The impact of the proposal on the courts and/or Tribunals

Do you expect there to be an impact on the Courts Service or on the Tribunals Service (or both)? Are those impacts likely to require new IT systems and/or new forms, training or guidance for court or tribunal staff?

There will be an impact on HMCS processes and staff (see IA). There will be no impact on the Tribunal service. Revisions to the existing IT system and forms will be required. Training and guidance will be provided to LSC and HMCS staff, the judiciary and practitioners. As with the magistrates' court means testing scheme, HMCS staff will be remunerated through a Service Level Agreement for time spent on administering a Crown Court means testing scheme.

Do you expect more or fewer cases to come to the Courts Service or Tribunals Service as a result of the proposal?

There should be no significant impact on the court caseload. It is possible that there could be a small rise in hearings to seek judicial agreement to enforcement measures such as clamping orders or distress warrants, but this will be minimal.

The scheme has been designed to minimise any risk of disruption – through an increase in litigants in person, adjournments, ineffective and vacated trials and a decrease in timeliness – to the courts, to other organisations within the wider criminal justice system, and to initiatives such as CJSSS that are delivering a more effective and responsive justice system for victims and the public.

Does your proposal create a new right of appeal or route to judicial review? If yes, how will these be handled? Has the use of alternative dispute resolution (ADR) procedures (including mediation, conciliation and ombudsman schemes) been considered?

No.

Section Three - The Impact of the proposal on Judges

Are you able to estimate whether your proposal will lead to a change in the number or type of judges required? If yes, please explain these changes.

No.

If more judges need to be appointed, when will they be needed?

N/A

Are there likely to be new judicial training requirements as a result of the proposals?

Yes – there will be training/guidance on the new scheme for the judiciary

Section Four – The Impact of the proposal on Legal Aid

Is your proposal likely to have an impact on Legal Aid?

Yes.

If yes, which type of legal aid is likely to be affected: i) criminal or ii) civil and family or iii) asylum?

Criminal, although there is a small risk of downstream costs to civil legal aid in terms of additional acts of assistance.

If yes, do you expect Legal Aid costs to increase or reduce as a result?

The estimated annual savings to the legal aid budget are set out in the consultation paper and IA.

Your completed questionnaire will be considered by relevant MOJ officials to establish whether your proposals will have an impact on legal aid or other aspects of the administration of justice. If no impacts are identified this should be agreed with MOJ and then recorded on the “Complementary Impact Test” sheet of the Impact Assessment. However, if a potential impact is identified you will need agree an estimate of costs with MOJ and agree arrangements for the costs to be met.

Your contact details

Name Sian Simpkins

Department Ministry of Justice

Address

Telephone number 020 3334 4277

email address sian.simpkins@justice.gsi.gov.uk

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

