



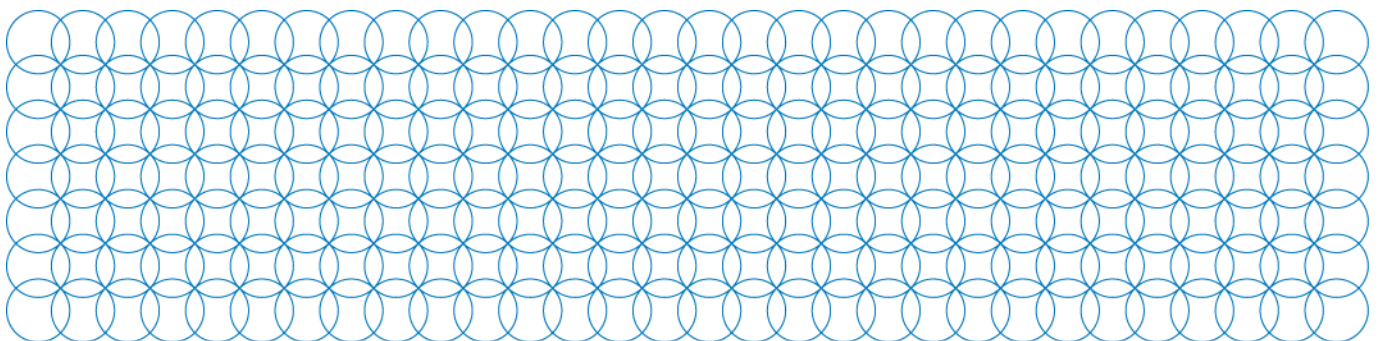
Ministry of  
**JUSTICE**

# **Crown Court means testing: the design of the scheme on implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012**

Consultation Paper CP21/2012

This consultation begins on 30 October 2012

This consultation ends on 11 December 2012





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**JUSTICE**

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Legal Aid, Sentencing and Punishment  
of Offenders Act 2012**

**A consultation produced by the Ministry of Justice. It is also available on  
the-Ministry of Justice website at [www.justice.gov.uk](http://www.justice.gov.uk)**

## About this consultation

- To:** The consultation exercise is aimed at all individuals, groups or professional bodies who either work in, or have an interest in the criminal justice system in England and Wales.
- Duration:** From 30 October 2012 to 11 December 2012
- Enquiries (including requests for the paper in an alternative format) to:** Shahi Rahman  
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- How to respond:** Please send your response by 11 December 2012 to:  
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- Additional ways to feed in your views:** This consultation exercise is accompanied by an online discussion space which can be found at:  
<https://consult.justice.gov.uk/digital-communications/crown-court-means-testing>
- Response paper:** A response to this consultation exercise is due to be published in early 2013 at:  
<http://www.justice.gov.uk>

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## Foreword

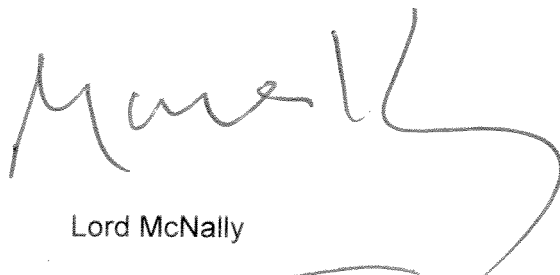
As part of its wider objective to restore the country's public finances, the Government is determined to ensure that public services offer much better value for money to the taxpayer. In respect of legal aid, we are reforming the existing system so that it becomes more cost-effective and financially sustainable in the longer term whilst protecting fundamental rights to access to justice. Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which will come into force on 1 April 2013, will repeal and replace the existing legal aid scheme and target funding on those who need it most, for the most serious cases.

The implementation of the 2012 Act will also allow the Government to re-assert its commitment to the principle of means testing in order to help determine the fairest way to allocate finite resources from the legal aid budget. In so doing, the new Act provides a valuable opportunity to consider whether improvements might be made to the scheme of Crown Court means testing. This scheme is used to determine whether an applicant for criminal legal aid at the Crown Court should be asked to pay a contribution towards the cost of their publicly funded defence.

The effectiveness of the Crown Court means testing scheme hinges on the ability to assess an individual's liability to a contribution order accurately and, subsequently, to collect and enforce such contributions in a timely manner. In so doing, there is clearly a balance to be struck between both incentivising co-operation from the individual whilst being able to address non-compliance robustly.

I believe there is room for improvement on both points. For this reason I am presenting a series of proposals that will, in particular, reinforce and strengthen the regime applied if a defendant does not support their legal aid application with the appropriate evidence as well as strengthening the ability to take action against an individual who does not comply with the terms of their contribution order.

These measures will help to underline public confidence in the legal aid system and ensure that Crown Court means testing is both fair to the taxpayer and just to those who can and should contribute to the costs of their defence.



Lord McNally



## Executive summary

1. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) received Royal Assent on 1 May 2012. When Part 1 of LASPO comes into force on 1 April 2013, it will repeal and replace the existing legal aid scheme established under the Access to Justice Act 1999. Part 1 of LASPO contains provisions governing the scope of the new criminal legal aid scheme as well as the financial eligibility criteria determining an individual's access to services under that scheme.
2. The current scheme of Crown Court means testing (CCMT) is governed by the Access to Justice Act 1999 and the Criminal Defence Service (Contribution Orders) Regulations 2009<sup>1</sup> and was implemented across England and Wales between 11 January and 28 June 2010. Under the scheme all defendants who submit a completed application form are granted legal aid. However, an assessment of each defendant's financial means determines whether that individual should pay a contribution towards their legally aided defence costs from income or capital assets.
3. Sections 23 and 24, and Schedule 2 to LASPO, and secondary legislation made under these provisions, will govern CCMT in the future. In light of the new statutory powers under Part 1 of LASPO and in anticipation of the secondary legislation implementing Part 1, the Ministry of Justice (MoJ) is keen to use this opportunity to consider proposals to improve the overall effectiveness of CCMT.
4. These proposals are aimed at ensuring that defendants comply fully with the requirements of the scheme so that a comprehensive and accurate assessment of financial liability can be undertaken, as well as reinforcing existing measures to support more effective collection of contributions.
5. We wish to stress that none of the proposals impact on the financial eligibility thresholds governing CCMT, nor do the proposals impact on the nature or type of evidence required in support of the criminal legal aid application.
6. Our proposals, some of which would mark a departure from the existing CCMT model, focus on the following key elements of the scheme:
  - The provision of evidence and sanctions for the defendant's failure to comply with requests for evidence;
  - Once liability to an Income Contribution Order (ICO) is established, considering the range of triggers which may lead to a re-assessment of that liability; and

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<sup>1</sup> SI 2009/No 3328.

- Provisions in relation to collection and enforcement of payments under a contribution order, including implementation of motor vehicle order regulations.
7. In setting out our proposals, we wish to make clear that we will not be undertaking a separate consultation exercise in relation to the draft regulations made under Sections 23 and 24, and Schedule 2 to Part 1 of LASPO.
  8. We also wish to stress that the proposals contained in this consultation paper are not intended as a substitute for the formal Post Implementation Review (PIR) of Crown Court means testing.<sup>2</sup> It is still the MoJ's intention to undertake a PIR, although if the proposals covered in this consultation paper were to be adopted, we would wish to allow these to become firmly entrenched as part of the new legal aid regime under LASPO before doing so.

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<sup>2</sup> In its consultation paper entitled *Proposals for the Reform of Legal Aid in England and Wales* (CP 12/10), which ran between 15 November 2010 and 14 February 2011, the MoJ gave an undertaking to carry out a comprehensive end-to-end assessment of implementation and evaluation of CCMT (page 100/para 5.65).



## **Introduction**

1. This consultation paper sets out proposals to improve the operational effectiveness of CCMT. Subject to the outcome of the consultation exercise, the MoJ intends to reflect any changes in the new CCMT scheme implemented under LASPO.
2. The consultation is aimed at members of all professional groups and bodies who work within the criminal justice system in England and Wales, including in particular the legal profession and the judiciary, as well as all those who have a wider interest in the criminal justice system.
3. A Welsh language version of the Executive Summary of this consultation paper is available at [www.justice.gov.uk](http://www.justice.gov.uk)
4. An Impact Assessment highlights that criminal legal aid clients are likely to be particularly affected by the proposals. Both the Impact Assessment and Equality Impact Assessment are published alongside this consultation paper.
5. Comments on the Impact Assessment and the Equality Impact Assessment are very welcome.
6. 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 Her Majesty's District Judges
  - National Bench Chair Forum
  - The Lord Chief Justice
  - The Senior Presiding Judge
  - Judicial Communications Office
  - Chartered 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  
Equality and Human Rights Commission  
Disability Rights UK  
Equality 2025  
Association of Asian Women Lawyers  
Association of Women Solicitors  
UK Association of Jewish Lawyers and Jurists  
Local Government Association  
National Association for Care and Resettlement of Offenders  
Citizens Advice  
Consumer Focus  
AGE Concern  
MIND  
Liberty  
Justice

7. 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.

## The proposals

1. Details of the MoJ's proposals in relation to the operation of CCMT under LASPO are set out below. We wish to stress that none of the proposals impact on the financial eligibility thresholds governing CCMT, nor do the proposals impact on the nature or type of evidence required in support of the criminal legal aid application.

### **Gathering evidence in support of the legal aid application: Operation of the income evidence sanction**

2. In order to confirm that the defendant's liability to an ICO has been accurately assessed, our policy has always been that the defendant should be obliged to submit evidence to corroborate the information contained on the application form. In light of the principle that individuals should contribute towards their legally aided defence costs if they have the means to do so, the provision of evidence acts as a safeguard to ensure individual accountability as well as public confidence in the scheme. Without this safeguard, defendants could provide misleading information about their financial status safe in the knowledge that they would face little or no investigation.
3. Under the current CCMT scheme, there is no requirement for a defendant to provide supporting evidence at the same time as submitting their legal aid application form. A representation order is granted upon receipt of a completed legal aid application form following which the defendant has an obligation to provide the necessary supporting evidence within a fixed timeline.<sup>3</sup>
4. Given that the legal aid representation order will be in place before supporting evidence has been provided, the income evidence sanction (IES) acts as an incentive to comply with the evidential requirements. In practice, the IES acts as a prompt for a defendant to comply with the evidential requirements in order for the Legal Services Commission (LSC)<sup>4</sup> to be able to make an accurate assessment of the defendant's ability to pay towards their defence costs. We believe that, in most cases, this should prove to be effective as the value of the ICO applied under the IES is likely to exceed what the defendant can afford to pay.

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<sup>3</sup> The defendant must provide the supporting evidence within 14 days of submitting the legal aid application. Failure to do so will trigger an evidence reminder giving the defendant a further seven days to comply with the request. A failure to comply with the evidence reminder will in turn trigger the income evidence sanction.

<sup>4</sup> When LASPO is commenced on 1 April 2013, the LSC will cease to exist and will be replaced by a Legal Aid Agency. For convenience, we refer to the 'LSC' throughout this document.

5. However, once documentary evidence has been submitted, it is only right that the IES should be lifted so that payments under the ICO can properly be revised to reflect the defendant's true income status.
6. We propose that the IES will continue to be calculated in the same manner as under the current CCMT scheme. Therefore, if the LSC<sup>5</sup> has grounds to believe that the defendant's annual disposable income exceeds £3,398,<sup>6</sup> the LSC will make an ICO calculated on the following basis:
  - where the LSC is able to determine the defendant's disposable income, the ICO will comprise six monthly payments each fixed at the higher of £900 or 1/12<sup>th</sup> of the defendant's annual disposable income; or
  - if the LSC is unable to determine the defendant's annual disposable income, the six monthly payments under the ICO will be fixed at £900.
7. However, we wish to ensure that the CCMT scheme under LASPO sets out more clearly how the IES will operate as well as providing sufficient flexibility to support its operation as effectively as possible. To facilitate this, we envisage that the new regulations will expressly provide for the following situations:
  - The LSC may make a decision on liability to an ICO and issue an ICO accordingly based solely on the information provided in the completed application form without awaiting receipt of the supporting evidence;
  - Having issued an ICO, the LSC may subsequently impose the IES if the defendant fails to comply with the requirement to provide supporting evidence; and
  - On receipt of supporting evidence from the defendant, the LSC will complete the means assessment process. The assessment process will then confirm whether if an ICO has already been issued or an IES imposed, it should now be revised (see paragraph 2 below).

**Question 1:** Do you agree that the IES should operate as set out above?

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<sup>5</sup> Under a Service Level Agreement, the LSC delegates day to day responsibility for assessment of the great majority of legal aid applications under CCMT to Her Majesty's Courts and Tribunals Service. In addition, it contracts out all collection and enforcement activity under the scheme to Rossendales Ltd.

<sup>6</sup> Under CCMT, annual disposable income is calculated by taking the defendant's annual household income (weighted to reflect family circumstances) minus allowable outgoings; these include actual housing, childcare and maintenance costs, as well as a weighted cost of living allowance.

### **Operation of the capital evidence sanction – request for further information/evidence**

8. Under the current CCMT scheme, as part of the application process, the defendant is obliged to provide details of their capital assets.<sup>7</sup> In the event of the defendant's conviction, any outstanding defence costs can be met from the defendant's capital assets, subject to an exemption on the first £30,000 of those assets.
9. Any failure to comply with a request for documentary evidence of a defendant's capital assets may trigger a sanction which allows the LSC to waive the defendant's right to the £30,000 exemption ('the capital evidence sanction'). This sanction may only bite if the LSC has reason to believe that the defendant has sufficient capital assets to cover this amount and the defendant has failed to provide a reasonable excuse for not submitting the necessary evidence.
10. In designing the CCMT model, we recognised that the financial assessment of a defendant's means may, in some cases, prove very challenging and, for this reason, the LSC must be in a position to request additional information or evidence to complete an accurate assessment.
11. The supplementary request for further documentary evidence or information in relation to capital assets is generally made once the defendant has been convicted and attention has switched to assessment of the final defence costs. In so doing, confirmation of the defendant's capital status becomes particularly relevant. The complex nature of capital assets will often require additional checking and verification by the LSC once supporting evidence has been provided with the legal aid application and this can lead to a supplementary request to provide further information or evidence.
12. We wish to ensure that the CCMT scheme under LASPO provides a sanction where the defendant fails to comply with the request to provide further information or evidence. We believe that this is necessary for the request to be effective and the Legal Aid Fund properly protected.
13. In those cases where the LSC undertakes more detailed investigations into a defendant's capital assets and this necessitates a supplementary request for further information or evidence, this is typically because the LSC has grounds to believe that the individual concerned may be attempting to under declare assets or simply not declare them at all. Whilst verification of ownership of some capital assets, such as property, can be more readily undertaken, it is much more difficult to identify, for example, ownership of relevant savings accounts or shares, especially if these have not been declared.

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<sup>7</sup> Capital assets for the purposes of CCMT may include equity in property, savings and current accounts, stocks and shares, premium bonds and other lump sum investments.

14. Where this arises, we are concerned that application of the existing capital evidence sanction will be inadequate. For example, a defendant who has £50,000 to £100,000 in capital assets may be reluctant to give full details of their assets as they realise that even if they are unable to benefit from a waiver on the first £30,000 of their capital assets, they can effectively continue to protect a significant share of those assets at the expense of the taxpayer.
15. For this reason, we believe that it is both reasonable and fair to apply a stiffer sanction where the defendant fails to comply with a request for further information or evidence in relation to capital assets.
16. Therefore, we are proposing under the new CCMT scheme that if a defendant ignores a request to provide further information or evidence relevant to the assessment of a defendant's capital status, the LSC is entitled to deem the defendant has sufficient capital resources to pay 100% of their outstanding defence costs. This sanction will only be triggered if the LSC has reason to believe that the defendant has capital assets to cover this amount and the defendant has failed to provide a reasonable excuse for not submitting the necessary information or evidence.
17. If the defendant subsequently complies with the request, the LSC will re-assess how much the defendant can afford to pay towards their defence costs based on the additional information or evidence submitted. Our overriding policy aim remains that the defendant only be asked to pay a Capital Contribution Order (CCO) which properly and accurately reflects the value of their capital assets.

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

#### **Triggers which may lead to a re-assessment of a defendant's liability to an ICO**

18. The current CCMT scheme recognises that there may be situations in which a defendant's liability to an ICO will need to be re-assessed. This can arise primarily when a defendant notifies the LSC of a change in their financial circumstances or where further information or evidence comes to light relevant to the defendant's liability to an ICO. It can also arise if there has been a miscalculation or administrative error on the part of the LSC in carrying out the original assessment.

19. We wish to ensure that the CCMT scheme under LASPO continues to provide the flexibility to recognise that liability under and to an ICO may change, so that a defendant only ever pays a contribution under an ICO for an amount which accurately reflects their true income status. We envisage that the new regulations will provide for the following situations:

- (a) Evidence is provided by the defendant following the submission of their legal aid application which enables the LSC to complete the means assessment process and this subsequently requires a revision of the ICO which has already been issued.

In this case, when a defendant's liability under an ICO or an IES is re-assessed and liability to an ICO remains, the ICO will be fixed at the amount that accurately reflects what the individual should pay.

- (b) A defendant's financial circumstances change after their liability to an ICO has been established (for example, following a loss of employment).

In this case, provided that the defendant submits the relevant forms supported by evidence (for example, a letter from the employer confirming termination of employment) within one month of the change in financial circumstances, any potential revision of liability will take effect from the date of the change. If the relevant forms and evidence are submitted more than one month after the event triggering the change in financial circumstances, any potential revision of liability will take effect from the date of notification of the change, unless there are special circumstances justifying the delay in notification (for example, if the defendant has been hospitalised or there has been a delay in confirmation of the defendant's entitlement to a 'passporting' welfare benefit).<sup>8</sup>

- (c) Information or evidence (provided by the individual or a third party) requires the LSC to revisit the original decision reached in relation to a defendant's liability to an ICO.

In this case, when a defendant's liability under or to an ICO is re-assessed and liability to an ICO remains, the ICO will be fixed at the amount that accurately reflects what the individual should have been asked to pay had all the relevant information and evidence been provided at the point of original assessment.

- (d) It appears that there has been an administrative error or mistake in undertaking the original financial assessment of the defendant.

In this case, when a defendant's liability under an ICO is re-assessed and liability to an ICO remains, the ICO will be fixed at the amount that accurately reflects what the individual should have been asked to pay had all the relevant information and evidence been taken into account at the point of original assessment.

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<sup>8</sup> Under CCMT, a defendant in receipt of income support, income-based jobseeker's allowance, the guaranteed state pension credit or income-related employment and support allowance is not liable to a contribution order.

20. We wish to stress that the CCMT scheme under LASPO will retain the hardship review process for defendants who are suffering or would suffer financial hardship as a result of making payments required under a contribution order. This will continue to provide a safeguard to defendants who, for example, believe they have higher than usual outgoings or expenditure that has not been taken into account in the full means test (for example, loans or care costs for a disabled relative) and that this means they are unable to afford to pay the assessed income contribution.

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

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

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

21. We also take the view that if a defendant exercises the option to make a lump sum payment, they do so of their own volition and are under no obligation to do so. For this reason, if the defendant subsequently submits a successful application for a change in their financial circumstances, or the case finishes early, the defendant should not be entitled to a 'pro rata' refund based on what they would have paid by that date had they chosen to pay on a monthly basis.

22. The MoJ considers that it would be administratively burdensome to hand back a 'pro rata' refund only to seek to recover those sums through capital assets if the defendant is subsequently convicted.

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

23. In circumstances where the defendant's liability to an ICO is re-assessed, the re-assessment may produce a range of different outcomes:

**No change in the defendant's liability**

24. In some cases, the re-assessment of the defendant's liability will lead to the same outcome in which event nothing will change.



### **Overpayments by the defendant**

25. In some cases, when liability to an ICO is re-assessed and it becomes apparent that a defendant made payments in excess of their liability, the amounts in excess of the defendant's liability will be refunded.
26. Where the defendant has already defaulted against one or more payments under the ICO, the LSC will only enforce payment to the extent that it reflects what the defendant should have properly been asked to pay from the outset.

### **Liability of the defendant to an additional payment**

27. In some cases, the re-assessment of liability to an ICO may take place after one or more or all of the payments under an ICO have been made or have fallen due for payment. When the re-assessment results in the ICO being fixed at a higher amount, there may be a shortfall between the amount a defendant has paid or was liable to pay under their ICO and the amount they should properly have been asked to pay from the outset.
28. In this case, we believe that it is both appropriate and fair to require the defendant to pay any shortfall between the amount a defendant has paid or was liable to pay under an ICO and the amount they should properly have been asked to pay from the outset. To give effect to this in the CCMT scheme under LASPO, we propose that the new regulations will provide for an additional payment beyond the six monthly payments currently required under an ICO.<sup>9</sup>
29. In setting out these proposals, we have considered whether it would be more appropriate to recover any outstanding sums owed from the defendant's capital assets following conviction at the end of the case. However, this is not necessarily a viable option: first, only 1 in 7 defendants convicted at the Crown Court are estimated to have eligible capital assets; and second, by its very nature, enforcement against capital assets is likely to be more complex and relatively expensive compared to income.
30. In some cases, we are aware that a proportion of Crown Court defendants choose to settle their liability under an ICO in a single lump sum. The MoJ is concerned that the option of a lump sum payment should not allow defendants to avoid or mitigate their liability in the event that further information or evidence comes to light indicating the defendant should have correctly been asked to pay a higher income contribution. For this reason, we believe that defendants who choose this payment option should also be liable to an additional payment if the re-assessment

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<sup>9</sup> In order to encourage compliance with the ICO, if the defendant makes the first five payments on or before the due date, they are exempt from the sixth payment under the ICO.

indicates that the defendant should rightfully have been asked to pay a higher contribution from their ICO.

31. Those defendants who have settled payment under their ICO in a lump sum or who paid the first five payments on or before the due date will have benefitted from the exemption from the sixth monthly payment. This exemption is intended to serve as an incentive for defendants to comply fully and transparently with the application process (including the timely provision of evidence).
32. Where an additional payment is identified following reassessment of a defendant's liability to an ICO which stems from the defendant's failure to provide all the relevant information and evidence when required, we consider it would be wrong for the defendant to continue to benefit from the exemption from the sixth monthly payment. In such cases, the outstanding sum owed under an additional payment will reflect the difference between the five payments made under the original ICO and the full revised value of that ICO.
33. However, if the re-assessment of the defendant's liability stems from an administrative error or mistake by the LSC, the defendant should continue to benefit from the exemption from the sixth monthly payment, and the outstanding sum owed under an additional payment should only reflect the difference between the original value of the ICO (reflecting all six monthly payments) and the revised value of that ICO.
34. Where a defendant becomes liable to an additional payment, we envisage that the following arrangements will apply:
  - The defendant will be required to make a single lump sum payment to cover the additional sum under the ICO;
  - In calculating the amount to be paid under the additional sum, if the defendant has already settled their liability under the original ICO, depending on the reason why an additional payment is being imposed, the defendant may lose the benefit of the exemption from the sixth monthly payment (see paragraph 32 above);
  - No interest will be charged against the additional sum until the new payment date has passed; and
  - Where an existing monthly payment or payments under the ICO remain outstanding, the LSC may continue to enforce payment of that outstanding sum regardless of any additional sum now due to be paid by the defendant.
35. We acknowledge that in some cases where the additional payment is due, it may be for a relatively small amount. However, in some cases, the additional sum may be much larger and give rise to concerns from the defendant as to their ability to settle this sum in a one-off payment. If this arises, we propose that the LSC can agree with the defendant a variation of the payment arrangements.

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

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

### **Disposal of the defendant's case**

36. Where the defendant is subsequently acquitted, any income contributions, whether paid monthly or by lump sum, would be refunded. If the Court of Appeal allows an appeal against conviction by the defendant, any payments made under an ICO or CCO would also be refunded.
37. Equally, if the defendant has been convicted and payment made under an ICO exceeded the total value of their defence costs, the defendant would also be refunded any overpayment.

### **Collection and enforcement of income and capital contribution orders**

38. The MoJ has always made clear that it wishes to support those defendants who voluntarily comply with the terms of their contribution order but that it will take a firm line with those individuals who do not.
39. Given that criminal legal aid is a public service funded by the taxpayer, it is only right that if an individual has had the benefit of services under that scheme and is able to afford to contribute to the cost of those services, the LSC should be able to enforce that contribution effectively.

### **Liability to ICO payments following conviction**

40. Under the current CCMT scheme, if a defendant does not pay any of their monthly payments under an ICO by the due date, the LSC can take enforcement action up to and, in certain circumstances, beyond the conclusion of proceedings. We wish to continue to provide the flexibility to take such enforcement action and to extend the circumstances in which the LSC may collect and enforce ICO payments following conviction.
41. Although, previously, we concluded that we would not seek to collect contributions earned from income following conviction<sup>10</sup>, we propose to amend this position as set out below. If the defendant has no capital assets or if the notional value of the CCO is less than any outstanding liability to ICO payments that have yet to fall due, or are due but unpaid

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<sup>10</sup> See *Crown Court means testing – response to consultation* (CP(R) 06/09); page 29/paragraphs 118 and 119.

(including any additional payment that might have been imposed under the ICO), we propose that the LSC will retain an option to pursue such outstanding income payments from income. The MoJ is aware, however, that only a very small proportion of defendants would retain their existing employment/income following conviction.

42. We envisage that the new regulations will provide for the following situations:

- While final defence costs are being assessed, the LSC may take enforcement action in relation to a payment under an ICO which fell due before conviction; and
- Once final defence costs have been assessed, the LSC may take enforcement action in relation to a payment under an ICO which fell due before conviction and will have the option to enforce any ICO payments which have yet to fall due; if the defendant is liable to pay outstanding defence costs from their capital assets, enforcement of the CCO may take place alongside the enforcement and collection of such ICO payments.
- Following conviction, it will remain possible for a defendant to submit a change in financial circumstances application in relation to liability to ICO payments.

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

#### **Enforcing payments under a CCO**

43. Following the conclusion of the case, if the defendant has been convicted the LSC will move to calculate the final defence costs and to establish whether the defendant has any outstanding liability to such costs through a CCO.
44. In assessing potential liability to a CCO, the LSC will rely on details of the defendant's capital assets provided as part of the application process. As described above (see paragraphs 10 to 17), the LSC may also need to clarify this position by making a further request for information or evidence in relation to capital assets following the defendant's conviction.
45. However, given that the defendant's capital status may have changed since the point of the original application, it is only fair that the defendant also has an opportunity to ask for such a change to be taken into account by the LSC. Therefore, once the LSC confirms the defendant's liability to, and amount due under a CCO, the defendant will have one month from notification of their liability (subject to any special circumstances – see paragraph 19 above) to submit the relevant forms and evidence of any change in their capital status which occurred prior to notification.

46. The hardship review process will continue to provide a safeguard to defendants who are suffering or would be likely to suffer financial hardship as a result of making a payment required under a CCO.

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

### **Motor vehicle order regulations (MVO regulations)**

47. The MoJ has consistently maintained that MVO regulations should form a part of the wider enforcement powers available to the LSC.<sup>11</sup>

48. Section 24 of, and Schedule 2 to Part 1 of LASPO provide the power to make MVO regulations. We propose to use this power to make MVO regulations under the new CCMT scheme. The main purpose of the regulations will be to act as an incentive for prompt payment and so promote collection from those defendants who have rightfully been asked to contribute towards their defence costs under CCMT and have continually failed to pay.

49. The main features of the proposed MVO scheme are as follows:

- The LSC will only consider making an application for a clamping order once the defendant has had the opportunity to pay voluntarily and the LSC has already made repeated attempts to encourage compliance through written correspondence and contact by telephone or e-mail.
- The court may only make an order if it is satisfied that the defendant's failure to pay the relevant amount was due to wilful refusal or culpable neglect on their part and that the value of the vehicle (or vehicles), if sold, would amount to over half of the estimated recoverable amount;<sup>12</sup>
- The court may not make an order in relation to a vehicle used by a disabled driver;<sup>13</sup> a vehicle used for police, fire or ambulance purposes; or a vehicle used by a doctor on call with a British Medical Association badge or other health emergency badge;
- The court may make an order both pre and post conviction and in relation to both ICOs and CCOs;

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<sup>11</sup> In consulting on the appropriate collection and enforcement mechanisms to be adopted under the CCMT scheme, the Department repeatedly emphasised that clamping orders were to be included among the suite of available options: see paragraphs 41 and 69 of the Consultation Paper/CP27/08)/paragraph 41; page 54 of the Initial Impact Assessment (annexed to the Consultation Paper); paragraph 155 of the CCMT Consultation Response; paragraph 16.2 of the Interim Impact Assessment and Q&A (page 12) published alongside that Response.

<sup>12</sup> As provided for in paragraph 5 of Schedule 2 to LASPO.

<sup>13</sup> As provided for in paragraph 7 of Schedule 2 to LASPO

- The court may not make an order for sale of the vehicle until the defendant has been convicted and a specified period of no less than one month has elapsed following seizure of the vehicle;
- If having been convicted, the defendant seeks leave to appeal against the conviction, the LSC will postpone an application for an order for sale until the application has been determined; if leave to appeal is subsequently granted, the LSC will postpone an application for an order for sale until the outcome of the appeal is known;<sup>14</sup>
- The defendant would have the opportunity to make representations to the court as to the adverse impact an order may have. If the defendant asserts that the order would have an adverse impact on them or a family member, they will need to support that assertion with evidence;
- The court may only make an order if it is satisfied that the order is both proportionate and appropriate in the circumstances;
- Payment for the release of the vehicle will reflect the outstanding amount owed under the contribution order along with an administrative charge to cover the costs incurred in connection with the enforcement action;
- Provision will be made for the urgent release of a vehicle clamped in error.

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

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

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

### General questions

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

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<sup>14</sup> Pending the outcome of an application for leave to appeal or of an appeal hearing itself, the LSC may still continue to enforce unpaid contributions under an ICO which fell due before conviction.

**Question 15:** Do you have any views on how the proposals described throughout the consultation paper are likely to impact either adversely or positively on those who share the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation? (Please see the Equality Impact Assessment which sets out our analysis in relation to our proposals and is published alongside this consultation paper.)

## Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

**Question 1:** Do you agree that the IES should operate as set out above?

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

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

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

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

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

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

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

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

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



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

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

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

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

**Question 15:** Do you have any views on how the proposals described throughout the consultation paper are likely to impact either adversely or positively on those who share the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation? (Please see the Equality Impact Assessment which sets out our analysis in relation to our proposals and is published alongside this consultation paper.)

**Thank you for participating in this consultation exercise.**

## About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
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.

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## Contact details/How to respond

Please send your response by 11 December 2012 to:

**Shahi Rahman**  
**Ministry of Justice**  
**Legal Aid Reform**  
**4<sup>th</sup> Floor (post point 4.38)**  
**102 Petty France**  
**London SW1H 9AJ**

**Tel: 020 3334 4067**

**Email: [legallaidreformmoj@justice.gsi.gov.uk](mailto:legallaidreformmoj@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 also be requested from Shahi Rahman at the address above.

### Publication of response

A paper summarising the responses to this consultation will be published in early 2013. 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.

## **Consultation Co-ordinator contact details**

**Responses to the consultation must go to the named contact under the  
How to Respond section.**

However, if you have any complaints or comments about the consultation  
**process** you should contact Sheila Morson on 020 3334 4498, or email her  
at [consultation@justice.gsi.gov.uk](mailto:consultation@justice.gsi.gov.uk).

Alternatively, you may wish to write to the address below:

**Ministry of Justice  
Consultation Co-ordinator  
Better Regulation Unit  
Analytical Services  
7th Floor, 7:02  
102 Petty France  
London SW1H 9AJ**

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**Alternative format versions of this report are available on request from Shahi Rahman at [legalaidreformmoj@justice.gsi.gov.uk](mailto:legalaidreformmoj@justice.gsi.gov.uk) or 020 3334 4067**