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

Response to Consultation CP(R) 7/2013

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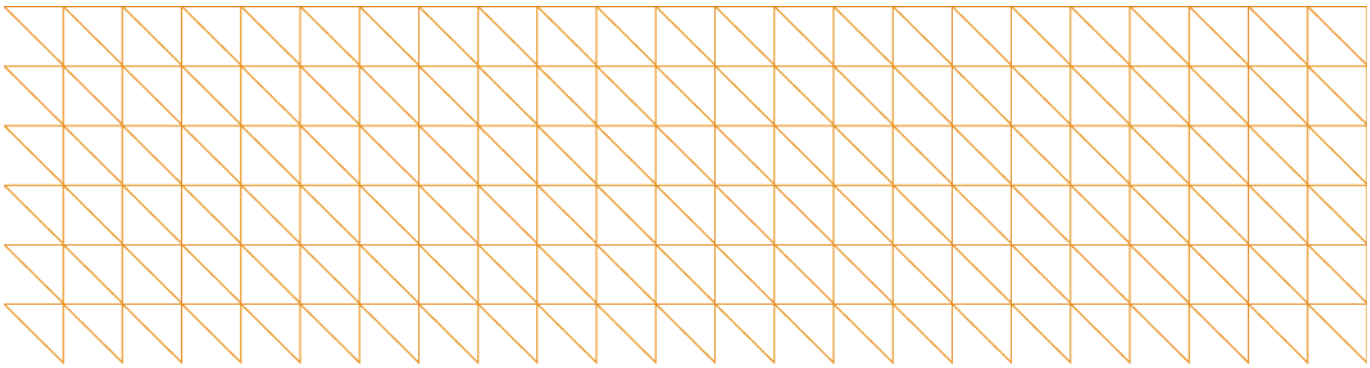

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Response to consultation carried out by the Ministry of Justice.

This information is also available on the Ministry of Justice website: www.justice.gov.uk

Contents

Introduction and contact details

This document is the post-consultation report for the consultation paper, 'Crown Court means testing: the design of the scheme on implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.'

It will cover:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting Shahi Rahman at the address below:

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This report is also available on the Ministry's website: www.justice.gov.uk.

Alternative format versions of this publication can be requested from Shahi Rahman (contact details above).

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Background

The consultation paper 'Crown Court means testing: the design of the scheme on implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012' was published on 30 October 2012.

It invited comments on a series of proposals to improve the overall effectiveness of the Crown Court means testing (CCMT) scheme in light of the forthcoming implementation of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). 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.

The proposals set out in the consultation paper sought to ensure 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.

The proposals focused 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
- Provisions in relation to the collection and enforcement of payments under a contribution order, including implementation of motor vehicle order regulations.

The consultation period closed on 11 December 2012 and this report summarises the responses, including how the consultation process influenced the final shape and further development of the proposals consulted upon.

The Impact Assessment accompanying the consultation was updated to take account of evidence provided by stakeholders during the consultation period. The updated Impact Assessment is published alongside this consultation response.

A Welsh language summary of this consultation response is available at: www.justice.gov.uk

A list of respondents is at Annex A.

Summary of responses

1. A total of 21 responses to the consultation paper were received. Of these, 6 came from professional groups or bodies representing the legal profession with a further 2 responses from individual solicitors. Additional responses were received from members or representatives of the magistracy as well as other groups with a direct interest in the operation of criminal justice system. There were also a handful of responses from members of the public (a list of respondents is attached at Annex A).

2. We have carefully considered the responses, full details of which are set out in the subsequent chapter, and have made some significant modifications to our proposed scheme as a result.

3. In general, we note that very few respondents expressed fundamental objections to the principle of means testing defendants at the Crown Court. However, the great majority of respondents did provide detailed comments and analysis of how both the efficacy of, as well as fairness under the CCMT scheme could be improved.

Responses to specific questions

1 Do you agree that the income evidence sanction should operate as set out above?

1.1 18/21 respondents answered this question.

- 10/18 respondents gave broad or qualified agreement to the proposal.
- 8/18 respondents disagreed or required revisions for the proposal to be acceptable.

1.2 Comments from those agreeing with the proposal:

- BC/CBA agreed that clarifying the operation of the income evidence sanction would assist both providers and defendants to better understand the consequence of failing to provide the required evidence.
- CDJMC agreed with the proposed process, in particular that the income contribution order should be calculated on receipt of the application form, thereby expediting the process. The prospect of an income evidence sanction would incentivise provision of evidence, which was the best way to ensure that the order was set at the appropriate level.
- BCJB agreed that the income evidence sanction should have the intended effect but said that timescales should be sensible and enforced so that timeliness of other criminal justice business was not affected. Legal aid for representation should not be granted without the provision of full and up-to-date financial records by the defendant, so that the income contribution order could reflect the correct financial position. The criteria should be set out very clearly and the Legal Services Commission (LSC) should determine liability based on the evidence provided by the defendant, and impose the income evidence sanction if insufficient evidence could be produced.
- FASO agreed subject to exceptions set out under question 5 below.
- One individual respondent suggested requiring proof of prisoner accounts at each stage of litigation by asking the Governor to disclose amounts in their spending and savings accounts.

1.3 Comments from those disagreeing with the proposal:

- TLS agreed with the need for documentary evidence to support an application but said that that could be problematic for self-employed sole traders such as window cleaners, who would often depend on former customers to provide evidence of earnings. Disproportionate time could be spent by provider, client and the LSC trying to obtain such evidence (two real examples of such cases being given), and applying a sanction could be unfair where the client had tried their

best but was unable to provide the information and ineffective where they were not in a position to pay. There should be flexibility for the LSC to base the assessment on the application form alone in low-income self-employed cases.

- TLS suggested that, just as the LSC could make a calculation without evidence where they had grounds to believe that the client's disposable income exceeded £3,398, they should be able to do likewise where they had grounds to believe that it was less than £3,398, where it was clear that the client had made every reasonable effort to obtain evidence (they also requested clarification of what the proposed grounds to believe would be based on).
- TS said that the proposals did not recognise the very real difficulties that could be experienced by those trying to gather the extremely detailed information required to calculate a contribution. They had experience of people who simply could not get the required information from a bank or employer. That was most common in work-related matters where the defendant was suspended from their employment and prohibited under the terms of the suspension from making contact with the employer. They accepted that some teeth were required to prevent attempts to mislead, but believed that the proposals would penalise those who were using their best endeavours to provide information. Each application should be considered on a case by case basis, rather than a draconian sanction that did not consider the individual circumstances.
- LCCSA said that while provision of documentary evidence was necessary it had always been problematic with certain categories of person such as the self-employed. The income evidence sanction could act as an incentive but not where the defendant was simply unable to provide the evidence. The LSC should take a pragmatic view in applying the sanction as there were occasions when the time, effort and resources spent on obtaining evidence was disproportionate.
- CLSA said that defendants might be willing but unable to provide evidence for a variety of reasons, including being in custody, being excluded from the family home by bail conditions, being self-employed or part of a new trading entity where up-to-date accounts were not yet available, or working for cash in hand; leeway needed to be provided for such defendants.
- E2025 expressed concern about the requirement to submit evidence within 14 days, which they considered would disadvantage some disabled people, in particular those with mental health conditions, behavioural difficulties or learning disabilities. They recommended that advocacy support be provided where such people needed extra help to provide proof of income. Many disabled people were self-employed or casual workers and might not receive wage slips, or have fluctuating income. Business accounts were not regularly finalised until six months or more after the end of the financial year, and interim accounts could be difficult to prepare. The procedures

needed to be significantly simplified for self-employed defendants in order to avoid substantial delay to proceedings.

- E2025 were also concerned that defendants in custody or excluded from home by bail conditions might not be able to access documents. The requirement to obtain a partner's signature on the means form could be a problem if the partner was unwilling or unavailable to sign.
- PF thought the proposal to issue an income contribution order based on answers given in the application form and then review the order once the evidence had been received would create more work for the LSC. While that would make no difference to applicants who had accurately completed the application form in the first place, it might lead to confusion for those who thought the process had concluded with the issue of the order.

MoJ conclusions:

1.4 We acknowledge the concerns expressed about the need for flexibility in applying time limits for submitting supporting evidence. Currently, the individual must provide the supporting evidence of the information provided in their application for legal aid within 14 days of the committal or sending of the individual to the Crown Court, the transfer of the proceedings to the Crown Court or the preferring of the bill of indictment. Failure to do so triggers an evidence reminder giving the individual a further 7 days to comply with the request.

1.5 In light of comments from respondents and following further reflection, we will now ensure that the individual may contact the Legal Aid Agency[1] (LAA) if the individual cannot meet the deadline set and, where reasonable, a new deadline may be agreed between the individual and the LAA. In this case, the income evidence sanction would not be applied until the renegotiated deadline had elapsed.

1.6 As now, the Income Evidence Sanction (IES) may only be applied if the individual does not have a reasonable excuse why they could not comply with a deadline (for example, in the event of hospitalisation) or the content of the request. Again, as now, the IES may only be applied where the LAA has reasonable grounds to believe that the individual has sufficient income.

1.7 The LAA intends to make these points clearer in their guidance to staff. Each case will be considered individually on its own facts and a pragmatic view will be taken where there are special difficulties.

1.8 If the LAA considers that the documentary evidence requested cannot reasonably be obtained by the individual, it will be open to the LAA to issue, or continue with, an income contribution order based solely on the

[1] When LASPO is commenced on 1 April 2013, the LSC will cease to exist and will be replaced by a Legal Aid Agency.

information provided on the application form. It will also be possible to revise the order if the documentary evidence is provided later. We recognise that this may increase the work involved in administering the case and make the position less conclusive but believe that that is more than justified by the need to ensure fairness and flexibility.

1.9 This increase in flexibility will enable the special needs and circumstances of disabled people, among others, to be fully taken into account.

1.10 Taken as whole, we believe that the additional flexibility afforded by our approach, would help to address concerns that some applicants may genuinely be unable to meet the initial deadline for the provision of documentary evidence.

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?

2.1 18/21 respondents answered this question.

- 1/18 respondents gave a non-committal response.
- 10/18 respondents gave broad or qualified agreement to the proposal.
- 7/18 respondents disagreed or required revisions for the proposal to be acceptable.

2.2 Comments from those agreeing with the proposal:

- BC/CBA agreed that defendants should be deterred from failing to provide additional requested evidence of their capital assets in a timely fashion following conviction. However, some defendants who were in custody might have difficulty in providing evidence, especially where the circumstances of the conviction had led to a breakdown in family relationships. They proposed the following guidance to ensure that the sanction was applied only in the circumstances outlined in paragraph 16 of the consultation paper:

  'If the LSC has reason to believe that the defendant has capital assets to cover this amount [100% of outstanding defence costs] and the defendant has failed to provide a reasonable excuse for not submitting the necessary information or evidence. The LSC recognises the increased difficulties presented to a defendant in custody in supplying this evidence. No deeming should take place where the consequences may result in injustice to the defendant.'

- CDJMC agreed with the proposed sanction; they said that they would support any sanction that was reasonable and effective in ensuring that the capital contribution order was set at the correct level. It was both reasonable and fair to assume that the defendant had sufficient capital

to pay all of their defence costs until they provided evidence to the contrary. The necessity for the LSC to have reason to believe that the defendant had sufficient capital and had not provided a reasonable excuse for failing to provide evidence were suitable safeguards.

- BCJB regarded the proposed sanction as entirely fair. They added that LSC needed staff who were properly qualified, or a reliable source of expert guidance, for cases involving complex capital assets. They suggested that the LSC be enabled to charge defendants with larger income or investments for the additional investigative work in cases involving shared ownership investments where the required evidence was not provided. Where there was uncertainty about a defendant's means, the LSC should liaise with HM Revenue and Customs and other agencies to share information.
- FASO agreed provided that there were sufficient checks and balances to prove failure to comply; malicious information should not be regarded as evidence of hidden capital assets.
- TS welcomed the provision allowing the defendant to show reasonable excuse for not providing information, and suggested that some examples of what would amount to reasonable excuse be provided, together with provision for the exercise of discretion to avoid a too prescriptive test. In their experience it was extremely difficult to obtain the required information where a defendant was sentenced to custody following conviction, and they regarded it as greatly unfair to assume that the absence of documentation meant that such a defendant could afford their defence costs.

2.3 Comments from those disagreeing with the proposal:

- LCCSA were not sure that a case had been made for this proposal; the existing capital evidence sanction was adequate. In their experience in the vast majority of cases where capital evidence was not provided that was not due to wilful non-cooperation by the defendant.
- CLSA said that defendants might be willing but unable to provide evidence for a variety of reasons, including being in custody, being excluded from the family home by bail conditions, being self-employed or part of a new trading entity where up-to-date accounts were not yet available, or working for cash in hand; leeway needed to be provided for such defendants.
- LLS said that there was an agreement in principle with a capital evidence sanction; such requests would generally be made after conviction. However, they sought a clear statement as to the relationship between this sanction and any post-conviction orders in relation to the Proceeds of Crime Act or compensation.
- E2025 said that such a sanction might cause people who could not provide documents because of their impairments to forgo legal aid altogether. They added that if a defendant was excluded from their home it could be very difficult to obtain proof of their assets.

- PF thought that monitoring would be required to ensure that the discretion to apply the sanction was being applied fairly, and where defendants genuinely did not have the assets they were believed to have, they would face difficulty in proving that.

MoJ conclusions:

2.4 We have taken on board the strength of concerns expressed by some respondents about an applicant's ability to comply with the timelines for provision of further information or documentary evidence in relation to their capital assets. On this basis, we consider it is appropriate, as with the IES, to provide that the individual may contact the LAA if the individual cannot meet the deadline set and, where reasonable, a new deadline may be agreed between the individual and the LAA.

2.5 This means that the LAA can take into account the special difficulties of disabled defendants, defendants in custody and others. It will enable this sanction only to be applied in cases in a proportionate and fair manner and will target those cases where the individual has wilfully resisted all reasonable attempts to ensure their compliance. As such, it should not deter anyone who genuinely cannot provide information due to impairment from applying for legal aid.

2.6 We also wish to emphasise that the LAA will only act under this power where it reasonably believes that the individual has the capital assets in question. In this respect, the LAA would contact the individual first to obtain more information, and only after the individual failed to comply would consideration of the sanction come into play.

2.7 The LAA will not act on potentially malicious third party information alone but will always seek to verify allegations about undisclosed assets independently. For example, independent investigations may confirm to the LAA that the value of the equity in the main property owned by the applicant is significantly higher than the value declared on the application form. In this example, the LAA would have reasonable belief that the individual did indeed have the relevant capital assets to the value in question. We can confirm that LAA staff dealing with potentially complex cases will have access to detailed guidance and specialist advice to support and inform their investigations.

2.8 In addition, as proposed in the consultation paper, this sanction will be lifted as soon as the defendant complies with the request for information and the individual's Capital Contribution Order (CCO) will be set at the level which accurately reflects the value of their capital assets.

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 income contribution order may change?

3.1 All respondents answered this question.

- 12/21 respondents gave broad or qualified agreement to the proposal.

- 9/21 respondents disagreed or required revisions for the proposal to be acceptable.

3.2 Comments from those agreeing with the proposal:

- BCJB hoped that there would be robust investigation, in dialogue with other agencies, of the reasons for any apparent change in a defendant's liability.
- LLS answered questions 3 and 4 with a qualified "yes". They recognised that there needed to be a system to assess and re-assess liability under an income contribution order and that in general terms the proposals in the consultation paper provided such a system. They were concerned that defendants might not be able to satisfy the evidence requirement within one month, especially where someone had been remanded in custody but had retained some form of income which then ceased. The proposal would be acceptable if there was discretion to allow backdating to the date of change in special circumstances, but a prescriptive, closed list of such circumstances would lead to unfairness.
- LCCSA agreed subject to their comments under question 4 (below).
- Rossendales agreed; they thought it essential that there was a straight forward mechanism that allowed mistakes and changes in circumstances to be corrected as simply as possible.

3.3 Comments from those disagreeing with the proposal:

- TLS considered that two or three months would be a more realistic period of time in which to expect the client to submit evidence of a change of circumstances. In the case of a change of employment (the most likely reason for a change in financial circumstances), most salaries were paid monthly in arrears so the first payment slip was unlikely to be produced within the first month. Bank statements were also normally produced monthly or less frequently so could not assist in that situation. Electronic bank statements might not show sufficient identifying details, entailing a request for a paper statement once the new salary had gone in.
- BC/CBA considered that the imposition of a one month time limit for notifying a change of circumstances was illogical in the context of the principle that contributions should reflect true income status; if evidence of reduced income was provided, albeit late, it could not be right that the defendant was required to pay a contribution based on an inaccurate higher income. No such time limit was proposed in respect of correction of LSC errors.
- TS considered that a more flexible approach was needed; the length of time that would be reasonable was totally dependent on individual circumstances. A list of special circumstances was too prescriptive; each case should be considered individually, with provision for the assessor to exercise discretion.

- CLSA said that three months should be allowed for notification of a change in financial circumstances, otherwise some defendants, the self-employed in particular, would have difficulty complying.
- E2025 said that disabled people were disproportionately likely to be hospitalised. They were also disproportionately in receipt of welfare benefits, and might experience delay in information about entitlement to passporting welfare benefits.
- E2025 agreed that there should be an exception where there was clear evidence of a defendant disposing of their assets. In that case a freezing injunction should be permitted, subject to compensation for any consequent financial loss in the event of acquittal.
- One individual respondent thought that even if the approach provided flexibility, it was unlikely the flexibility would be used. Another thought that if there was not a simple system, the LAA would not cope.
- Two other individual respondents disagreed that the approach set out would provide the flexibility required.

MoJ conclusions:

3.4 Whilst acknowledging the differences of opinion expressed in relation to the concept of a time limit for submitting evidence of a change in financial circumstances, we firmly take the view that a time limit is required in order to support the effective administration of the scheme. The time limit set down also needs to reflect that an ICO runs over a maximum period of 6 months; a limit of 2 or 3 months would account for one third or half of all payments due to be made under the ICO.

3.5 Therefore, we remain of the view that the one month time limit we proposed in the consultation paper is appropriate and we regard this approach as a reasonable norm for the majority of cases, although we recognise the need for flexibility in its application.

3.6 We agree in particular with the comments of TS (above). For this reason, we will revise this proposal so that the one month time limit can be extended where the defendant has a reasonable excuse for not complying with the time limit.

3.7 What is reasonable will be determined by the LAA taking into account the circumstances of each individual case, including any disability of the defendant; there will not be a closed list of qualifying circumstances. This will allow greater flexibility than simply increasing the time limit.

3.8 Otherwise, we consider that the proposals set out in the consultation paper are appropriate and in addition –

- In circumstances where the outcome of the re-assessment demonstrates that an original decision that the defendant should not be liable to an ICO was incorrect and in fact an ICO should have been made, it will be possible to recoup from the defendant the

amount the defendant would have been liable to pay under an ICO had one been made through a one-off payment;

- In all cases, the re-assessment may take place up until the date on which the final assessment of defence costs concludes and any liability to a CCO is established. This means that the re-assessment may take place after the date of the conclusion of the proceedings. However, a defendant will only ever be asked to pay the amount which would have fallen due on or before the date of the conclusion of the proceedings. Regulations will make clear that the date of the conclusion of the proceedings is the date on which a convicted defendant's hearing concludes – this is when the defendant stops incurring costs and the costs of representation can therefore be assessed with a view to establishing liability to a CCO.

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?

4.1 All 21 respondents gave views on the proposed one month rule:

- 12/21 respondents agreed that one month was a reasonable period of time.
- 9/21 respondents considered one month to be inadequate.

4.2 Comments from those agreeing with the proposal:

- BC/CBA considered that one month was a reasonable time in which to expect the defendant to submit an application form with evidence where there was a change in their financial circumstances; it was an appropriate extension of the 14 days that evidence had to be provided within when making the original legal aid application. However, they did not accept that a failure to provide the evidence within that time should prevent the defendant's contribution being reassessed if the true position meant that they would be required to pay a disproportionately high percentage of their income.
- CDJMC agreed that one month would be a reasonable period in most cases. However, there might be circumstances in which a self-employed defendant's income changed but the supporting evidence, such as formal accounts, took considerably longer than one month to obtain. Presumably the defendant would be able to rely on "special circumstances".
- LLS answered questions 3 and 4 with a qualified "yes". They recognised that there needed to be a system to assess and re-assess liability under an income contribution order and that in general terms the proposals in the consultation paper provided such a system. They were concerned that defendants might not be able to satisfy the

evidence requirement within one month, especially where someone had been remanded in custody but had retained some form of income which then ceased. The proposal would be acceptable if there was discretion to allow backdating to the date of change in special circumstances, but a prescriptive, closed list of such circumstances would lead to unfairness.

- BCJB agreed that one month was reasonable.
- FASO agreed provided that an exception could be applied for in exceptional circumstances.
- JCS agreed as a general rule, subject to the period being extended where there was good reason to do so.
- One individual respondent agreed unless the applicant could show evidence of another person at fault, eg their employer. Another individual respondent also agreed as long as the rules were made clear to everyone.

4.3 Comments from those disagreeing with the proposal:

- TLS considered that two or three months would be a more realistic period of time in which to expect the client to submit evidence of a change of circumstances. In the case of a change of employment (the most likely reason for a change in financial circumstances), most salaries were paid monthly in arrears so the first payment slip was unlikely to be produced within the first month. Bank statements were also normally produced monthly or less frequently so could not assist in that situation. Electronic bank statements might not show sufficient identifying details, entailing a request for a paper statement once the new salary had gone in.
- TS considered that a more flexible approach was needed; the length of time that would be reasonable was totally dependent on individual circumstances. A list of special circumstances was too prescriptive; each case should be considered individually, with provision for the assessor to exercise discretion.
- LCCSA said that one month might be insufficient where the defendant had been remanded in custody, due to difficulties in obtaining legal visits. Wages were almost always paid monthly and bank statements were no longer produced at intervals of less than a month, so a longer period, at least two months, would be more practical.
- E2025 referred to their concerns expressed under question 1 above in relation to people with mental health conditions and learning disabilities.
- CLSA said that three months should be allowed for notification of a change in financial circumstances, otherwise some defendants, the self-employed in particular, would have difficulty complying.
- One individual respondent argued that a six week time period should be applied.

- Rossendales thought from an operational perspective that the introduction of a set period of time in which to supply details of the change in the defendant's circumstances was problematic; this might mean that a different set of rules could be applied to the effective day for the same sort of changes causing complaint from the defendant and error by those calculating contributions. Rossendales thought it would be better to set parameters that instructed the defendant to notify the LSC of the change in circumstances as quickly as possible so that the defendant could benefit from the reduced payments. Rossendales would consider it equitable to backdate the order to when the change applied (assuming proof was provided) as long as it was pre sentence order date.

MoJ conclusions:

4.4 Our conclusions under Question 3 refer. We would add that a defendant who notifies a change late without a reasonable excuse will nevertheless have the change taken into account from the date of notification, so there need be no question of defendants who suffer large reductions in their income suffering financial hardship on an ongoing basis.

4.5 We recognise that it would be possible to adopt a simpler approach along the lines suggested by Rossendales but consider that the proposed approach strikes the right balance between fairness to both defendant and taxpayer on the one hand and operational feasibility on the other.

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?

5.1 All 21 respondents gave views on the issue of special circumstances and extension of the proposed one month rule:

- TLS referred to their answer to questions 3 and 4 above and said that a two or three months time period should apply in every case where the client had changed employment. They added that any notification of new financial circumstances should always be backdated to the time of the change of circumstances rather than the date of notification; provision of evidence of this change was dependent on the employer's bureaucratic procedures and entirely out of the client's control.
- BC/CBA considered that "reasonable excuse" was a more appropriate test than "special circumstances". Guidance should be given as to what amounted to a reasonable excuse and might include situations where delays in making an application and/or providing evidence were entirely outside the control of the defendant, where paperwork from a new or previous employer was not forthcoming, where other government agencies were delayed in providing appropriate paperwork or where a defendant was affected by family

bereavement. In addition the fact that a defendant was remanded in custody was a relevant consideration. Ultimately, if a defendant established that they did not have the income that formed the basis for assessing their contribution it could not be just nevertheless to require them to pay that contribution.

- CDJMC proposed an extension where there had been delay in processing a benefit claim or transferring from one type of benefit to another; long term ill health/hospitalisation; mental health problems; or self-employment. The list should be open-ended to encompass unforeseen circumstances.
- E2025 believed that there should be an exception to the one month rule for defendants who were mental health service users, learning disabled, in prison or excluded from their home address.
- BCJB said that that it might be appropriate to extend the one month rule where a defendant became a beneficiary following a death, or where a business in which a defendant had an interest went bankrupt or produced better returns than expected. However, a preliminary income contribution order should be made in such cases.
- FASO said that in addition to the recognition of medical problems, special circumstances should include being fired from a job, not overcoming stress due to the nature of the allegation, or activities of a partner/family or third party in maligning the defendant.
- TS considered that a more flexible approach was needed; the length of time that would be reasonable was totally dependent on individual circumstances. A list of special circumstances was too prescriptive; each case should be considered individually, with provision for the assessor to exercise discretion.
- LCCSA said that special circumstances should include where the defendant was remanded in custody, as there might be insufficient time to obtain the necessary evidence and signed statement. The bureaucratic procedures of larger employers might present additional obstacles.
- CLSA said that three months should be allowed for notification of a change in financial circumstances, otherwise some defendants, the self-employed in particular, would have difficulty complying.
- LLS opposed a prescriptive, closed list of special circumstances and argued for wide discretion, with the special circumstances including (but not restricted to) ill health, custody, delay by a third party in producing or providing evidence or in informing the defendant of a change in circumstances, and failure by an agent instructed by the defendant to act upon those instructions. There should also be a provision for backdating where some evidence was provided within a month but the LSC requested more.
- JCS said that there would need to be a good reason to extend the period – certainly it would need to be extended where the defendant

had been unable to send in the information, for example due to ill health.

- PF highlighted illness of the defendant (not just in hospital); where the defendant had been away from home at the point notification would otherwise have been received; where the defendant could show that receipt of notification of the change was otherwise delayed; and where the defendant was on remand and therefore reliant on others to inform them of the change.
- Among the special circumstances cited by individual respondents were the serious illness of the defendant; other dire, life changing circumstances; the fault of a third party; holiday periods (eg Christmas) which could make it difficult for people to progress matters; mental health issues faced by the defendant; and illiteracy.
- Rossendales did not agree with the imposition of any time period at all.

MoJ conclusions:

5.2 Our conclusions under Questions 3 and 4 refer. We have decided in light of respondents' views to substitute for the proposed test of exceptional circumstances a more flexible test. In this respect, we share the view expressed by the BC and CBA that the test should be based on one of reasonable excuse. We certainly do not regard it as unjust to require a defendant who fails without reasonable excuse to provide the necessary information regarding a change in financial circumstances in good time to bear the cost of the delay.

5.3 However, that is not to say that all the situations mentioned above will always qualify for an extension – each case will be considered in the light of its particular circumstances.

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

6.1 21/21 respondents answered this question.

- 10/21 respondents agreed with the proposal.
- 11/21 respondents disagreed with the proposal.

6.2 Comments from those agreeing with the proposal:

- BCJB said that it should be made extremely clear that payment by lump sum was voluntary and that the defendant would not be able to claim a pro rata refund. They agreed that in the event of conviction it would be burdensome to make a refund only to recover the assets after conviction. There would need to be multi-agency working to make any offsetting arrangements work efficiently.

- FASO said that it should be made abundantly clear at the outset that a pro rata refund would not be made.
- JCS agreed, provided the position was very clearly outlined to defendants who chose to pay by lump sum, and provided refunds were actioned quickly when defendants were acquitted.
- Rossendales did not disagree with the concept of refusing pro rata refunds but thought it essential that the defendant is aware of the situation; in that way it was their own decision whether to pay in a lump sum or not. Without that advice the defendant might simply be "getting the payment out of the way" without knowing that they could be penalising themselves if their circumstances change pre conviction.

6.3 Comments from those disagreeing with the proposal:

- TLS considered it unfair that a client who had paid by lump sum should be penalised by not receiving a refund on reassessment as it assisted the LSC administratively to receive payment by lump sum. The proposal could discourage people from using the lump sum payment option.
- BC/CBA did not agree that pro rata refunds should be refused where a defendant had made a lump sum payment. That was contrary to the principle that contributions should reflect true income status and would act as a disincentive to make lump sum payments. The view that it would be administratively burdensome to make pro rata refunds failed to recognise that capital contribution orders were only available where a defendant was convicted and had sufficient capital; in the majority of cases defendants subject to an income contribution order would not necessarily be subject to a capital contribution order on conviction. Denying a pro rata refund meant that the Ministry of Justice would receive an unfair windfall, even more so because it was proposed to require further payment from a defendant who had made a lump sum payment when they became liable to a higher income contribution.
- CDJMC said that on the face of it this proposal could penalise defendants who acted responsibly by making a lump sum payment. It seemed unfair and would probably result in fewer lump sum payments. The cost of administering a pro rata refund needed to be weighed against the financial benefit of receiving a lump sum.
- E2025 said that there were potentially serious consequences where people with, for example, learning disabilities made a decision to pay by lump sum without realising the implications; there should be some redress in such cases.
- TS believed that this proposal would act as a disincentive to pay by lump sum, and could not be justified; an immediate pro rata refund should be made to those entitled to it on the basis of reassessed contributions following a change in circumstances.
- LCCSA said that arguably the whole CCMT regime was administratively burdensome; they did not understand how that could

be said of pro rata refunds. The calculation was straightforward and the few defendants each year who might be affected would probably be in financial difficulties following the loss of income and employment. The LSC would have been assisted administratively by the defendant's decision to pay by lump sum. The proposal was unfair and unjust.

- CLSA considered this proposal unfair. They said that the number of defendants who paid by lump sum was very small – they would expect a handful each year – so there was no administrative burden in making pro rata refunds. The proposal would discourage payment by lump sum and increase the risk of non-payment.
- LLS said that this proposal was not fair; it would discourage payment by lump sum and potentially cause hardship, particularly when combined with a capital contribution.
- One individual said the position needed to be made clear to applicants at the point a decision needed to be taken. However, the proposal was addressing a 'problem' that did not exist. If a person's means altered in those circumstances the chances were that it would affect very few cases and the excuse put forward by the LSC was without merit.

MoJ conclusions:

6.4 Provided that the consequences of making a lump sum payment at the start of the case in terms of subsequent changes of financial circumstances have been made clear to the defendant at the outset, we do not consider it unfair that they should be held to their decision if their income subsequently reduces following a change in financial circumstances.

6.5 However, we must stress that this proposal has nothing to do with generating a windfall payment for the LAA or MoJ. As has always been the case since the introduction of the CCMT scheme, at the end of the case and once the assessment of final defence costs has been concluded, no defendant will ever be asked to pay more than the costs of their defence (with any enforcement costs added, where appropriate, and in accordance with the Regulations). Any overpayments will always be refunded with interest.

6.6 Furthermore, a defendant will only ever be asked to make an additional payment under their ICO if a re-assessment of their liability reveals that the individual should correctly been asked to pay a higher amount under their ICO from the date that their application was originally considered.

6.7 Therefore, we remain of the view that it is appropriate to proceed with this proposal but that we will: (a) ensure that the consequences of paying by lump sum are made very clear at the outset, so that defendants, including disabled defendants, can make properly informed choices with a full understanding of the implications; and (b) monitor the impact on the level of payment by lump sum so as to identify any excessively discouraging effect.

7. Do you agree with our proposal to require a defendant to make an additional single payment under an income contribution order in order to cover any shortfall between the amount a defendant was liable to pay under their order and the amount they should properly have been asked to pay from the outset?

7.1 19/21 respondents answered this question.

- 14/19 respondents gave broad or qualified agreement to the proposal.
- 5/19 respondents disagreed or required more substantial changes for the proposal to be acceptable.

7.2 Comments from those agreeing with the proposal:

- BC/CBA believed that the overriding commitment should be to ensure that defendants only paid income contributions that accurately reflected their true income status. However, there should be sufficient flexibility to enable additional payment to be made other than in a lump sum, and review processes should be available to deal with concerns about how the decision was made, extenuating circumstances in relation to delay in providing information, and inability to pay the required amount.
- CDJMC agreed, subject to the proposal that the LSC could agree to vary the payment arrangements in suitable cases.
- BCJB said that in view of the complexity of means testing there would be cases where liability for an income contribution was assessed inaccurately. They suggested that any overpayment by the defendant should be held pending possible conviction (possibly subject to a time limit); if the cause had been error on the part of the LSC, interest should be paid. They agreed that where a defendant defaulted the LSC should enforce payment of the sum originally calculated; that any reassessment leading to a higher contribution should be met by the defendant, either by a lump sum or staged payment, depending on ability to pay; and that proactive payment should be rewarded by a sixth “free” payment except where a subsequent lump sum was found to be payable.
- CLSA said that it might be very difficult for defendants in a financially uncertain situation to make up a shortfall in contributions in a single payment; they should be given time to pay where necessary. They added that there was no funding for solicitors to act as intermediaries in enforcement matters; the Ministry would have to deal directly with defendants, and the more complex the measures the more time the Ministry would need to spend on that, at public expense.
- LLS agreed, subject to account being taken of the fact that a defendant with no capital might not be able to meet the demand for a further payment from income to make up the shortfall if that meant making two payments in the same month. That would be particularly unfair where the need for additional payment had been caused by administrative error.

- Rossendales agreed that the defendant's means should be correctly calculated and the difference either returned to the defendant in the case of a downward reassessment or paid by the defendant if the income contribution order was increased. Any additional payment sought from the defendant should be payable in the same terms as the original order, ie if the additional amount requested was less than or the same as the previous monthly payment then a lump sum payment should be ordered. If, however, more than one month's instalment was due then payment terms should at least be offered when the new amount was set.
- PF argued that if someone had paid their income contribution order in a lump sum, or in five monthly instalments, and was required to pay an additional monthly payment as well as the additional amount following reassessment, the payment of the additionally assessed payments should be separate from the extra monthly payment. Otherwise, the defendant might be required to pay more than 100% of their disposable income for that month.

7.3 Comments from those disagreeing with the proposal:

- E2025 said that disabled people already faced barriers to employment; a person who was able to retain their employment following conviction should not be further penalised.
- FASO said that defendants should be allowed flexible payments.
- TS said that the proposals had no regard for individual circumstances; calculations of individual liability should be made in each case. A blanket approach for the sake of operational ease was unjust and inappropriate.
- One individual respondent strongly disagreed arguing that it was up to the state to get it right first time otherwise defendants would end up being surprised by further demands.

MoJ conclusions:

7.4 It would be unfair to the taxpayer not to seek to make good mistakes that had led to underpayments. The proposal is entirely related to individual circumstances in that it depends on calculation of the amount that each individual is liable to pay based on their financial circumstances. It includes flexibility to enable the additional payment to be made other than in a lump sum; we believe that our proposal that the lump sum be paid within 28 days or within such other period as may be agreed between the defendant and the Director of the LAA will enable any difficulty arising in connection with payment to be dealt with pragmatically.

7.5 In addition, as mentioned at paragraph 3.8 (above), in circumstances where the outcome of the re-assessment demonstrates that an original decision that the defendant should not be liable to an ICO was incorrect, and in fact an ICO should have been made, it will be possible to recoup from the defendant the amount the defendant would have been liable to

pay under an ICO had one been made by means of a one-off payment. This sum will be payable on similar terms to the additional payment.

7.6 As a further step towards ensuring fairness, we also proposed in the consultation paper that if the re-assessment leading to the liability to the additional payment stemmed from an administrative error, the defendant should continue to benefit from the exemption on the 6th monthly payment under the original ICO, if they qualified for it. We maintain that this is the correct policy position to adopt.

7.7 In the consultation paper, we also proposed that if the re-assessment leading to the imposition of the additional payment arose because of the defendant's failure to provide the relevant information and evidence as required, it would, in contrast, be inappropriate for the defendant to benefit from the exemption on the 6th monthly payment.

7.8 On further reflection, we now believe that there may be some circumstances in which failure to provide the correct information and evidence may not always reflect a wilful intent by the defendant to mislead the LAA. For example, a defendant may mistakenly provide incorrect information to their solicitor during the pressure and stress of attendance at the police station. Therefore, we now believe that the correct course of action is to allow the LAA the option to waive the 6th monthly payment, dependent on the circumstances of the case.

7.9 As the calculations and decisions involved in assessing liability to an additional payment (or liability to a payment to recoup the amount that an individual would have paid had an ICO been imposed) are of a relatively routine nature, we do not see any need to introduce special review processes for them (we do though point out that the defendant will still be able to apply under the hardship review mechanism should they consider themselves unable to meet the payment). Enforcement action will be taken only where that is considered to be cost effective.

7.10 We are not persuaded that the proposal will have any greater impact on disabled people than on other defendants. In any case, the proposed provision for flexibility in payment arrangements, in addition to the hardship review mechanism, will avoid any hardship that might otherwise result.

7.11 We also wish to stress that an individual may only be found liable to a payment under these proposals up until the date on which the final assessment of defence costs concludes and any liability to a CCO is established. Liability will not, therefore, remain indefinitely.

8. Do you agree with our proposal to require a defendant to make an additional single payment under an income contribution order if that additional liability stems from an administrative error or mistake?

8.1 19/21 respondents answered this question.

- 11/19 respondents gave broad or qualified agreement to the proposal.
- 8/19 respondents disagreed or required more substantial changes for the proposal to be acceptable.

8.2 Comments from those agreeing with the proposal:

- BC/CBA believed that where an additional liability arose because of an administrative error there should be greater flexibility to allow defendants to pay any additional contribution. They welcomed the commitment to ensuring that the defendant would remain exempt from the sixth monthly payment if they had paid promptly. For that to be appropriately implemented they believed that the defendant should only be liable to pay the lesser amount of the difference between the original income contribution order and the reassessed order, and the difference between what would actually have been payable if the exemption from the sixth monthly payment was enforced. For example, if the original income contribution order had amounted to £600 in total, and the reassessed order to £1,200, the defendant should only have to pay £500 (as opposed to £600), as that was the difference between what would have been paid if the orders were each divided into five monthly contributions.
- CDJMC agreed, subject to the proposal that the LSC could agree to vary the payment arrangements in suitable cases. It would be wrong for the defendant to benefit from an administrative error when they could be contributing correctly to their defence costs. However, the LSC might be more likely to agree to vary the payment arrangements in such cases.
- BCJB agreed that where it was reasonable for the defendant to make an additional payment it should be a single payment, but if the sum was too large for that to be manageable a staged approach should be arranged, with rules as in their responses to preceding questions, as if the payments had been those originally agreed.
- LCCSA's only concern was that there had to be a contingency for where the error had led to a demand for a substantial additional payment which the defendant could not pay in one further instalment.
- LLS agreed, subject to account being taken of the fact that a defendant with no capital might not be able to meet the demand for a further payment from income to make up the shortfall if that meant making two payments in the same month. That would be particularly unfair where the need for additional payment had been caused by administrative error.

- JCS said that they hoped that all was done to minimise mistakes rather than accepting that they occurred in the knowledge that the money could be recouped. That said, they agreed that people should make appropriate payments according to their means. To ensure fairness, they proposed that any additional payment should have to be requested within a reasonable period of time, say a month, from when the mistake was made.

8.3 Comments from those disagreeing with the proposal:

- E2025 said that disabled people already faced barriers to employment; a person who was able to retain their employment following conviction should not be further penalised.
- FASO said that defendants should be allowed flexible payments
- TS said that the proposal had no regard for individual circumstances; calculations of individual liability should be made in each case. A blanket approach for the sake of operational ease was unjust and inappropriate.
- One individual strongly disagreed, saying it was up to those that administered legal aid to get it right first time. The respondent noted that this suggestion demonstrated how bad the system was and how inefficient those administering legal aid were as an organisation. The respondent said a contribution should be arranged and the defendant accept the grant of legal aid on those terms; if an additional charge was to be made the defendant should be allowed to decide at that stage whether they wished to accept legal aid or not. They pointed out that if the case was over and the defendant decided that they would not have accepted legal aid then the problem would arise where the legal aid administrators would have to pay the solicitor and could not recoup those fees, and the defendant would be entitled to get all his contributions back.
- Whilst Rossendales understood the principles behind the use of either a five months or a six months payments calculator, they said it would make an already complicated scheme more complex and difficult to quality assure. They would expect the numbers of these cases to be quite low and suggested that the correct income contribution order was calculated based on the defendant's income and the outstanding amount be obtained by deducting the income contribution order already paid from that figure, which would then be ordered to be paid as above.
- PF disagreed, stating that the LSC should bear the cost and it could be used as a performance tool to eradicate errors.

MoJ conclusions:

8.4 Our conclusions under Question 7 refer. We do not see the ability to recoup money where an administrative error has occurred as a disincentive to getting it right first time; the additional work involved in correcting a mistake should have the opposite effect.

8.5 As is common with any public sector organisation, an administrative error can be so serious as to amount to maladministration. Therefore, in cases where such an error has arisen, if the defendant has in good faith organised their affairs so that in consequence they have been financially disadvantaged by correction of the error beyond the mere fact of being required to pay the correct amount, they may have grounds on which to found a complaint. That aside, however, we consider that responsible administration demands that errors be made good where practicable.

8.6 We think the arrangements proposed strike the right balance between ensuring fairness and flexibility and avoiding excessive complexity.

8.7 We can confirm that if the defendant paid their original ICO promptly, and therefore benefitted from the exemption on the 6th payment, any additional payment now due following re-assessment will also reflect a similar deduction to take account of the exemption they would have received on the 6th payment.

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

9.1 21/21 respondents answered this question:

- 13/21 respondents gave broad agreement to the proposal.
- 8/21 respondents disagreed with the proposal.

9.2 Comments from those agreeing with the proposal:

- TLS said that they could see the logic of this proposal and agreed it was likely to apply to only a small number of people, but requested more detail of how in would operate, in particular:
  - We assume that the provision would only have an impact where the client starts to earn above the current threshold for legal aid; but how would this be assessed, given that s/he will no longer be in the system, with no solicitor involved to assist with submission of forms etc?
  - Would there be one simple assessment as soon as the client starts to earn money, or would this be a debt that would hang over the client and would become payable once they start to earn a higher income, as is the case with student loans?
  - If the client is given a custodial sentence, would they become liable for these contributions on their release, or is it envisaged this would only apply to those still in employment immediately following conviction?
- BC/CBA repeated that the overriding commitment should be to ensure that defendants only paid income contributions that accurately reflected their true income status. If a defendant continued in

employment following their conviction, further contributions should be sought from them to meet the costs of their defence.

- CDJMC agreed that the option should be retained; the defendant's ability to submit a change in financial circumstances application would act as a safeguard.
- BCJB agreed provided that the option was applied consistently to all similar cases, supported by robust guidelines for LSC staff.
- FASO pointed out the need to allow for use of the appeal system, and also suggested that prisoners should be means tested again before being required to pay from limited prison earnings.
- LLS did not object in principle to the proposal but referred to their answers to Questions 3 to 5.
- One individual respondent suggested some type of financial freeze of the defendant's finances when they secured legal aid so as to prevent them moving monies to avoid future costs orders.

9.3 Comments from those disagreeing with the proposal:

- TS regarded the current liability to pay contributions on the calculated basis as extremely onerous; requiring contributions to continue following conviction would cause extreme hardship.
- LCCSA found this proposal slightly troubling. The defendant might be in custody and have difficulty complying. Following conviction and sentence (and assuming no appeal) the defendant would no longer have legal advice and assistance with form completion.
- CLSA believed that significantly more defendants would retain their employment after conviction than the consultation paper envisaged; the Crown court had significant powers to suspend sentences and make community orders. The administrative burden of continuing to enforce income contributions after conviction would be borne by the Ministry and the amounts recovered might not be worth the expenditure.
- E2025 said that disabled people already faced barriers to employment; a person who was able to retain their employment following conviction should not be further penalised.
- Rossendales thought this proposal would further complicate a scheme that might already struggle to be understood. They assumed that the provision would allow the LSC to collect/enforce the full amount of the income contribution order post-conviction – giving no credit for reduction caused by an early sentence order date. If that was to be the case then as long as the defendant knew that at the outset fairness would prevail and it was in the defendant's hands to comply with the order.
- One individual respondent thought the cost would be prohibitive, and for some might be a disincentive to return to employment.

MoJ conclusions:

9.4 On reflection, while we remain of the view that this proposed option is right in principle, we have doubts about its cost-effectiveness at the present time and, therefore, now do not intend to proceed with it as described.

9.5 We do, however, consider liability for payments under an income contribution order should continue during the period between conviction and sentence. During that period the legal aid certificate will usually remain in force and the defendant will have access to legal advice. Final defence costs cannot be assessed until after the date of the sentencing hearing.

9.6 This means that if any payments under the ICO fall due for payment (or should have fallen due for payment) between the date of conviction and the date of the sentencing hearing, the defendant is liable to meet those payments.

9.7 We do not believe this places too onerous a burden upon defendants or over-complicates the scheme.

9.8 We also wish to re-iterate that in cases where the defendant has not met payments under an ICO which were required to be made before the date of the sentencing hearing, the defendant remains liable for all such outstanding payments after the date of the sentencing hearing.

9.9 Following the final assessment of defence costs, if the defendant has capital, the defendant remains liable to pay any outstanding defence costs from the capital assets that they hold. The maximum amount payable under a CCO is calculated from the total value of the defence costs, less any amounts paid and/or owing under the ICO (with any enforcement costs added, where appropriate, and in accordance with the Regulations).

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 capital contribution order?

10.1 19/21 respondents answered this question.

- 13/19 respondents gave broad agreement to the proposals.
- 6/19 respondents disagreed or required substantial revisions for the proposals to be acceptable.

10.2 Comments from those agreeing with the proposals:

- BC/CBA considered that one month was a reasonable time in which to expect the defendant to submit an application form with evidence where there was a change in their financial circumstances; it was an appropriate extension of the 14 days that evidence had to be provided within when making the original legal aid application. Giving the defendant an opportunity to provide information about any changes to their financial circumstances also lessened the

administrative burden that might arise if a capital contribution order was enforced before fully understanding the defendant's current capital situation. The test for failure to comply should be that of "reasonable excuse."

- CDJMC agreed. They regarded one month as sufficient even for a defendant in custody. The special circumstances provisions would also apply.
- BCJB said that it seemed prudent to make provision for dealing with changes in a defendant's financial position following conviction. Information used to calculate income contributions could be used to calculate and enforce capital contributions.
- FASO agreed provided that the checks and balances were there and monitored for hardship cases.
- CLSA agreed but said that longer than one month might be required in some circumstances. Defendants in prison could be subject to mail delays and moves from holding to longer term prisons. A month might be insufficient for a defendant to be able to inform the Ministry of a change in capital. Once enforcement had started it was difficult to stop so a longer period for notification of a reduction in capital should be readily granted.
- LLS agreed subject to the comments made in response to Questions 3 to 5.
- Rossendales thought that whilst it would extend the life of a case it was fairer to allow the defendant to challenge "old" or wrong information being used by the LSC. Tight discretion would be needed on the period in which challenge could be made as delaying tactics would make ultimate collection and enforcement of the debt difficult and a longer process than necessary.

10.3 Comments from those disagreeing with the proposals:

- E2025 referred to their concerns expressed under question 1 above in relation to people with mental health conditions and learning disabilities (ie could such individuals reasonably be expected to comply with requirements relating to changes in financial circumstances, especially regarding the one month deadline).
- LCCSA were concerned that allowance should be made for defendants in custody where additional information was requested.
- PF noted that the one month time limit might be too short for defendants who had received custodial, non-suspended sentences and might have to rely on others to obtain evidence of changes in circumstances.

MoJ conclusions:

10.4 We acknowledge the concerns about the need for flexibility in the one month time limit. Accordingly, we will revise this proposal so that the one month time limit can be extended where the defendant has a reasonable

excuse for late notification. What is reasonable will be determined by the LAA taking into account the circumstances of each individual case, including any disability suffered by the defendant.

11. Do you agree with our proposed approach to the operation of the motor vehicle order (MVO) scheme?

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

12.1 Questions 11 and 12 relate to proposals in our consultation paper to introduce motor vehicle order (MVO) regulations. These would allow the LAA to apply to the court for a clamping order and, subsequently, to apply for an order for sale of the vehicle if the defendant is convicted and has still not settled their liability under the ICO or Capital Contribution Order.

12.2 Respondents raised queries about safeguards required if an application is made to the court to seize or sell a motor vehicle under these proposals.

12.3 We remain persuaded that MVO regulations should form part of the wider enforcement powers available to the LAA for the purpose of encouraging and supporting compliance under the new scheme.

12.4 We wish to give further thought to the final shape of the scheme and, in so doing, will consider the points raised by respondents. For this reason, we plan to delay introduction of the MVO regulations until July 2013.

12.5 We can confirm that we will publish the outcome of our final discussions and consideration of the design of the MVO scheme in an addendum to this consultation response. The addendum will be published alongside an updated Impact Assessment before the MVO regulations are introduced. We wish to stress that we will not be conducting a separate consultation exercise on the draft MVO regulations.

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

13.1 13/21 respondents answered this question.

13.2 The proposals and observations made were:

- TLS said that for those in employment the tax system could be used to deduct sums at source, as for student loans.
- E2025 were concerned that the complexities of the proposed system might lead to more people with impairments, especially cognitive impairments, being unrepresented in the Crown Court, leading to delay and added costs and in some instances to unwarranted guilty pleas or wrongful convictions. They recommended that collection and enforcement be left until the end of the case.

- BCJB suggested that HM Revenue and Customs could provide evidence regarding taxed income. They wanted to be assured that there would be robust, workable guidelines and properly trained staff with a remit to link to other agencies, so as to ensure fairness.
- TS said that their experience suggested that there was a serious communication problem between the LSC and Rossendales. Communication should be improved and speeded up. Rossendales staff should be trained sufficiently to understand the process and be given some "ownership" of files to prevent individuals from feeling that they were being ignored
- JCS suggested pre-authorisation of debit/credit cards where appropriate, and third party debt orders.
- Rossendales argued that the most effective way to collect any order was to keep all options open to the creditor by providing for one all encompassing order granted by the magistrates' court once payment of the initial sum was in default. Such orders were now common for council tax and child maintenance and allowed for attachment of earnings, deductions from benefit, seizure and sale of goods including motor vehicles under the laws of distress, charging orders, removal of driving licenses and the like. The order could also make use of the civil enforcement powers in the county court such as third party debt orders, orders to disclose information and orders for sale. Not all the enforcement options would be relevant for the LSC, such as deduction from benefits, but specific powers could be tailored by the legislation. The power to exercise the most relevant form of enforcement for that particular defendant would sit with the creditor and so provide a level of safeguard as to the action taken on each case.
- One individual respondent stated that the scheme should be run like a student loan and paid back via future earnings.
- Another suggested tightening up the grant of legal aid in the first place, but if granted, treating it as a debt payable back over a lifetime (if that was what was required) in order to protect the taxpayer.
- One individual respondent argued that the system was flawed and cost-ineffective to operate but suggested that options offering a discount for paying by direct debit and allowing defendants to pay over a longer period might be considered to address the concerns flagged by this question.
- Another put forward the option of imprisonment for non payment.
- One individual respondent pointed to the trivial nature of the litigious culture that they considered had grown in the prison population and to a number of ombudsman avenues that should be used in the first instance.
- Another suggested there would need to be a better understanding of the cost/benefits identified, as he considered that the operating costs of means tested legal aid had historically exceeded the income generated.

- One individual argued that the scheme should be abandoned.

MoJ conclusions:

13.3 We are grateful for those suggestions which we will consider going forward. In the meantime we regard the proposed MVO scheme and the other proposals discussed in this paper as useful and proportionate additions to the procedures already in place as well as to the range of powers already available to the LAA. These are appropriate in helping to ensure that defendants pay what they can reasonably and fairly afford towards the cost of their legally aided defence in the Crown Court.

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

14.1 17/21 respondents answered this question.

- 10/17 respondents disagreed that the impact on providers would be negligible.
- 6/17 respondents agreed that the impact on providers would be negligible
- 1/17 respondents was not sure about the likely impact.

14.2 Comments from those who disagreed that the impact was likely to be negligible:

- TLS emphasised that where clients were in custody, providers might have to do extra unremunerated work to help them to obtain evidence.
- BC/CBA acknowledged that defendants would need providers' help in completing forms and providing evidence, which was likely to require prison visits where a defendant was in custody. Defendants would expect providers to write to employers and others for evidence, obtain property valuations and liaise with the LSC and the court in relation to a motor vehicle order. Defence firms ought to be properly remunerated for the extra work. There ought also to be provision for providers to continue to assist their clients post-conviction in relation to legal aid queries, particularly where there was to be a further assessment of capital.
- CDJMC suspected that there would be an increased burden on providers (eg in familiarising themselves with the new MVO scheme and advising their clients accordingly) but stressed that other respondents would be better placed to judge the impact on providers.
- FASO said that there would be fewer lawyers available to those who could least afford them.
- LCCSA said that the proposals would lead to far more work and the burden would fall on providers. Fee income was falling and many providers no longer found it economic to offer legal aid.

- CLSA said that in theory there should be no impact on providers as enforcement and collection was a matter between the Ministry and the defendant. However, some providers would find themselves dealing with these regulations on behalf of defendants who were simply helpless. That was significant and time-consuming work which was not remunerated so would eat into the firm's profits and ultimately mean that to sustain an independent criminal defence base more money would have to be paid to firms.
- LSS considered that the scheme created a "client care nightmare". The LSC/Ministry should publish clear literature explaining the impact of the scheme and the consequences of non-payment of contributions to clients applying for legal aid.
- One individual respondent said that when taken into account with other measures in force there was likely to be a significant impact on providers; the problem with the question was that it ignored all other matters. Another asked why solicitors should have to deal with even a negligible impact if they were not paid for it.

14.3 Comments from those who agreed that the impact was likely to be negligible:

- Rossendales agreed that the impact on providers would be minimal as only a small number of defendants would be affected.
- JCS said that they imagined that to be the case but that time would tell.
- One individual respondent agreed that, in the long term, the impact would be negligible.

MoJ conclusions:

14.4 We do not dispute that there may be some impact to legal services providers as they will have to explain to legal aid clients the additional implications of non-compliance with the evidential requirements as well as the consequences of non-compliance with the terms of a contribution order. We acknowledge that this burden may increase with the proposed introduction of MVO orders in July 2013.

14.5 There may, therefore, be an increase in client care demands for affected clients, at least in the short term. We will do what we can to minimise that by ensuring that the relevant information published to support the scheme (notably on the LAA website and in written correspondence with legal aid clients) clearly explains the salient features of the scheme.

14.6 We also recognise the ongoing concern among some providers arising from the cost in assisting clients in the collection of appropriate evidence with which to support the legal aid application. We stress that the Crown Court evidence provision fee was introduced with the implementation of the CCMT scheme in 2010 in order to address this concern. The

arrangements through which the fee may be claimed as part of the Litigator Graduated Fee scheme remain the same.

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?

15.1 12/21 respondents answered this question.

15.2 The observations made were:

- TLS said that it would be helpful if the vulnerability policy in the LSC contract for collection and enforcement (referred to in paragraph 12 of the Equality Impact Assessment) could be made available to representative bodies.
- CDJMC broadly agreed with the findings of the Equality Impact Assessment and had no additional views.
- E2025 expressed concern about the impact of the proposals on disabled people, especially those with mental health conditions, learning disabilities and other cognitive, intellectual or mental impairments. They referred to data showing disproportionately high levels of disability among prisoners.
- BCJB said that, if fairly administered, the proposals would not discriminate on the grounds outlined.
- FASO said that people who maintained their innocence of sex abuse or child protection issues but were found guilty and imprisoned were not recognised under the equality impact system; they described the difficulties generally faced by that group.
- CLSA were particularly concerned about the impact on defendants with a disability; many of the proposed provisions had tight timetables which those with disabilities might have difficulty meeting.
- PF noted that the changes might affect defendants whose first language was not English since it might be more difficult for them to understand and comply with the evidential requirements of an application.
- One individual respondent stressed that exceptions would have to be highlighted clearly so that individual hardship cases were not overlooked.
- Another advised that Equality Impact Assessments should be conducted bi-annually for the first three years so that any unintended consequences could be addressed and rectified.
- One individual observed that the history of the initiative probably showed the very real disadvantage that people with protected

characteristics faced when dealing with a complex set of regulations where the Ministry and the LSC could not agree on their meaning.

- Another said that the proposals would be disastrous for all protected groups.

MoJ conclusions:

15.3 The Equality Impact Assessment included with the consultation paper set out our initial views on the equality impacts of the proposals. We have carefully reconsidered that in the light of the consultation responses and have taken those responses into account when developing the refinements to the original proposal described in this paper.

15.4 In the light of the above comments, and similar comments made by respondents in relation to other groups such as the self-employed and defendants in custody, we have revised the proposals so that the time limits can be subject to an extension where one is agreed between the defendant and the Director, and that a defendant will be not penalised for failing to abide by a deadline if there is a reasonable excuse.

15.5 This increase in flexibility will enable the special needs and circumstances of disabled people, among others, to be fully taken into account. The LAA will work with solicitors and relevant authorities to provide extra help in verifying the means of disabled people. In view of those modifications we do not consider that any disabled person need be deterred from applying for legal aid for fear that sanctions will be applied inappropriately.

15.6 The provision of appropriate literature made available on the MoJ website, supplemented where necessary by advice from providers, should ensure that the complexity of the scheme is not an obstacle to obtaining legal aid, even for those with cognitive impairments or those whose first language is not English.

15.7 Regarding the impact of MVO regulations, any potential equalities impacts will be taken into account in the addendum to the consultation response to be published in July 2013.

15.8 We will of course continue to comply with our duty to have due regard[2] to the equality impacts as the proposals are implemented and during

[2] Under section 149 of the Equality Act 2010, the Department has a legal duty to have 'due regard' to the need to: eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act 2010; advance equality of opportunity between different groups (those who share a protected characteristic and those who do not); and foster good relations between different groups.

Having 'due regard' needs to be considered against the nine 'protected characteristics' under the Equality Act 2010 – namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

their operation. In particular, if any unanticipated equalities impacts become apparent we will review the policy in the light of them.

15.9 We have taken particular note of the comment by TLS requesting that the LSC's vulnerability policy be made available. The LSC has subsequently agreed to share those sections from its Code of Conduct dealing with its approach to vulnerable clients.

Conclusion and next steps

1. In light of our consultation exercise, we have decided that the secondary legislation implementing the new CCMT scheme will incorporate the following features:

   - Time limits under the scheme: the most common criticism related to the time limits attached to our proposals. In particular, there were concerns from respondents that specific categories of defendant (especially, those in custody and those with disabilities) would struggle to meet the deadlines for submission of evidence in relation to the legal aid application, as well as submitting an application and supporting evidence in relation to a change of financial circumstances affecting the defendant's liability to an income or capital contribution order.
   - In response to these concerns, we are qualifying the time limits so that if a defendant has a reasonable excuse for not meeting a deadline, it may be extended. This will protect those defendants who face genuine difficulties in complying with the deadlines set down. We are also providing that, where appropriate, the defendant can contact the LAA to negotiate the extension of a deadline.
   - Re-assessment of an individual's liability to an ICO: we will make clear that an individual may be re-assessed in relation to their liability under an ICO up until the date when the final assessment of defence costs has concluded and liability to a potential CCO has been established. On re-assessment, the approach in the consultation paper will provide sufficient flexibility to deal with situations where a defendant's liability under or to an ICO may change. In particular, if the re-assessment demonstrates that the defendant should have been correctly asked to pay a higher amount under their ICO, the defendant will be liable to make an additional payment to reflect this difference. In addition, if the defendant was not subject to an ICO and the re-assessment demonstrates that one should have correctly been imposed, it will be possible to recoup from the defendant the amount the defendant would have been liable to pay under an ICO had one been imposed.
   - Liability to a lump sum payment following re-assessment: If liability to the payment stemmed from an administrative error, the defendant will retain the right to the exemption on the 6th monthly payment if they qualified for it. If the liability to the additional payment arose from the defendant's failure to provide the correct information, the LAA will have the discretion to waive the 6th monthly payment depending on the circumstances of the case.
   - Application for change in financial circumstances: in relation to an ICO, the application will only take effect from the date of the change in circumstances if the individual notifies the LAA of the change within 28 days, unless the defendant has a reasonable excuse for not doing so. Similarly, in relation to a CCO, the defendant will have 28 days from the

date that the CCO is issued to notify the LAA of any change in their financial circumstances, unless the defendant has a reasonable excuse for not being able to meet this deadline.

- Collecting payments from income after the end of the case: We have decided against implementation of this option as described. However, we do believe that there are strong grounds for liability under an ICO to continue during the period between conviction and sentence. The legal aid certificate remains in force during this period and the defendant will continue to have access to legal advice. In addition, final defence costs cannot be assessed until this point. Therefore, if any payments under an ICO fall due for payment between the date of conviction and the date of the sentencing hearing, the defendant is liable to meet those payments.
- We wish to stress that in cases where the defendant has not met one or more of the payments under an ICO which were required to be made before the date of the sentencing hearing, the defendant remains liable for all such outstanding payments after the date of the sentencing hearing and this amount will be deducted from the amount of any CCO imposed.
- Failure to comply with a request for further information or evidence in relation to capital assets: Our new scheme makes clear that if the defendant fails to comply with this request, and the LAA has reasonable belief that the defendant does have sufficient capital assets, the defendant will be liable to pay all outstanding defence costs from those assets.

2. As we have made clear in the main chapter to this consultation response, we have decided to delay implementation of the MVO scheme until July 2013. This will allow us an opportunity to give further thought to the final shape of the scheme.

3. We will publish an addendum to this consultation response, with an updated impact assessment, setting out our conclusions and these will be made available before the MVO regulations are introduced. As emphasised in this consultation response, we will not be conducting a separate consultation on the draft MVO regulations.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf

Annex A – List of respondents

There were 21 responses to the consultation exercise. Those were from eight individuals and the following professional groups and bodies:

Bar Council of England and Wales and Criminal Bar Association (BC/CBA)

The Law Society (TLS)

London Criminal Courts Solicitors' Association (LCCSA)

Criminal Law Solicitors' Association (CLSA)

Liverpool Law Society (LLS)

Thompsons Solicitors (TS)

Justices' Clerks' Society (JCS)

Bedfordshire Criminal Justice Board (BCJB)

Council of HM District Judges (Magistrates' Courts) (CDJMC)

Police Federation of England and Wales (PF)

Rossendales

Equality 2025 (E2025)

False Allegations Support Organisation (FASO)

Alternative format versions of this report are available on request from Shahi Rahman at legalaidreformmoj@justice.gsi.gov.uk or 020 3334 4067