



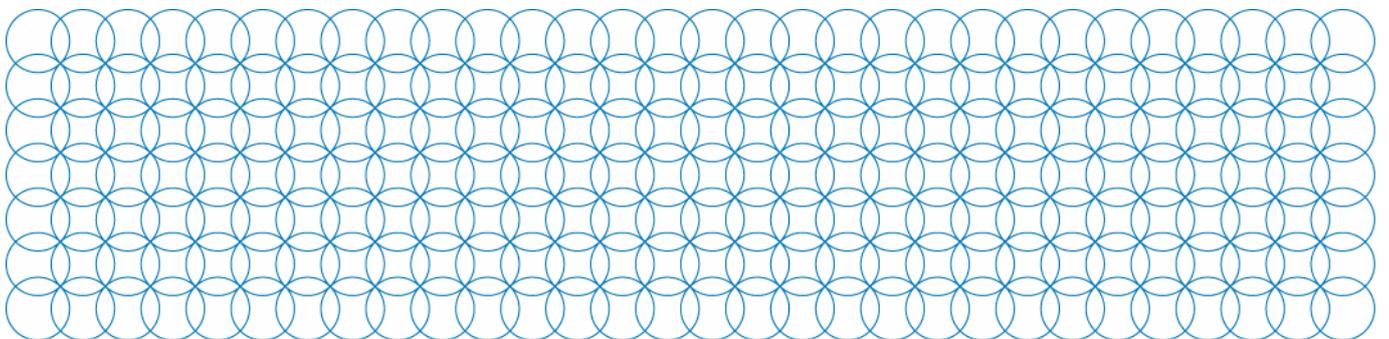
Ministry of  
**JUSTICE**

# **The Award of Costs from Central Funds in Criminal Cases**

**Consultation Paper CP28/08**

Published on 6 November 2008

This consultation will end on 29 January 2009





Ministry of  
**JUSTICE**

## **The Award of Costs from Central Funds in Criminal Cases**

**A consultation produced by the Ministry of Justice.**

**This information is also available on the Ministry of Justice website:  
[www.justice.gov.uk](http://www.justice.gov.uk)**

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## Foreword

The Ministry of Justice and the Legal Services Commission are currently consulting on the introduction of means testing in the Crown Court. The legal aid system in England and Wales is the best funded in the world, but against the current economic backdrop, it is essential that we target the limited resources available at those who need them most. We must explore ways of getting more out of the significant commitment of resources we make, not only in legal aid but all areas of expenditure, ensuring that taxpayers get value for money, whilst those most in need have access to the help and services they require.

The proposed introduction of Crown Court means testing also raises questions about how we remunerate privately paying acquitted defendants in criminal cases, who can currently obtain recompense for this expenditure from Central Funds. It cannot be right, or a responsible use of taxpayers' money, that individuals who choose not to take the available state funded service, opting instead to procure a more expensive private service, should then be able to claim back their costs. The recommended approach for Crown Court means testing would ensure that individuals will retain their automatic right to legal aid in all cases on indictment. We are therefore proposing that, in the future, any individual who does not apply for legal aid in defending their case would no longer be able to receive back their legal costs from Central Funds. Just as an individual who chooses to put their child through private education does not reclaim this cost from the education system, nor should public funding recompense those that choose to pay privately for a lawyer when a publicly funded alternative is available.

Central Funds expenditure has consistently exceeded its fixed allocation of £45 million in recent years, a budget that is highly unlikely to increase in the foreseeable future. It is extremely important that we target our resources effectively across Government, particularly in the current financial climate. We are also taking this opportunity, therefore, to consider other options for reform to Central Funds that would help bring expenditure in this area under control. I look forward to reading your views on the options for consideration that we have put forward.

A handwritten signature in black ink that reads "Lord Bach". The signature is written in a cursive style and is positioned above a horizontal line.

Lord Bach  
**Justice Minister**

## Executive summary

1. This paper sets out for consultation the Government's proposals for reforming the way costs from Central Funds are awarded in the defence of privately funded defendants acquitted in criminal cases in England and Wales. We are not proposing any changes in this paper to the current arrangements for private prosecutor, witness, medical expert or interpreter costs which are also paid from Central Funds.
2. It has been the practice that those found innocent of charges brought by the state are compensated for the costs they have incurred in defending themselves. Under the Prosecution of Offences Act 1985, if an individual pays for their defence privately – either because they choose to do so or because they do not qualify for legal aid – they can usually reclaim their 'reasonable' costs and expenses from Central Funds if they are acquitted. Companies, which do not currently qualify for representation under legal aid, can similarly claim from the Central Funds allocation held by the Ministry of Justice.
3. The Government is committed to the principle that state funding in the form of legal aid should be available to individual defendants who cannot afford to pay for their own representation. But it also believes that those who can afford to pay towards the cost of their defence should do so. For these reasons, means testing was reintroduced in the magistrates' court in 2006 and we are currently consulting on a pilot of means testing in the Crown Court. We recommend that the Crown Court proposals be considered alongside this document.
4. Since private rates for legal representation are much higher than legal aid rates, if a privately funded individual or company has recourse to Central Funds, the cost to the taxpayer can be significant. This is particularly true in complex cases involving charges against a company and on occasion claims from Central Funds under private rates can run into several million pounds for a single case. The Lord Chancellor may by regulation fix the scales or rates of these payments and set conditions, but this power has not been used except in relation to personal incidental expenses.
5. The allocation for Central Funds was fixed at £45 million per annum in 2003/04, and has remained at that level ever since, despite the fact that the cash out-turn in every subsequent year has been over £60 million. In 2007/08 acquitted defendant costs accounted for approximately £41 million of Central Funds costs, which represented two-thirds of the total expenditure in that year.

6. The reintroduction of means testing has seen an increase in privately funded defendants in the magistrates' court. It is also likely that, if means testing is extended to the Crown Court, some defendants involved in these cases may choose to exercise their right not to claim legal aid and pay privately for their defence. This is expected to increase the pressure on Central Funds.
7. Following Lord Carter's review of criminal legal aid procurement in 2006, the Ministry of Justice has embarked on a series of legal aid reforms, which are designed to encourage and reward more efficient working so that we can help as many people as possible within the available resources. We believe that it is now the time to consider whether it is counterintuitive to pay privately funded rates in criminal cases when the legal aid system pays both sustainable fee levels for practitioners and ensures a sufficient level of quality for clients. We believe that there is a strong case for reforming the current payment of legal costs from Central Funds to ensure that we are balancing effectively the need to pay fair rates in criminal cases to practitioners whilst using taxpayers' money effectively and responsibly.
8. There are 3 options that we are currently considering for the reform of Central Funds payments:
  - Option 1 – no change to the present system.
  - Option 2 – restrict access to Central Funds. This would mean that individuals who fail to apply for legal aid in Crown Court cases would no longer be eligible for Central Funds payments if acquitted. To clarify, this would mean that private paying individuals in the Crown Court could no longer claim from Central Funds. We are also considering in this option whether it would be appropriate that individuals who fail the Interests of Justice test in magistrates' court cases, but subsequently obtain legal advice and/or representation, could no longer claim back their costs from Central Funds.
  - Option 3 – cap Central Funds payments in all cases for acquitted defendants, including companies, to the relevant legal aid rates.
9. This consultation was published on 6 November 2008 and will last for 12 weeks closing on 29 January 2009. Responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

## Introduction

1. This paper sets out for consultation the Government's proposals for reforming the way costs from Central Funds are awarded and paid. The consultation is aimed at the costs payable for the defence of acquitted defendants in criminal cases in England and Wales only and should be considered alongside the draft impact assessment. Responses to this consultation should also highlight any comments that are relevant regarding the draft impact assessment.
2. This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out on page 45 have been followed.
3. We would also recommend that key stakeholders and other respondents consider the proposals for the implementation of a pilot for Crown Court means testing, which have been published for consultation simultaneous to this document. This can be found on the Ministry of Justice (MoJ) website at [www.justice.gov.uk/publications/consultations.htm](http://www.justice.gov.uk/publications/consultations.htm) and has also been shared in hard copy with the organisations listed below.
4. An impact assessment has been completed and is attached at Annex 1. Comments on the impact assessment are particularly welcome.
5. This consultation was published on 6 November 2008 and will last for 12 weeks closing on 29 January 2009. During this period the Ministry of Justice is committed to engaging with providers and will be conducting additional research on Central Funds expenditure to inform any final decisions and impact assessment. A response to consultation, outlining the Government's final decision and next steps, will be published within three months of this consultation closing, alongside an updated impact assessment.

### **Copies of the consultation paper are being sent to:**

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

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

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

### The case for reform

1. The 20<sup>th</sup> century saw the first coordinated legislation enabling prosecutors and acquitted defendants to be reimbursed for their legal costs from public funds. One of the main purposes of this legislation throughout the last century, culminating in the Prosecution of Offences Act 1985, was to ensure that innocent defendants were reasonably compensated for the costs incurred by them defending charges brought by the state. For much of the last century legal aid was not readily available or was subject to individual means testing. If you could afford to, you were expected to pay for your own legal representation and many people therefore either paid privately or exercised their right to act in person.
2. The Government is committed to the principles on which legal aid was founded and strongly believes that individuals who cannot afford to pay for their own representation should have access to funding from the state. This is also essential in helping us both increase trust in the justice system and in meeting our obligations under the European Convention on Human Rights by ensuring that those citizens who cannot afford to pay for their representation have access to public funding to ensure a fair trial when accused of a crime. Legal aid is therefore fundamental in underpinning the success and fairness of the justice system.
3. Having said this, the Government also believes that those defendants who can pay towards the cost of their defence should do so. To this end magistrates' court means testing was re-introduced in 2006, delivering in excess of £65 million net savings to date from the legal aid budget. We are also currently consulting on the potential mechanisms for the re-introduction of means testing in the Crown Court, which could potentially see additional net savings of up to £50 million per annum. This consultation paper can be found on the MoJ website at:  
[www.justice.gov.uk/publications/consultations.htm](http://www.justice.gov.uk/publications/consultations.htm)

4. The reintroduction of means testing in the magistrates' court has also seen an increase in privately funded defendants in the magistrates' court. It is likely therefore that some defendants involved in Crown Court cases may choose to exercise their right not to claim legal aid and pay privately for their defence. Where these individuals are acquitted, they are currently entitled to reclaim their 'reasonable' costs and expenses from Central Funds, and rates claimed are significantly higher than legal aid rates. We need to mitigate the effect this may have on savings and are proposing that defendants who fail to apply for legal aid to secure defence representation in their case at the Crown Court shall no longer be able to reclaim privately incurred legal expenses from the state.
5. The legal aid system in England and Wales is the best funded in the world. We spend £38 per head of population compared to between £3 and £5 in France and Germany. Even countries with a legal system more like ours spend less; for example, both New Zealand and the Republic of Ireland spend around £8 - £10 per head. Legal aid has also been one of the fastest growing areas of public sector spending over the last 25 years. Spending has increased from £522m in 1982 (in today's prices) to around £2 billion today: a real terms increase of 5.7% per annum. Of this, criminal legal aid accounts for over £1.1 billion from the overall budget.
6. Following Lord Carter's review of criminal legal aid procurement in 2006, the Ministry of Justice embarked on a series of legal aid reforms designed to encourage and reward more efficient working, so that we can help as many people as possible within the available resources. Although these reforms have been controversial at times, the Government believes that they have been essential in ensuring that we balance effectively the fair remuneration of practitioners with value for money for the taxpayer, whilst guaranteeing a quality standard of representation for clients. Through a combination of fixed, standard and graduated fee rates, a move towards competitive principles and the implementation of Peer Review<sup>1</sup>, this process is creating the necessary culture change in the legal aid market to ensure we have a 21<sup>st</sup> century service that maximises its use of taxpayers' money.
7. Given the changes we have made, alongside future plans for reform such as Crown Court means testing, we believe that now is an appropriate time to consider what additional options are available to address the regular overspend in the Central Funds budget.

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<sup>1</sup> Information on the LSC's Peer Review scoring process can be found on their website at [http://www.legalservices.gov.uk/criminal/contracting/how\\_peer\\_review\\_works.asp](http://www.legalservices.gov.uk/criminal/contracting/how_peer_review_works.asp)

8. In particular, we are looking at whether it is counterintuitive to pay for higher privately funded rates in cases when the existing legal aid system pays both sustainable fee levels for practitioners and ensures a sufficient level of quality for clients. Given the number of contracted providers offering criminal legal aid services and the relatively small proportion of privately funded work available, there is no obvious reason why practitioners should not offer private clients legal aid rates. Whilst some individuals or companies may in the future be willing to pay a premium to a particular firm based on their local reputation, this is a financial choice that should not necessarily be subsidised by the taxpayer. We would welcome views from respondents on this issue.
9. In a similar vein, there are some circumstances where a company may be accused of committing a criminal offence, for instance corporate manslaughter. Companies do not currently qualify for representation under legal aid and these cases are often complex and take a significant amount of time to progress through the Criminal Justice System (CJS). This means that, in those circumstances where a company is acquitted, claims from Central Funds under private rates can run into several million pounds for one case. Given the huge cost of many of these cases, coupled with the need to target resources effectively, we are considering whether these rates should also be capped to their legal aid equivalent. To support this position we will be conducting research over the consultation period to assess the types of business currently prosecuted under criminal legislation and will factor our findings, particularly with regard to the potential effect on small businesses, into our final impact assessment. As part of this, we would welcome any views and evidence from providers that have represented companies in such cases that could help inform any final decision.
10. The purpose of this consultation is therefore twofold. For one, we are looking to ensure that Crown Court means testing does not create an increase in demands on a Central Funds budget that is already overspent. At the same time, we are taking this opportunity to consider the other options available for reforming the current system of Central Fund payments to bring the existing overspend under control.

## The current system

11. Central Funds payments are currently available in criminal cases for:
- Expert, professional and lay witnesses
  - Acquitted defendants; and
  - Private prosecutors

The award of these costs is governed by The Prosecution of Offences Act 1985, which states that a court may make an order to a private prosecutor or acquitted defendant for:

"such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings".

12. Under Section 20 of the Act the Lord Chancellor has the right to make regulations for the governance of costs awarded in criminal cases and is specifically authorised to fix the:

"...scales or rates of payments of any costs payable out of Central Funds in pursuance of any costs order, the circumstances in which and conditions under which such costs may be allowed and paid and the expenses which may be included in such costs".

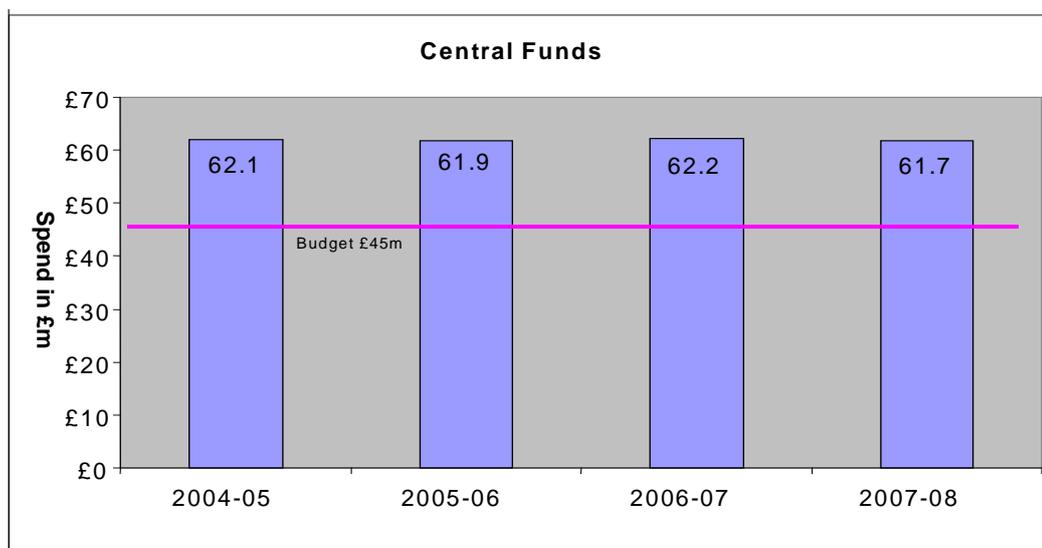
13. Whilst the Lord Chancellor has not used his powers to fix rates for the payment of claimants' legal expenses, he has set the rates payable for their personal incidental expenses. He has also fixed the rates payable to lay and professional witnesses and, with the agreement of HM Treasury, has issued guideline rates for expert witnesses' attendance at court and for the costs of their reports. These can be found at [www.hmcourts-service.gov.uk/infoabout/allowances/index.htm](http://www.hmcourts-service.gov.uk/infoabout/allowances/index.htm) and are not considered within this paper.

14. Under the Act and associated regulations, the Costs in Criminal Cases (General) Regulations 1986, therefore, a private prosecutor, an acquitted defendant, or a successful appellant in the Crown Court may, subject to judicial consent, be paid a sum representing compensation for the costs actually and reasonably incurred by them. Should there be any doubt as to whether any costs have been reasonably incurred or are reasonable in their amount, then that doubt must be exercised in favour of the Central Fund.

15. There are two ways of ascertaining the amount of these legal expenses to be paid. One method is for a court to specify the amount to be paid when they are making a costs order at the time of the hearing. If the receiving party agrees to that figure, this is the amount paid from Central Funds. The alternative, and more common, approach is for the amount of costs to be determined by an officer of the Ministry of Justice (from Her Majesty's Court Service (HMCS)) in accordance with the terms of the General Regulations.
16. The assessment of 'reasonable' legal expenses is a discretionary and subjective process. Solicitors' fees are, broadly speaking, assessed by multiplying the time they have actually and reasonably spent on a case, by an appropriate hourly rate. This relates to the historic payment system for legal aid and is not necessarily in step with the reforms made by shifting to a remuneration system predicated on fixed, standard and graduated fee schemes.

## Current expenditure

17. The allocation for Central Funds was fixed at £45 million per annum in 2003/04, and has remained at that level ever since despite the fact that the cash out-turn in every subsequent year has been over £60 million. The current forecast for expenditure in 2008/09 is £70 million.



18. The level of Central Funds expenditure is also vulnerable to high cost one-off cases where privately funded defendants, often in circumstances where a company has been accused of a criminal offence, are acquitted. For example, in one recent high profile case, Central Funds payments totalling £21 million were made to two organisations between 2005/06 and 2006/07.

19. Overall, in 2007/08 Central Funds expenditure can be broken down approximately as follows:

- High cost acquitted defence costs (Crown Court) - £8 million
- Acquitted defence costs (Crown Court) – £14 million
- Acquitted defence costs (magistrates' court) – £19 million
- Interpreters - £12 million
- Defence witnesses – £3 million
- Medical reports - £2 million
- Other costs - £4 million

In 2007/08, therefore, acquitted defence costs in all areas accounted for approximately £41 million expenditure, 66% of the total expenditure in that year. Given that the other areas that can claim from Central Funds are already subject to fixed rate payments, it is here that the need for reform is greatest.

20. For the avoidance of doubt, the options outlined in this paper will not result in any change to payment of costs for private prosecutors, for instance charities such as the RSPCA. Nor will these reforms affect the current arrangements for the payments of witnesses, medical experts or interpreters, for whom costs will continue to be awarded and assessed as they are now.

### Current levels of defence costs

21. At present, Central Funds costs are paid to a defendant's solicitor's firm, with advocacy costs for counsel paid under disbursement.
22. The hourly rates and fees charged by privately funded solicitors and advocates when a defendant is acquitted are, at present, considerably more expensive than legal aid rates. For example, the Supreme Courts Costs Office guideline hourly rate for a privately funded senior solicitor based in London (excluding the City or the West End) ranges from £210 to £246 per hour. These rates cover a broad range of criminal work from the routine to the problematic and may be increased significantly if a case is considered particularly substantial or complex. For advocates, rates are set on a case by case basis and paid under disbursement, which is subsequently subject to scrutiny for reasonableness by HMCS.
23. In comparison, a London based senior solicitor acting in a relatively straightforward Crown Court case is paid a standard legal aid rate of £55.75 per hour, which, if the case is considered more complicated, may be increased to up to £111.50 per hour. As well as this, a senior solicitor acting in the most serious and complex very high cost case would receive £152.50 per hour.
24. Given this, coupled with the evident sustainability of these fees as evidenced by the number of criminal legal aid providers, we believe that there is a strong case for reforming the current payment of legal costs from Central Funds. We are aware that in doing this we must balance effectively the need to pay fair rates in criminal cases for practitioners, whilst using taxpayers' money effectively and responsibly.

**Question 1: Do you agree that Central Funds payments should be reformed to ensure that the taxpayer does not subsidise disproportionately high private rates for legal representation in criminal cases?**

## Options for reform

25. There are 3 options that we are currently considering for the reform of Central Funds payments.

### **Option 1 – no change to the present system**

This is not considered attractive given the ongoing overspend and wider pressures on the Ministry of Justice's budget.

### **Option 2 - restricted access to Central Funds**

This would mean that individuals who fail to apply for legal aid in Crown Court cases would no longer be eligible for Central Funds payments if acquitted. To clarify, this would mean that private paying individuals in the Crown Court could no longer claim from Central Funds. We are also proposing that individuals who failed the Interests of Justice test in magistrates' court cases, and in appeals to the Crown Court, but subsequently obtained legal advice and representation, would no longer be able to claim back costs from Central Funds.

### **Option 3 – cap Central Funds payments in all cases for acquitted defendants to the relevant legal aid rates**

This would see all payments made in both magistrates' court cases and Crown Court cases for private paying clients restricted to legal aid rates.

26. A more detailed explanation of the potential implications of options 2/3 and the underlying rationale for such an approach is outlined below. This does not include further detail relating to Option 1 as this would effectively result in the maintenance of the present system as outlined above. It should be noted that Options 2 and 3 are not considered to be mutually exclusive and that all of the approaches outlined could conceivably be implemented, subject to the outcome of further research and the views expressed in this consultation.

27. We have also published a draft impact assessment alongside this consultation paper that you should consider when providing your response to the questions contained in the following section. This can be found on the Ministry of Justice website at: [www.justice.gov.uk/publications/consultations.htm](http://www.justice.gov.uk/publications/consultations.htm)

### **Option 2 - restricted access to Central Funds**

28. This option would see a restriction on access to Central Funds from the current position. This approach would not affect companies should it be implemented in isolation. In practical terms, the proposals considered here would mean that:
29. Any individual who failed to apply for legal aid representation at the Crown Court would not subsequently qualify for reimbursement of private costs from Central Funds; and

30. Any individual who failed the Interests of Justice test, either in the magistrates' court, or on appeal to the Crown Court, would no longer qualify for reimbursement from Central Funds. Those that passed the Interests of Justice test but had failed the means test and were subsequently acquitted would continue to be able to reclaim their costs.
31. We believe that either of the approaches outlined within this option could be implemented and respondents to this consultation should consider their views on each, both in isolation and alongside each other.

## Defendants in the Crown Court

32. The process for magistrates' court means testing is quite different to that proposed for the Crown Court, operating on an exclusionary basis given that these cases are considered affordable in their entirety to those of a certain means. In contrast, Crown Court cases at trial cost approximately £2,800 on average at legal aid rates as against the category 2 lower standard fee in London of just under £500 for a magistrates' court case – meaning it would not be fair in the former to have a straightforward exclusionary scheme. In addition, a defendant in the magistrates' court is also subject to the outcome of the Interests of Justice test, which, under the proposals for Crown Court means testing, all cases heard on indictment in the Crown Court would pass automatically.
33. The proposals for means testing in the Crown Court therefore ensure that all defendants undergoing a trial on indictment would retain their access and entitlement to legal aid funding for the duration of their case. Although some defendants may have to pay an upfront contribution depending on their means, this would be refundable in full, except in exceptional circumstances, e.g. if the defendant's conduct has brought suspicion on him/herself by misleading the prosecution into believing the case against him/her was stronger than it was, or where the defendant has wilfully sought to avoid payment and enforcement action has been required.
34. Some defendants may decide, however, that they do not want to apply for legal aid and would prefer to pay for their legal representation privately. Should defendants take this option, it is our view at this stage that, if subsequently acquitted, they should not be eligible for restitution of their costs from Central Funds. Given that all individuals facing trial on indictment would retain their right to legal aid under the means test, it does not seem to be in the public interest for those that decide to fund their case privately to be able to reclaim money from public funds.

35. The potential savings from this proposal are not quantifiable given the fact that each client would take a decision on their representation on a case by case basis. Indeed, currently private paying clients take on the risk of paying privately for their case without assurance that they will be acquitted, and as such receive payments from Central Funds. We are not of the view at this stage, therefore, that this would have a significant effect on the decision made by clients as to whether to pursue publicly funded legal advice. We believe at this stage that this is both an appropriate, and, given the proposals for Crown Court means testing, necessary, approach to the reform of payments from Central Funds.

### Appellants in the Crown Court

36. We propose that successful appellants who fail the Interests of Justice test in appeals to the Crown Court should be subject to the same provisions as defendants who fail the Interests of Justice test in the magistrates' court, i.e. they would not be able to recover their private legal costs from Central Funds.

### Defendants in the Magistrates' Court

37. We are also considering under this option whether, where a defendant fails the Interests of Justice test, they should receive payment from Central Funds on acquittal.
38. Currently, whether or not an applicant is granted a representation order for legal aid in the magistrates' court depends on the outcome of both the Interests of Justice and means tests. In practical terms this means that:
- Both tests must be carried out before a decision on representation is made.
  - If either test is failed, a representation order will not be granted.
  - A representation order cannot be granted before both tests are passed.
  - A court (i.e. the bench) cannot override the means assessment or grant the representation order when the means test has been failed.
  - Applicants can appeal a refusal on the Interests of Justice test.
  - Applicants can ask for a hardship review of their means test result.
  - If either the appeal or the review is unsuccessful, the overall decision remains a refusal.

39. The Interests of Justice test itself determines whether an applicant is entitled to a Representation Order based on the merits of the case. This is also known as the 'Widgery Criteria'. As part of this test, the applicant must indicate which of the following criteria they believe apply to their case:

- It is likely that they will lose their liberty.
- They have been given a sentence that is suspended or non-custodial. If they break this, the court may be able to deal with them for the original offence.
- It is likely that they will lose their livelihood.
- It is likely that they will suffer serious damage to their reputation.
- A substantial question of law may be involved.
- They may not be able to understand the court proceedings or present their own case.
- They may need witnesses to be traced or interviewed on their behalf.
- The proceedings may involve expert cross-examination of a prosecution witness.
- It is in the interests of another person that they are represented.
- Any other reasons.

It is therefore only the most straightforward of cases and where a custodial sentence is highly unlikely to apply, such as low level driving offences, that do not pass the Interests of Justice test.

40. The magistrates' court means test itself operates on a simple "in or out" basis, with an initial test that assesses an applicant's income and how this is spread between any partners and children. Following this, a more detailed assessment is carried out if, through the initial test, the applicant's adjusted income is calculated to be more than a set minimum level (currently £12,475) and less than a set maximum (currently £22,325). This assessment considers the applicant's disposable income after deducting tax, maintenance and other annual costs from their gross annual income. After all of these costs are accounted for, only if the defendant's annual disposable income exceeds £3,398, is the defendant held to be capable of paying for privately funded defence costs. This is estimated at an average of £1,500 based on a sample of bills submitted to HMCS. Hardship Reviews can also be carried out if an applicant can show they are genuinely unable to fund their own representation.

41. Under this option, where an individual has failed the means test but passed the Interests of Justice test, they would still be able to claim their defence costs from Central Funds if acquitted. Additional options for reform in these cases can be found below. However, if an individual were to have failed the Interests of Justice test, but still obtained the services of a solicitor, they would no longer be able to reclaim this expense if acquitted. We intend to conduct additional research to assess all of the potential savings outlined in this consultation over the next 12 weeks, however, should this be implemented, we believe that it would offer savings of approximately £5 million to Central Funds.
42. We believe that this is a fair position as, in these straightforward cases, defence representation is not a requirement for an individual. Whilst they may, and have the right to, choose the support of a solicitor, we are not of the view at this stage that it is an effective use of taxpayers' money to continue to pay for these costs out of Central Funds. Magistrates' courts are traditionally set up to deal with litigants in person and have qualified legal advisers who can, and do, assist litigants in person. There is also a well-established appeal route in place providing a further safety net for those defendants concerned their convictions are unsound. Defendants would continue to have the support of the existing on-site legal adviser service on the day of their case for ad hoc advice under our proposals, which we believe is sufficient in these cases. Whilst there may be an argument that this may increase the number of litigants in person at the magistrates' court, it is also worth outlining that no individual can be sure of the outcome of their case when deciding to pay for legal representation. We are not of the view at this stage, therefore, that the approach we have outlined would significantly affect the actions of individuals in these minor cases.

**Question 2: Do you agree that it is right that individuals who are eligible for legal aid in Crown Court cases, but choose instead to pay privately for their legal representation, should not be able to reclaim their costs from Central Funds in future? Please provide supporting reasons for your answer.**

**Question 3: Do you agree that individuals who have failed the Interests of Justice test in the magistrates' court should no longer be able to claim back any legal costs they have incurred from Central Funds? Please provide supporting reasons for your answer.**

### Option 3 – capping Central Funds payments

43. The Government believes that the rates paid under legal aid for criminal cases are fair and proportionate for the complexity and expertise required for the full range of criminal cases conducted within the Criminal Justice System. The Legal Services Commission (LSC) currently contracts with over 1800 solicitors firms for criminal legal aid, whilst the number of barristers engaged in this work is also healthy, totalling approximately 5000 in 2007/08. Criminal legal aid therefore remains attractive to a large number of firms and individual practitioners. The LSC also has a statutory duty to maintain the Criminal Defence Service, which means that it has to ensure that rates are set at a level which will attract a sufficient number of suppliers into the legal aid market to meet the needs of the Criminal Justice System.
44. Given this, we are considering whether it would be appropriate to limit both magistrates' court and Crown Court payments from Central Funds to the relevant legal aid rates for both solicitors and barristers (who are paid via disbursement claims by solicitors under the current regime). This would affect both private paying individuals and companies. For cases in the Crown Court, for example, this approach would mean that all cases were paid at the levels outlined in the relevant remuneration scheme, such as the litigators' and advocates' graduated fee scheme. Using expenditure from 2007/08 as a baseline, and excluding any high cost cases, we anticipate that this could generate savings of £20 million to the Central Funds budget, with £12 million coming from the magistrates' court and £8 million from the Crown Court.
45. In individual high cost cases we also believe that there are significant savings that could be made from this approach. For example, in one recent high profile case, had payment been restricted to legal aid rates, the cost would have been approximately £10 million in total, a saving of £11 million.
46. As noted above, the Lord Chancellor already has the power under the Costs in Criminal Cases (General) Regulations 1986 to set the rates payable out of Central Funds for defence work. This option would therefore be relatively straightforward to implement.

47. These proposals would only affect individuals in the Crown Court in cases on indictment should we not implement our proposal in option 2 to stop access to Central Funds in Crown Court cases for private paying individuals. We are therefore focusing here primarily on those that fail the means test, but pass the Interests of Justice test, in the magistrates' court. We accept that some private paying individuals accused of criminal offences may consider that they would find it difficult to negotiate rates similar to those available under legal aid from defence solicitors or counsel. In particular, those clients excluded from legal aid rates via the magistrates' court means test could consider this approach unfair.
48. However, given the number of providers available in the legal aid market, we would suggest that those individuals who wished to procure defence services for a case in the magistrates' court would be in a strong position to negotiate comparable rates to those offered under legal aid. A client may be prepared to pay a higher rate to a particular firm on the basis of their local reputation. However, it could be argued that it is not appropriate for the taxpayer to foot the bill for this additional, and optional, cost, given that all contracted legal aid providers will in the future have to meet the LSC's quality assurance criteria. We would suggest that it is not an efficient use of public funds, particularly in the current financial climate, to subsidise those individuals wishing a 'gold-plated' legal service. There is also current inconsistency nationally on the rates paid from Central Funds by individual courts. The Ministry of Justice has therefore commenced research that is intended to identify the extent of this to inform any final decision in this area. The early findings from this have informed the projected savings outlined in this option. Additionally, the National Taxing Team at HMCS have recently taken over responsibility from justices' clerks for determining defendants' costs orders from Central Funds, which should help to achieve consistency in the sums allowed. Some administrative savings may also come from this transfer of responsibility. We would welcome views from providers on the issue of private paying clients at the magistrates' court and the reasons behind any current difference in the services offered to legally aided, as opposed to privately funded, clients, and their experiences in dealing with individual courts.

49. We also accept that, unlike individuals, companies do not qualify for legal aid and therefore may argue that they cannot access legal aid rates. However, as already outlined, we are of the view that the taxpayer should not be required to subsidise private fees when the legal aid rates we pay are both fair and allow for a quality service to be provided. This should mean that there is no particular reason why competitive pressures would not make them available on the private market.
50. Unlike individuals, companies prosecuted under criminal legislation do not face the risk of imprisonment and may also have access to insurance to protect them against actions relating to, for instance, corporate manslaughter. Just as companies do not have access to legal aid in civil cases, it is arguable that they should not have access to publicly funded defence costs in criminal cases above those offered at legal aid rates. As with privately paying individuals, we are of the view at this stage that companies should be in a good position to negotiate favourable rates with their legal teams given the number of providers available and the evident sustainability of legal aid rates. Any additional 'gold plating' that a company may wish to fund would then be subject to a clearly defined business decision, taken in full knowledge of the rates available from Central Funds.
51. Under the current system, companies can already have their private cost claims assessed downwards in high cost cases. For example, in one recent case, the defence costs paid from Central Funds were reduced to £2.64 million from an original claim of £3.5 million. However, this arguably builds uncertainty into the system for companies, their defence teams and potentially insurance companies about the level of remuneration to which they are entitled. It also runs the risk of inconsistency between cases due to the subjective nature of some elements of the assessment.

52. Overall, we consider that making clear the level of payment that an acquitted defendant, be it a company or individual, has access to at the outset of a case, would build greater certainty and consistency into the system and help them make informed decisions when procuring their defence. It should also add greater clarity for companies about the insurance arrangements they may wish to make should they wish to protect themselves against legal action in criminal matters, such as corporate manslaughter, where liability amounts to a fine charged against a company rather than criminal prosecution against an individual in a company<sup>2</sup>.
53. Similarly, by clarifying from the outset the rates available from the Government, with the risk of a reduction via HMCS assessment greatly reduced, clients would be able to have greater certainty in their negotiations with their legal advisers regarding the private rate payable. Any liability over and above legal aid rates would be clearly visible to firms from the outset helping them to plan financially for their case and negotiate throughout its progress as required.
54. As with private paying clients in the magistrates' court, we welcome views, particularly from providers, on whether it is appropriate to limit payment from Central Funds to companies to legal aid rates. Any supporting evidence, for example where a provider has been involved in a private paying case and can outline the difference in service and reasons for this, compared with that provided under legal aid, would be welcomed. We will also be looking in more detail during consultation at the types of cases and companies currently prosecuted under criminal legislation to identify any disproportionate impact on small businesses and whether it would be appropriate to take action to mitigate this as part of our plans.

**Question 4: Do you agree that it is appropriate to cap payments from Central Funds to the relevant legal aid rates for individuals who have failed the means test in the magistrates' court? Please provide supporting reasons for your answer.**

**Question 5: Do you agree that it is appropriate to cap payments from Central Funds to the relevant legal aid rates for companies in either the magistrates' or the Crown Court? In particular do you feel that a firm's size should be taken into account? Please provide supporting reasons for your answer.**

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<sup>2</sup> see the Corporate Manslaughter and Corporate Homicide Act 2007  
[http://www.opsi.gov.uk/acts/acts2007/ukpga\\_20070019\\_en\\_1](http://www.opsi.gov.uk/acts/acts2007/ukpga_20070019_en_1)

**Question 6: What amendments, if any, would you make to any of the options outlined should we decide to progress with the reform of Central Funds payments? Please provide supporting reasons for your answer.**

## Questionnaire

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

**Question 1: Do you agree that Central Funds payments should be reformed to ensure that the taxpayer does not subsidise disproportionately high private rates for legal representation in criminal cases?**

**Question 2: Do you agree that it is right that individuals who are eligible for legal aid in Crown Court cases, but choose instead to pay privately for their legal representation, should not be able to reclaim their costs from Central Funds in future? Please provide supporting reasons for your answer.**

**Question 3: Do you agree that individuals who have failed the Interests of Justice test in the magistrates' court or on appeal to the Crown Court should no longer be able to claim any legal costs they have incurred back from Central Funds? Please provide supporting reasons for your answer.**

**Question 4: Do you agree that it is appropriate to cap payments from Central Funds to the relevant legal aid rates for individuals who have failed the means test in the magistrates' court or on appeal to the Crown Court? Please provide supporting reasons for your answer.**

**Question 5: Do you agree that it is appropriate to cap payments from Central Funds to the relevant legal aid rates for companies in either the magistrates' or the Crown Court? Please provide supporting reasons for your answer.**

**Question 6: What amendments, if any, would you make to any of the options outlined should we decide to progress with the reform of Central Funds payments? Please provide supporting reasons for your answer.**

**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 29 January 2009 to:

**Annette Cowell**  
**Criminal Legal Aid Strategy Division**  
**Ministry of Justice**  
**5th Floor**  
**102 Petty France**  
**London SW1H 9AJ**

**Tel: 020 3334 4217**  
**Fax: 020 3334 4295**

**Email: [annette.cowell@justice.gsi.gov.uk](mailto:annette.cowell@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 [www.justice.gov.uk/publications/consultations.htm](http://www.justice.gov.uk/publications/consultations.htm)

Alternative format versions of this publication can be requested from Annette Cowell using the above telephone number/email address.

### Publication of response

A paper summarising the responses to this consultation will be published as soon as possible after consultation. The response paper will be available on-line at [www.justice.gov.uk/publications/consultations.htm](http://www.justice.gov.uk/publications/consultations.htm)

### Representative groups

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

### Confidentiality

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

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

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

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

## Impact Assessment

### Summary: Intervention & Options

<b>Department /Agency:</b> <b>Ministry of Justice</b>	<b>Title:</b> <b>Impact Assessment of reform of Central Funds payments to acquitted defendants in criminal cases</b>	
<b>Stage:</b> Consultation	<b>Version:</b> 1.0	<b>Date:</b> 6 November 2008
<b>Related Publications:</b> Central Funds consultation document (November 2008), Crown Court means testing consultation document and impact assessment (November 2008).		

**Available to view or download at:**

<http://www.justice.gov.uk/publications/consultations.htm>

**Contact for enquiries:** Annette Cowell

**Telephone:** 020 3334 4217

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

Means testing in the magistrates' court has led to an increase in claims for costs from acquitted defendants who have paid for their defence privately at rates higher than legal aid rates. Our proposals for Crown Court means testing could add further pressure if individuals choose to pay privately rather than apply for legal aid. Annual expenditure also currently exceeds the Central Funds budget by over £15 million with little prospect of a budget increase, whilst the current system exposes us to large fees in one-off high cost cases against companies that do not qualify for legal aid.

**What are the policy objectives and the intended effects?**

To control rising costs and live within the fixed Central Funds budget. The Government is committed to the principle that those found innocent of charges requiring legal advice should be reasonably compensated for any costs they have incurred in their defence, and that individuals who cannot afford to pay for their own defence should be entitled to legal aid. However, we wish to use taxpayers' money responsibly and avoid subsidising significantly higher private defence rates, particularly for those who have access to legal aid rates or insurance schemes, through Central Funds.

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

Three policy options have been considered: Option 1 – no change; Option 2 – restrict access to Central Funds to only those acquitted defendants that have undergone the proposed Crown Court means test, and to those that have passed the Interests of Justice test in the magistrates' court (with no change to the current arrangements for companies); Option 3 – cap all Central Funds payments to the relevant legal aid rates. We are open-minded on all options, which are not mutually exclusive. We welcome evidence from providers and the market.

**When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?** The policy will be reviewed in the light of responses to the consultation document and within two years of implementation.

**Ministerial Sign-off** For SELECT STAGE Impact Assessments:

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

Signed by the responsible Minister:

Lord Bach

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

.....Date: 6 November 2008

## Summary: Analysis & Evidence

<b>Policy Option: 1</b>	<b>Description: No change to the current system</b>
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<b>COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' There will be no change to the current level of costs borne by the Central Funds budget for payments to acquitted defendants (£41 million in 2007/08) and the Ministry of Justice will also bear the risk associated with higher claims following the proposed introduction of Crown Court means-testing.		
	<b>One-off</b> (Transition)		<b>Yrs</b>	
	<b>£ 0</b>		1	
	<b>Average Annual Cost</b> (excluding one-off)			
	<b>£ 0</b>		<b>Total Cost (PV)</b>	<b>£ 0</b>
Other <b>key non-monetised costs</b> by 'main affected groups' None identified.				

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>	Description and scale of <b>key monetised benefits</b> by 'main affected groups'		
	<b>One-off</b>		<b>Yrs</b>	
	<b>£ 0</b>		1	
	<b>Average Annual Benefit</b> (excluding one-off)			
	<b>£ 0</b>		<b>Total Benefit (PV)</b>	<b>£ 0</b>
Other <b>key non-monetised benefits</b> by 'main affected groups' None identified.				

**Key Assumptions/Sensitivities/Risks** It is assumed that means-testing is introduced in the Crown Court as planned in April 2009.

Price Base Year 2007	Time Period Years 3	<b>Net Benefit Range (NPV)</b> <b>£ 0</b>	<b>NET BENEFIT (NPV Best estimate)</b> <b>£ 0</b>
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What is the geographic coverage of the policy/option?	England and Wales			
On what date will the policy be implemented?	06.04.2009			
Which organisation(s) will enforce the policy?	N/A			
What is the total annual cost of enforcement for these organisations?	<b>£ 0</b>			
Does enforcement comply with Hampton principles?	Yes/No			
Will implementation go beyond minimum EU requirements?	N/A			
What is the value of the proposed offsetting measure per year?	<b>£ 0</b>			
What is the value of changes in greenhouse gas emissions?	<b>£ 0</b>			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)			(Increase - Decrease)
Increase	£ 0	Decrease	£ 0
		<b>Net</b>	<b>£ 0</b>

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Summary: Analysis & Evidence

<b>Policy Option: 2</b>	<b>Description: Restrict access to Central Funds to certain classes of acquitted defendants</b>
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<b>ANNUAL COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' Magistrates' court defendants: – £5 million per annum. We are unable to estimate the total cost to Crown Court defendants.
	<b>One-off</b> (Transition)	<b>Yrs</b>	
		1	
	<b>Average Annual Cost</b> (excluding one-off)		
			<b>Total Cost (PV)</b>
Other <b>key non-monetised costs</b> by 'main affected groups' None identified.			

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups'  Savings to Ministry of Justice Central Funds budget – £5 million per annum associated with magistrates' court cases. We are unable to estimate the savings to Central Funds associated with Crown Court cases should means testing be implemented.
	<b>One-off</b>	<b>Yrs</b>	
	£ 0	1	
	<b>Average Annual Benefit</b> (excluding one-off)		
£ 5 million			<b>Total Benefit (PV)</b> £
Other <b>key non-monetised benefits</b> by 'main affected groups' None identified.			

**Key Assumptions/Sensitivities/Risks** It is assumed that means-testing is introduced in the Crown Court as planned in April 2009. The information and costs contained in this initial IA are the best currently available, but will be updated as necessary.

Price Base Year 2008	Time Period Years 3	<b>Net Benefit Range (NPV)</b> £	<b>NET BENEFIT (NPV Best estimate)</b> £
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What is the geographic coverage of the policy/option?		England and Wales			
On what date will the policy be implemented?		06.04.2009			
Which organisation(s) will enforce the policy?		N/A			
What is the total annual cost of enforcement for these organisations?		£ 0			
Does enforcement comply with Hampton principles?		Yes/No			
Will implementation go beyond minimum EU requirements?		Yes/No			
What is the value of the proposed offsetting measure per year?		£ 0			
What is the value of changes in greenhouse gas emissions?		£ 0			
Will the proposal have a significant impact on competition?		No			
Annual cost (£-£) per organisation (excluding one-off)		Micro	Small	Medium	Large
Are any of these organisations exempt?		Yes/No	Yes/No	N/A	N/A

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)				(Increase - Decrease)	
Increase	£ 0	Decrease	£ 0	<b>Net</b>	£ 0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Summary: Analysis & Evidence

<b>Policy Option: 3</b>	<b>Description: Cap Central Funds payments in all cases for acquitted defendants to the relevant legal aid rates</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>	Description and scale of <b>key monetised costs</b> by 'main affected groups'  Magistrates' court defendants: – £12 million per annum. Crown Court defendants – £8 million per annum.  High cost cases – No annual cost available, but was £8 million in 2007/08.
	<b>One-off</b> (Transition) <span style="float: right;">Yrs</span>	
	£ <span style="float: right;">1</span>	
	<b>Average Annual Cost</b> (excluding one-off)	
£ 20 million +	<b>Total Cost (PV)</b>	£
Other <b>key non-monetised costs</b> by 'main affected groups' There may be some downward pressure on private rates for criminal defence work if individuals negotiate rates that are closer to those available under legal aid but we are unable to quantify the impact on solicitors, advocates or firms.		

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>	Description and scale of <b>key monetised benefits</b> by 'main affected groups' Savings to Ministry of Justice central funds budget – £12 million per annum for magistrates' court cases and £8 million per annum for Crown Court cases. High costs cases - No annual cost available, but was £8 million in 2007/08.
	<b>One-off</b> <span style="float: right;">Yrs</span>	
	£ 0 <span style="float: right;">1</span>	
	<b>Average Annual Benefit</b> (excluding one-off)	
£ 20 million +	<b>Total Benefit (PV)</b>	£
Other <b>key non-monetised benefits</b> by 'main affected groups' None identified.		

**Key Assumptions/Sensitivities/Risks** It is assumed that means-testing is introduced in the Crown Court as planned in April 2009. The information and costs contained in this initial IA are the best currently available, but will be updated as necessary.

Price Base Year	Time Period Years	<b>Net Benefit Range (NPV)</b> £	<b>NET BENEFIT (NPV Best estimate)</b> £
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What is the geographic coverage of the policy/option?	England and Wales				
On what date will the policy be implemented?	06.04.2009				
Which organisation(s) will enforce the policy?	N/A				
What is the total annual cost of enforcement for these organisations?	£ 0				
Does enforcement comply with Hampton principles?	Yes/No				
Will implementation go beyond minimum EU requirements?	Yes/No				
What is the value of the proposed offsetting measure per year?	£ 0				
What is the value of changes in greenhouse gas emissions?	£ 0				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off)	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; background-color: #FFFF00;">Micro</td> <td style="width: 25%; background-color: #FFFF00;">Small</td> <td style="width: 25%; background-color: #FFFF00;">Medium</td> <td style="width: 25%; background-color: #FFFF00;">Large</td> </tr> </table>	Micro	Small	Medium	Large
Micro	Small	Medium	Large		
Are any of these organisations exempt?	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> </tr> </table>	No	No	N/A	N/A
No	No	N/A	N/A		

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)				(Increase - Decrease)
Increase	£ 0	Decrease	£ 0	<b>Net</b>
				£ 0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Evidence Base (for summary sheets)

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

### Introduction and rationale

1. This impact assessment is concerned with proposals to reform the way in which costs from Central Funds are awarded for the defence of privately funded defendants who are acquitted in criminal cases in England and Wales. The Central Funds budget, held by the Ministry of Justice, has been held at £45 million per annum, although the cash out-turn in each year since 2003/04 has stood at around £62 million. The current system also exposes the Government to meeting privately funded defence costs in a small number of very high cost cases in which the bill can run into several millions of pounds. It is anticipated that our proposals to introduce means testing in the Crown Court would place further pressure on this budget.
2. The Government considers that reform is necessary in order to control rising costs and bring Central Funds costs within the available budget. The Prosecution of Offences Act 1985 gives courts the power to order that in certain circumstances, the accused should receive a payment out of central funds in respect of his costs. It also gives the Lord Chancellor the power to make regulations making provisions about, amongst other things, the rates of payments, and circumstances in which and the conditions under which such costs may be allowed and paid. We remain committed to ensuring that defendants who are acquitted of offences are compensated for the reasonable costs they have incurred in their defence. However, we believe that this should be subject to certain limitations, which are explained below. We are also committed to the principle that individuals who cannot afford to pay for their own defence should receive support from the state in the form of legal aid. However, the current system has not kept pace with legal aid reform. There are some anomalous areas where arguably the “reasonableness” definition is not being met. In certain circumstances, privately funded acquitted defendants are effectively being treated more generously than those whose defence costs are met by legal aid.
3. Two options have been developed that are intended to address these points and they are explained in more detail below. Option 1 – no change to the current system – has been included for comparative purposes. Option 2 would address the “reasonableness” of claims on the Central Funds budget by restricting access to Central Funds to those defendants who do not have access to alternative funding in the form of legal aid, but who pass the Interests of Justice test so that they would, but for their means, be entitled to legal aid. Option 3 would introduce a cap, thereby bringing Central Funds payments into line with those available under legal aid. The Government is open-minded on all options, which are not considered to be mutually exclusive, i.e. both options 2 and 3 could be implemented following consultation. We are particularly minded to implement the restriction of access to Central Funds to individual defendants who choose not to apply for legal aid in the Crown Court. This would mitigate the impact of the proposed introduction of means testing in the Crown Court, by ensuring that individuals who choose not to accept legal aid when it is available, albeit that they may have to make a contribution, and instruct lawyers privately, would not be able to recover their private costs from Central Funds.
4. The information in this impact assessment is the best currently available. This document will be revised in the light of responses to the consultation, and any other information that may be forthcoming in the meantime, and an updated version will be published alongside the response to consultation. We have committed to conducting additional research on the options outlined during consultation.

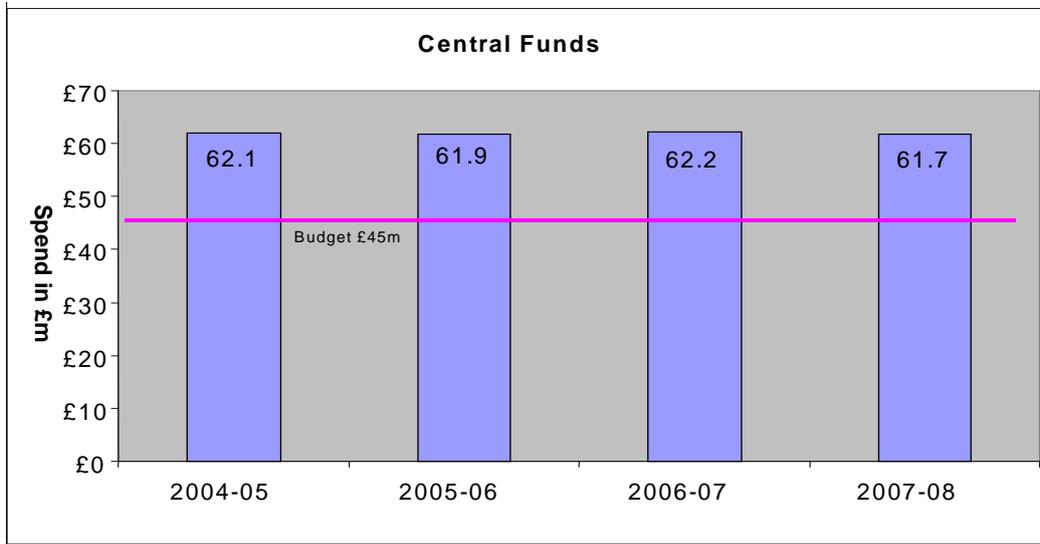
## Background

5. Under the Prosecution of Offences Act 1985, and the Costs in Criminal Cases (General) Regulations 1986, acquitted defendants in both the magistrates' and Crown Courts, and successful appellants in the Crown Court, are entitled to have their 'reasonable' legal costs and expenses paid for from Ministry of Justice Central Funds (a "defendant's costs order"), unless the court decides that an order should not be made because the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it is. Such orders apply only to those defendants that have paid for their defence privately and not to those whose defence costs have been met under the legal aid scheme. (Legally aided defendants can recover out of pocket expenses, such as travelling to court.) The Lord Chancellor has the power to set the scale or rate of payment from Central Funds under the Act and its associated Regulations (*Costs In Criminal Cases (General) Regulations 1986*) although this power has never been used. As a result, the rates available from Central Funds for those defendants that have paid privately are higher than those accessible under legal aid.
6. There are two ways of ascertaining the amount of legal expenses to be paid. One method is for the court to specify the amount to be paid when making a costs order at the time of a hearing. If the defendant agrees to that figure, it will be paid from Central Funds. The alternative and more common approach is for the costs to be determined by an officer of Her Majesty's Court Service (HMCS) in accordance with the terms of the General Regulations, based on bills submitted by the defence team. The assessment of 'reasonable' legal expenses is a discretionary and subjective process and is normally based on the amount of time spent on a case multiplied by an hourly rate.
7. In general, hourly rates for privately paying clients are significantly higher than those paid to solicitors and barristers under legal aid. For example, the Supreme Court Costs Office guideline hourly rate for a privately funded senior solicitor based in London – although outside the City/West End areas – ranges from £210 to £246 per hour. These rates cover a broad range of criminal work from the routine to the problematic and may be increased if a case is substantial or complex. For advocates, rates are set on a case by case basis and paid under disbursement. While the rates quoted above provide an indication, we do not have any detailed information on private criminal defence rates since these are a matter for private negotiation between the solicitor and/or barrister and their client.
8. The equivalent legal aid hourly rates are, on the other hand, much lower. A London-based senior solicitor acting in a relatively straightforward Crown Court case is paid the standard legal aid rate of £55.75 per hour; if the case is unusually complex, this may be increased to a maximum of £111.50. A senior solicitor acting in the most serious and complex very high cost case is paid £152.50 per hour.

## Current position

9. The current budget for Central Funds is £45 million per annum, but actual cash out-turn over the past four years has been in the region of £62 million per annum as shown in the figure below. The current forecast for expenditure in 2008/09 is £70 million.

**Figure: Central Funds out-turn 2004/05 to 2007/08**



10. This includes expenditure on expert witnesses, interpreters, medical reports and other costs that are outside the scope of the current proposals. In 2007/08, it is estimated that expenditure of £62 million was divided amongst:
  - High cost acquitted defence costs (Crown Court) - £8 million
  - Acquitted defence costs (Crown Court) – £14 million
  - Acquitted defence costs (magistrates’ court) – £19 million
  - Interpreters - £12 million
  - Defence witnesses – £3 million
  - Medical reports - £2 million
  - Other costs - £4 million
  
11. The reintroduction of means testing in the magistrates’ court has increased claims on the Central Funds budget. The means test is exclusionary and operates on a simple ‘in or out’ basis and is quite different from our proposals for Crown Court means testing which, for most defendants, would involve a contribution towards the costs of their defence. Under the magistrates’ court means test, if an applicant’s income, adjusted to take family circumstances into account, is more than £22,325 (at current levels), they will fail the means test. If it falls below £12,475 (at current levels) they will pass. If it falls between the upper and lower limit, a more detailed means assessment is undertaken, which considers the applicant’s disposable income after deducting tax, maintenance and other annual costs from their gross annual income. After all of these costs are accounted for, only if the defendant’s annual disposable income exceeds £3,398, is the defendant held to be capable of paying for privately funded defence costs. These are estimated at an average of £1,500, based on a sample of bills received by Her Majesty’s Court Service. A Hardship Review may be carried out if the applicant can show they are genuinely unable to fund their own representation.

12. Acquitted defendants in the magistrates' court who would previously have been able to claim legal aid are now entitled to reclaim any reasonable costs they have incurred in their defence from Central Funds and current estimates suggest the annual cost has been £14 million. Our proposals to introduce means testing in the Crown Court could have a similar effect. Although individual defendants facing trial on indictment would continue to qualify for legal aid in the Crown Court under our proposals (albeit they may be required to make a financial contribution), some could choose to pay for their defence privately rather than go through the financial assessment that will be required. Should these individuals be subsequently acquitted, this could lead to an increase in claims against Central Funds at higher rates than those offered by legal aid. We are unable to quantify the impact at present since it depends on the choices made by individuals in the light of their own particular circumstances.
13. The current system of Central Funds payments also exposes us to significant fees in one-off high cost criminal cases against companies that are not eligible for legal aid. Although criminal prosecutions against defendant companies are rare in the Crown Court, amounting to 0.12% of the total in 2005 (105 prosecutions from a total of 85,165 cases), if these firms are acquitted, the payments from Central Funds can run into millions of pounds. For example, in one recent high profile case, had payment been restricted to legal aid rates, the cost would have been approximately £10 million rather than the actual cost of £21 million.

## **Assessment of the options**

### **Option 1 – No change to the current system**

14. Under this option, we would continue with the current system for the payment of costs to acquitted defendants, and successful appellants in the Crown Court, as outlined in the background section above. It is expected that expenditure in these cases would continue at its current level of approximately £41 million per annum (based on 2007/08 out-turn), subject to any annual fluctuations associated with payments in one-off very high cost cases. In addition, we anticipate that our proposals for Crown Court means testing may well increase costs above their historic level, although we cannot quantify this at present. There would be no impact on acquitted defendants, successful appellants, practitioners or any other groups and no impact on competition or on small firms.
15. This option has been included for comparative purposes, but it is not considered attractive since it would not address the issues identified in the rationale section above.

## **Option 2 – Restrict access to Central Funds to certain classes of acquitted defendants and successful appellants**

### *Defendants in the Crown Court*

16. Under this option, an individual who chose not to undergo the proposed Crown Court means testing process and chose to arrange their own representation privately would not qualify for reimbursement from Central Funds if they were subsequently acquitted. Our research shows the mean average cost of a privately funded case in the Crown Court to be approximately £19,500, based on a sample of bills received by Her Majesty's Court Service. We are unable to quantify the savings associated with this proposal since it would depend on the decisions made by individual defendants based on their own personal circumstances. A defendant who did undergo the means testing process and made a contribution to the costs of his/her defence would normally have his/her contributions refunded in full if he/she was subsequently acquitted, unless the court decided that he/she should pay because his/her own conduct had brought suspicion on him/herself and has misled the prosecution into thinking that the case against him/her was stronger than it was. This is the same test applied by a court when deciding whether to make a defendant's costs order. This group would therefore be unaffected by this proposal. Defendants who appeal to the Crown Court against a magistrates' court conviction and/or sentence would remain subject to the Interests of Justice test, as some of these appeals would not warrant the grant of legal aid. The Interests of Justice test (also known as the '*Widgery Criteria*') is an assessment of the merits of an individual case for the purpose of determining whether legal aid (a representation order) should be granted. The test considers factors such as whether it is likely that the individual will lose their liberty if convicted, whether a substantial question of law may be involved, and their ability to understand the court proceedings. Under this option, appellants who failed the Interests of Justice test would not qualify for reimbursement of legal costs from Central Funds. All cases tried on indictment in the Crown Court would automatically pass the Interests of Justice test and so this restriction would not apply to these cases.

### *Defendants in the magistrates' court*

17. Under this option, where an individual has failed the means test but passed the Interests of Justice test, they would still be able to claim their defence costs from Central Funds if acquitted. However, if an individual were to have failed the Interests of Justice test, but still obtained the services of a solicitor, they would no longer be able to reclaim this expense if acquitted. We intend to conduct additional research to assess all of the potential savings outlined in this consultation over the next 12 weeks, however, should this be implemented, we believe that it would offer savings of approximately £5 million to Central Funds.
18. This option has the potential to save the Central Funds budget £5 million in the magistrates' court, in addition to an unknown sum in the Crown Court. It would only affect defendants who either declined to take advantage of legal aid, or who decided to instruct lawyers when the case has been deemed not to require legal representation. We are of the view at this stage that in these circumstances it is not reasonable to expect Central Funds to reimburse a defendant's legal costs.

## **Option 3 – Cap Central Funds payments in all cases for acquitted defendants and successful appellants to the relevant legal aid rates**

19. Under this option, all payments made to acquitted defendants in both magistrates' court and Crown Court cases, and successful appellants in the Crown Court, would be paid on the basis of the relevant legal aid rates. In the Crown Court, all cases would be remunerated under the relevant legal aid fee scheme rather than on the basis of private rates negotiated between the client and their solicitor and/or barrister. It is estimated that, excluding high cost cases which are managed under a separate fee scheme, this would result in savings of £20 million per annum to the Central Funds budget - £12 million from the magistrates' court and £8 million from the Crown Court.

20. Since individual defendants in the Crown Court are entitled to legal aid, a large proportion of claims from Central Funds in very high cost cases relate to companies. It is difficult to annualise the impact of individual high cost cases, since these are few in number and costs vary significantly so they can have a significant impact on Central Funds expenditure in any one year. However, we estimate that, if payments in a recent case had been restricted to legal aid rates, the overall cost would have been £10 million rather than the actual cost to Central Funds of £21 million.

### **Impact on acquitted defendants and successful appellants**

21. If this option were to be implemented, individual defendants and defendant companies would be liable for any difference between the refund of costs at legal aid rates and their actual expenditure on their case at the private rate they had negotiated with their solicitor and/or barrister. We estimate that in the magistrates' court this could average in the region of £1,000, being the difference between the estimated average privately funded case (£1,500) and the average legally aided case (£500). In the Crown Court, we estimate that this could average in the region of £16,700, being the difference between the estimated average privately funded case (£19,500) and the average legally aided case (£2,800). In very high cost cases, this sum could be much higher. As illustrated by the example above, the difference could be as much as £11 million. While companies do not have access to legal aid and so have no choice but to pay privately for their defence, the impact may be mitigated if they have taken out insurance to protect them against such an action.
22. The impact on individual defendants may also be mitigated if implementation of the proposal resulted in downward pressure on private rates. Competition between providers for private clients and individual negotiations over rates could see private rates moving more closely into line with those available under legal aid, but we are unable to quantify the effect. This would result in a reduction in income for solicitors, barristers and firms. We cannot quantify the impact since we have no reliable data on private rates, although we understand that they are considerably higher.
23. This option taken alone has the potential to save the Central Funds budget £20 million.
24. Options 2 and 3 taken together have the potential to save the Central Funds budget £25 million, in addition to unknown sums in the Crown Court.

### **Impact on offenders**

25. We do not believe the proposals will have any negative impact on offenders and their rehabilitation, because these proposals will only affect acquitted defendants and successful appellants.

### **Impact on solicitors and barristers**

26. Option 2 could impact solicitors' firms and barristers if defendants who fail the Interests of Justice test choose not to employ a solicitor if they know that they will not be able to recover such costs if they are acquitted. The impact is not quantifiable because it would depend on decisions made by individuals on a case by case basis, however, given that defendants currently make this decision in the full knowledge that they may be convicted we do not anticipate that this would be significant.
27. Option 3 could impact solicitors' firms and barristers if defendants are able to negotiate lower private fees on the basis that, if acquitted, they will only recover legal aid rates, rather than private rates. However, we are not of the view at this stage that the impact will be great, due to the relatively small number of firms that are prosecuted for criminal offences. Part of the purpose of this consultation is to get evidence from the market and providers about the approach to payment in private client cases which are subsequently refunded out of Central Funds. Again, given that defendants currently employ defence teams privately with no guarantee of success we do not believe that this would be significant. However, our proposals would give greater certainty to defendants and providers on their financial entitlement if acquitted.

### **Competition assessment**

28. The Department applied the Competition Filter test, which showed that the proposals are likely to have little or no effect on competition for solicitors' firms. No one firm has more than 10% of the market, and existing firms will not be at an advantage over new or potential firms. The proposals will not affect set up costs. The scheme will not restrict the ability of firms to offer a range of services.

### **Impact on small firms**

29. We are not of the view at this stage that there will be a significant impact on small firms, due to the small number of prosecutions involving companies. As stated above, criminal prosecutions against companies in the Crown Court amounted to 0.12% of the total in 2005 (105 prosecutions from a total of 85,165 cases). We will be conducting research on the types of companies involved during the period of consultation, which will inform any final impact assessment and policy decision.

### **Impact on HMCS**

30. The National Taxing Team of HMCS has recently taken over responsibility from justices' clerks for determining claims from Central Funds. Over the period of consultation we will look at administrative savings that may result from these proposals.

### **Impact on legal aid**

31. Central Funds are presently in a separate budget from legal aid, but in the areas under discussion the two are closely related. Crown Court means testing has the potential to impact on Central Funds expenditure, which in turn, given the higher rates paid privately, would affect the levels of saving from Crown Court means testing. While there is potential to encourage more people to apply for legal aid than do so currently, we believe any impact is mitigated by securing Crown Court means testing savings.
32. The proposed scheme has also been designed to ensure there will be little or no additional acts of assistance and consequential costs for civil legal aid. We do not believe that our proposals will increase the current incidence of debt, loss of housing or divorce.

## Equality impact assessment

### The Award of Costs from Central Funds in Criminal Cases

33. This is the initial equality impact screening exercise for reform of Central Funds payments to acquitted defendants in criminal cases in magistrates' courts and the Crown Court, including successful appellants in the Crown Court. A full equality impact assessment will be undertaken in light of responses to the consultation paper and ongoing work, and published alongside the response to the consultation paper.

#### *Statutory duties*

34. Public authorities in Britain have a legal duty to promote race equality. This means that they must have due regard to how they will eliminate unlawful racial discrimination, promote equal opportunities and promote good relations between people from different groups. The Ministry of Justice (MoJ) is also under a specific duty to conduct race equality impact assessments of its policies in relation to the public duty to promote race equality and within this, to identify whether there is a differential and adverse impact on particular racial groups.
35. The Disability Equality Duty came into force on 4 December 2006. The MoJ has published a Disability Equality Scheme, which is available at our website at: <http://www.justice.gov.uk/publications/equality-schemes-2008.htm>.
36. This sets out the actions that the MoJ will be taking to promote disability equality. When carrying out our functions, the MoJ must have due regard to the duties placed upon us by the Disability Discrimination Act 2005. From 4 December 2006, the MoJ is also under a specific duty to conduct disability equality impact assessments of its policies in relation to the public duty to promote disability equality and within this, to identify whether there is a differential and adverse impact on disabled people and other people.
37. The Equality Act of 2006 places a statutory duty on all public authorities when carrying out their functions to have due regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity between men and women. The MoJ also has a specific duty to conduct gender equality impact assessments of its policies in relation to the public duty to promote gender equality and within this, to identify whether there is a differential and adverse impact on people of different genders.

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

38. The proposed scheme aims to deliver:
- more effective use of public resources through the restriction of Central Funds payments to acquitted individuals who either do not need to employ solicitors or who choose not to take up legal aid when available;
  - more effective use of public resources through the capping of Central Funds payments to acquitted defendants and successful appellants in the Crown Court at legal aid rates.

#### **What are the intended outcomes?**

39. Successful outcomes will include a saving to Central Funds payments, which has no detrimental impact on court performance or the wider Criminal Justice System (CJS).

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

40. MoJ (Criminal Legal Aid Strategy Division) own the policy, and are responsible for administering the scheme.

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

41. Key stakeholders include the legal profession, the judiciary, defendants and those working in the wider CJS, including equality bodies and those who act on behalf of defendants, such as the Citizens Advice Bureaux. Stakeholders will want to ensure that the scheme is fair to defendants, fair to those operating the scheme, and to the taxpayer.

**What data will we use?**

42. We use data from the Ministry of Justice's forecasting, finance and analysis branch, who collect information about Central Funds payments.

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

44. We welcome any input from consultees on the potential impact of the proposed scheme on the group(s) they represent.

**Assessment of impact on defendants**

*Age*

45. There is no evidence that the policy will have any adverse impact based on age.

*Gender*

46. There is no evidence that the policy will have any adverse impact based on gender.

*Ethnicity*

47. There is no evidence that the policy will have any adverse impact based on ethnicity.

*Disability*

48. There is no evidence that the policy will have any adverse impact based on disability.

*Religious belief*

49. There is no evidence that the policy will have any adverse impact based on religious belief.

*Sexual orientation*

50. There is no evidence that the policy will have any adverse impact based on sexual orientation.

## Specific Impact Tests: Checklist

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

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

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

## Annexes

## **The consultation criteria**

The seven consultation criteria are as follows:

**When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.

**Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

**Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

**Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

**The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

**Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

**Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

**These criteria must be reproduced within all consultation documents.**

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

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 7210 1326, 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:

**Gabrielle Kann  
Consultation Co-ordinator  
Ministry of Justice  
5th Floor Selborne House  
54-60 Victoria Street  
London  
SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **How to respond** section of this paper at page 27.

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