



**Response to  
Ministry of Justice consultation paper  
*Crown Court Means Testing: Draft Regulations***

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## Introduction and summary

1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. Its mission is to advance access to justice, human rights and the rule of law. It is the UK section of the International Commission of Jurists.
2. JUSTICE is an influential commentator on legal aid policy. We responded to the Ministry of Justice consultation paper on *Crown Court Means Testing* in February 2009. In our response we set out the following principles:
  - (a) The need to comply with Article 6(3) European Convention on Human Rights (ECHR) which provides that everyone charged with a criminal offence has the right **‘to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require’**.
  - (b) We did not take issue in principle with the means testing of defendants before the Crown Court and the recovery accordingly of a proportion of defence costs from **convicted** defendants who can afford to contribute to them.
3. We also emphasise the importance of ensuring that the introduction of a regime of contributions to legal aid does not provide a perverse incentive for innocent defendants to plead guilty to avoid the financial cost of a trial. This fear may be thought unrealistic due to the seriousness of Crown Court proceedings, but for less serious crimes likely to attract a fine or community sentence, or even where a short prison sentence may result, defendants might plead guilty rather than risk the loss of their family home, for example, or to avoid serious financial consequences to their families and children. Thresholds for contribution and the levels of contribution sought must be set with this in mind. Further, the right to trial by jury in either way offences should not be compromised by defendants choosing to remain in the magistrates court for financial reasons because of fear of the cost of a Crown Court trial.
4. In our view the seriousness, and frequently the complexity, of Crown Court proceedings mean that the interests of justice will automatically require free legal assistance to be provided if the defendant does not have sufficient means to pay for

it. The regulations should therefore ensure that the scheme provided does not result in any defendant going unrepresented through insufficient means. We are pleased, therefore, that the regulations provide that a representation order will be made automatically.

4. However, it is just as important, to ensure adequate representation, and to prevent perverse guilty pleas, that the means thresholds for contributions are not set too low. The considerable cost of Crown Court proceedings is likely to lead defendants above those thresholds to consider going unrepresented rather than incur the costs of legal aid contributions. The thresholds must therefore be set at a sufficiently high level so that a defendant is never pressurised into going unrepresented by financial constraints. It is worth noting in this context that the financial impact of a criminal trial and conviction can in all events be severe, including not only direct costs such as fines; awards of prosecution costs; compensation; the victims' surcharge; and confiscation orders, but also indirect costs such as loss of employment or loss of a business; impact upon future employment; family breakdown; etc.
5. The impact of defendants choosing to go unrepresented in the Crown Court should not be underestimated. The complexity of the law, procedure and evidence, and the need for legal arguments to be made and responded to mean that defendants in most cases will be unable to respond to the prosecution case, or put their own case, adequately; our adversarial system rests on the principle of equality of arms, and the court cannot consider issues which are not put before it by the parties. Many defendants would therefore not receive a fair trial. Cases would be subject to increased delay, trials would take longer and case management would be likely to become chaotic since defendants will be unfamiliar with procedure.
6. We believe that the requirement that defendants pay contributions to legal aid during the currency of their trial may make them more likely to go unrepresented or for innocent defendants to plead guilty, particularly if thresholds are set insufficiently high so that they do not feel that they can afford to pay them. We also believe that on principle defendants should not be required to contribute to their legal aid unless and until they have been convicted. A person, who may be wholly innocent, does not choose to be prosecuted by the state, nor can they 'settle' or negotiate as they could in a civil action. In our view the presumption of innocence should not be compromised by the defendant being financially penalised unless and until they are convicted and sentenced. We believe that it is not enough to say that the

contributions will be returned, with interest, upon acquittal. If this is so, what is the justification for demanding them in the first place? If there is a well-grounded fear is a defendant will dissipate his or her assets before conviction then a freezing order should be sought. We are concerned that the collection of contributions from a defendant who is eventually acquitted could result in permanent impact upon them and their family.

7. We are also concerned that the assessment of 'disposable income' may not take into account all the obligations that a defendant may have (in regulation 8 of the draft regulations). For example, the care of dependant children is taken into account, but that of dependant relatives (for example, the sick and elderly) living in the defendant's household is not; mortgage repayments are taken into account but repayments required on unsecured loans, previous fines or court judgments are not.
8. We are particularly concerned at the proposal, at regulation 26, that the income and capital of the defendant should be deemed to include that of their partner unless the partner 'has a contrary interest in the proceedings' (which we assume means that they are the victim of the offence, or a prosecution witness). This is a remarkable proposal; it means that the wholly innocent partner of a defendant in criminal proceedings may be arbitrarily deprived of their income and assets by the state merely because they are in a relationship with that defendant. The partner need not be guilty, on trial or even suspected of any crime or in particular in involvement in the defendant's offence as an accessory or otherwise. Whether they are a victim or prosecution witness (in particular the latter) is a matter of chance and depends upon whether they have any relevant evidence to give. We are extremely concerned that this provision may make partners and spouses (in particular, those where the relationship is not in a good state) feel compelled to give evidence against the defendant in order to escape financial penalty, thus undermining the fairness of the trial (and potentially, resulting in successful appeals against conviction on that basis).
9. We believe that regulation 26 represents an unjustifiable interference with Article 1 of Protocol 1 ECHR (protection of property) and, in cases where the contribution requirement forces the partner to sell or otherwise cease to occupy their dwelling, Article 8 ECHR (private and family life and the home). This regulation cannot be said to be necessary in a democratic society 'for the prevention of disorder or crime' for it punishes the innocent, not the guilty. We therefore advise that the government submit

this regulation to more careful legal analysis and abandon regulation 26 before the regulations are finalised.

10. The arbitrariness of regulation 26 is demonstrated by the fact that it applies only to a partner and not to other members of a defendant's household with whom he or she enjoys a close familial or friendly relationship and may share assets: for example, a friend with whom a defendant shares a mortgage; a parent, sibling or adult offspring with whom a defendant shares ownership of a dwelling or vehicle. The romantic/sexual nature of the relationship with a partner is not a difference of kind justifying treatment such as that in regulation 26.
11. Further, the impact on the families of convicted defendants, in particular those who are imprisoned, is already severe. Most of those imprisoned are men; the gender pay gap and dominance of women as main carers for children means that an employed defendant with a family is likely to have been the main breadwinner and the financial impact on the family of his imprisonment will be considerable. The maintenance of a stable family unit and family home is one factor that is likely to reduce the likelihood of reoffending on release; it is therefore short-sighted and counter-productive to promote measures that will promote the loss of the family home and which may result in resentment on the part of an innocent partner who has been financially penalised for the defendant's crime towards the defendant and therefore promote family breakdown.
12. Finally, we believe that the assessment of a defendant's income and assets should take place after, not before conviction, since in the Crown Court proceedings can be lengthy and there may have been considerable changes in circumstances during the course of the proceedings – not least, changes in the value of real property due to the volatility of the housing market. In order that contributions are assessed on an accurate basis we therefore recommend post-conviction assessment, when the defendant's circumstances as a convicted and sentenced person can also be more realistically considered.

**JUSTICE, October 2009**