



**Criminal Justice and Courts Bill
House of Lords Report Stage**

**Briefing and suggested amendments on Part 3:
Criminal Court Charges
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Summary

- **Court charges in criminal cases must not be imposed unless it is just and reasonable to do so in the circumstances of each case, and upon a detailed impact assessment of the proposed charges and costs of enforcement.**

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. The issues raised in this briefing should not be taken as our sole concerns with regard to the proposals contained in the Bill.
2. This briefing deals with the court charge proposals in Part 3 of the Bill. We have prepared and circulated separate briefings on Part 1 and the proposed changes to judicial review in Part 4.¹ We also support the concerns raised by many with regard to secure colleges in Part 2. While we continue to hold concerns about many aspects of the Bill, there is one priority area in Part 3 that must in our view be addressed before the Bill is passed. This relates to the imposition of court charges upon people convicted of offences. We invite members of the House to support the tabled amendments that address our pressing concerns.

Clause 46 – Criminal courts charge

Amendments

Lord Marks

124A Page 43, line 31, leave out “order” and insert “consider ordering”

124B Page 43, line 33, after “costs,” insert “if it considers it just to do so, having regard to the circumstances of the offender and of the offence or, if applicable, of any failure to comply with the requirements of a court order (or both)”

125A Page 44, line 15, leave out “must” and insert “may”

125B Page 44, line 28, leave out “must” and insert “may”

125C Page 44, line 39, leave out “must” and insert “may”

125D Page 44, line 47, leave out “of” and insert “no greater than”

¹ Available on the JUSTICE website <http://www.justice.org.uk/resources.php/364/criminal-justice-and-courts-bill>

Briefing

1. Clause 46 creates a new requirement for all criminal courts (Magistrates, Crown and Court of Appeal) to impose a costs order upon every convicted person, without discretion. This is a significant change to the current regime. Lord Marks’ amendments would at least ensure that discretion to impose the charge will lay with the court, having assessed the individual circumstances of each case.

Impact upon the presumption of innocence

2. The imposition of court costs may further increase the perverse incentives placed on accused people to plead guilty, despite their protestations of innocence; not only will a higher sentence be imposed if the defendant proceeds to trial, but a potentially substantial, mandatory, court charge as well as prosecution costs. Moreover, since further charges will be sought if a convicted person pursues an appeal, they may be unduly dissuaded from appealing by the potential costs of doing so.² A restriction placed on access to a court or tribunal will not be compatible with article 6(1) ECHR unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved.³ As drafted, a mandatory court charge that does not take into account the circumstances of each case may infringe the right to a fair trial protected by article 6 ECHR. The JCHR in its recent report found it difficult to assess this risk in the absence of clear evidence about the impact of court charges in practice, and recommended that the Government monitor carefully the impact of the criminal courts charge on the right of defendants to a fair trial of the charge against them and make available to Parliament the results of that monitoring.⁴ Government has still not

² Lord Ponsonby of Shulbrede, a magistrate, said during the Committee Stage that “If defendants are made aware of the non-discretionary nature of the victim surcharge and the courts charge, poorer people could be more likely to plead guilty so that there are less extensive court charges, rather than going into a lengthy trial where there is an unpredictable but mandatory level of courts charge if they are found guilty,” HL Deb 23 July 2014 at Column 1251.

³ *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (1999) EHRR 249, para 72; *Kreuz v Poland*, App. No. 28249/95 (unreported, 19th June 2001).

⁴ JCHR, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill*, Fourteenth Report of Session 2013-2014, HL 189/ HC 1293 (11 June 2014), para 1.72.

produced sufficient information as to how charges will be classified and the level of charges to be proposed.

The need for a discretionary test

3. In our view an order for court costs should only be imposed where the presiding judge or tribunal considers it just and reasonable in the circumstances of the case to do so. This is the effect of Lord Mark's amendment 124B. During Committee, the Minister suggested that, "As the court is the main beneficiary of the charge, there is a risk that this would be perceived as providing the ability directly to influence the funding of the criminal courts."⁵ We find this concern to be misplaced. It also undermines the integrity of the magistrates and judges administering justice in our criminal courts.
4. The test proposed is a familiar one to the courts, which assesses both the means and other surrounding circumstances as to whether costs can realistically be paid, and whether they should be paid. The Prosecution of Offences Act 1985, s18 gives the courts the discretion to award prosecution costs against a convicted person only where it considers it just and reasonable to do so.⁶ Moreover, the Crown Prosecution Service applies a similar test in deciding whether to seek costs, and manages to do so without causing unfairness to the offender, despite being the beneficiary of those costs.
5. Since no discretion is provided in the new provision it seems clear that the intention is to apply court charges irrespective of the means and circumstances of the convicted person. This is concerning and draconian, particularly where the person is sentenced to a term of imprisonment or a hospital order by reason of a mental illness, or has an addiction at the root of their criminal conduct. The Ministry of

⁵ HL Deb 23 July Col 1252, per Lord Faulks

⁶ The operation of this award is further understood by reference to the CPS Guidance on costs, which provides that an application for costs need not be made where it would be unmeritorious or impractical. The guidance gives examples of where it would not be appropriate for a prosecutor to seek costs, such as: the defendant does not have the means to pay, i.e. where a lengthy term of imprisonment, hospital order or substantial compensation is likely to be ordered, see http://www.cps.gov.uk/legal/a_to_c/costs/; and the Practice Direction on Costs in Criminal Proceedings at para 3.4:

An order should be made where the court is satisfied that the defendant or appellant has the means and the ability to pay. The order is not intended to be in the nature of a penalty which can only be satisfied on the defendant's release from prison,

available at <http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/costs-in-criminal-proceedings.pdf>.

Justice data on prisoners' pre-custody backgrounds further affirms the problems this will cause:⁷ 13% reported never having had a job; 36% had not been employed in the previous year, but had a job at some point in their lives; 64% had received some form of benefit. The average gross weekly wage for those in employment was £250 for men, £167 for women. By comparison, the average weekly wage for the population as a whole was £500 for men, £400 for women. The practical impact of these proposals may in our view be that the economically vulnerable will end up with even greater debt than they currently owe and will be unable to pay.

6. It is fair and appropriate for the courts imposing charges to have the discretion in the circumstances to review whether it is just and reasonable to impose a charge.
7. Wide-ranging amendments were laid to afford discretion and limit the compulsion upon courts to charge during the House of Lords Committee Stage, but the Government rejected them on the basis that they would not only make the scheme more complicated and difficult to understand and apply, but would also create the risk of unequal treatment of different offenders.⁸ We find this conclusion hard to follow since this is the historical and current basis upon which all financial impositions are awarded by all courts, civil and criminal, across the country. It has not previously been found wanting for the reasons indicated, rather it is considered the fairest way to apportion costs.

Practical problems of a court charge

8. Each case will involve differing complexities such as type of offence; length of trial; complexity of issues, which must be factored into a court charge. During Committee the Minister indicated that charges will be categorised according to offence. But rejected the suggestion that any further circumstances ought to be taken into account. This ignores the complexity of cases. For example:
 - Should multiple defendant cases bear the costs evenly? What if a co-defendant plays a minor part in the commission of an offence, would they

⁷ Kathryn Hopkins (Ministry of Justice Analytical Services), *The pre-custody employment, training and education status of newly sentenced prisoners: Results from the Surveying Prisoner Crime Reduction (SPCR) longitudinal cohort study of prisoners*, Ministry of Justice Research Series 3/12 (March 2012), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278832/newly-sentenced-prisoners.pdf

⁸ Hansard, PBC, Deb, 23 July 2014 col 1252

only be required to pay the portion of court time devoted to their share of the proceedings?

- What if during the course of a three day trial it appears that evidence has been obtained in breach of the Police and Criminal Evidence Act 1984 and an application to exclude evidence is necessary, which takes a further court day and deliberations of the judge. Should the person bear these costs if the judge excludes the evidence but a finding of guilt is still made out?⁹

Problems of enforcing charges universally imposed

9. These charges will be imposed on top of fines, compensation awards, victim surcharges and prosecution costs already ordered in criminal courts. A significant amount of money is already owed by people under court orders. As of Q1 2014, the total outstanding debt for all criminal financial penalties was £549m,¹⁰ of which 59% (£325m) is over 12 months old.¹¹

10. Under the Government's plans, the court charge will have the lowest priority of collection.¹² Debtors will only begin to pay the charge once they have paid off all other forms of financial imposition and, in light of the repayment figures above, a significant number of people may never pay at all, or only begin to do so after 18 months.

⁹ Lord Faulks said that: "We expect that each offender will pay the full amount, although the power will exist to charge multiple defendants less when they are convicted at the same time as others [if this power is intended, in JUSTICE's view it should be expressly included in the Bill not left to secondary legislation] The amendment creates unnecessary complexity and is likely to result in one offender, who has been tried with one or more co-defendants, paying less than an offender who has been tried on their own, despite the fact that they may have committed identical offences. This raises questions of fairness. Our approach is the fairest approach and should be both simpler to operate and simpler for offenders and the public to understand." We disagree. The purpose of the charge ought to be to cover the costs incurred during the hearing, not to add an additional punishment. The costs should therefore in our view be apportioned according to demands upon court time by each defendant.

¹⁰ Figure from Table A.4, Ministry of Justice, *Main Tables: January to March 2014*, 19th June 2014 (herein *Main Tables*), (information received from a FOI request)

¹¹ The total amount relates to 1,254,502 individuals with an average of £437 owing per case. 714,044 individuals were owing for more than 12 months. Information received from a FOI request.

¹² Ministry of Justice, *Criminal courts charge impact assessment (24/02/2014)* [19], available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284169/Criminal-courts-charge-IA.pdf

11. With respect to prosecution costs and fines in particular, there are low prospects of recovering all debt beyond 18 months. According to the Ministry of Justice's statistics,¹³ the total amount of fines imposed for 6 Quarter periods (Q2 2011 – Q3 2012) was £351.6m.¹⁴ The total amount of costs awarded was £163.3m. Out of those totals, £170.3m in fines (48%) and £56.8m in costs (35%) were still uncollected 18 months after they were first made. While the statistics do not record subsequent payment rates after 18 months, the figures indicate that any additional repayments will be small and that a significant amount of the outstanding debt may never be recovered.¹⁵ In 2012-3, £75.9m of outstanding debt was administratively cancelled – which only occurs after all attempts to collect the amount outstanding have been made.¹⁶
12. On top of these outstanding debts are the costs incurred in enforcing them. In 2011/12 the cost to HM Courts and Tribunals Service for the enforcement of fines, penalty notices and confiscation orders was £54m.¹⁷ Given the announcement on 11th June that fines levels are set to dramatically increase, the likelihood of convicted people being able to cover all of the existing charges in addition to court costs is very uncertain. With little explanation of how the costs recovery scheme will operate, or any safeguards to protect the integrity of the criminal justice system, we consider the demand for court charges to be unprincipled, unjustified and unnecessary. The Government must make clear how it intends to apportion and recover these charges without incurring disproportionate enforcement costs, and in a way that is fair to the convicted person. At a minimum, whether court charges should be imposed must be a matter for the courts to decide in each individual case. We urge Peers to support the tabled amendments.

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¹³ Ministry of Justice, *Court statistics quarterly: January to March 2014*, 19th June 2014, available here: <https://www.gov.uk/government/publications/court-statistics-quarterly-january-to-march-2014>

¹⁴ Figures from Table A.2, *Main Tables* (n.8)

¹⁵ Only an additional 4-5% of debt was repaid in the 6 months between the debt being due for 12 months and 18 months. By contrast, 51% of costs were paid in the first 6 month period from their imposition; an additional 9% were paid in the second 6 month period and 5% in the third 6 month period. The same is true of fines: 38% were paid in the first 6 months; 9% paid in the second 6 month period; and 4% in the third 6 month period.

¹⁶ HC Written Answer, 2 Apr 2014, Column 705W

¹⁷ HMCTS Aged Debt Pilot Report (n.6), [3]