

**EXPLANATORY MEMORANDUM TO**  
**THE CRIMINAL DEFENCE SERVICE**  
**(FINANCIAL ELIGIBILITY) REGULATIONS 2006**  
**2006 No. 2492**

**THE CRIMINAL DEFENCE SERVICE (REPRESENTATION ORDERS: APPEALS**  
**ETC) REGULATIONS 2006**  
**2006 No. 2494**

**THE CRIMINAL DEFENCE SERVICE (REPRESENTATION ORDERS AND**  
**CONSEQUENTIAL AMENDMENTS) REGULATIONS 2006**  
**2006 No. 2493**

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty.

**2. Description**

2.1 These regulations will introduce a new financial eligibility test for criminal legal aid and transfer the power to grant the right to publicly funded representation from the courts to the Legal Services Commission (LSC). They set out the criteria relating to financial eligibility which must be satisfied before individuals involved in criminal proceedings in a magistrates' court may receive publicly funded representation, provide for appeals or renewed applications and set out the procedure to be followed by applicants.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

**4. Legislative Background**

4.1 The Criminal Defence Service (CDS) Act 2006 makes a number of amendments to the Access to Justice Act 1999, which established the LSC and the Criminal Defence Service, the purpose of which is to ensure that individuals involved in criminal proceedings have access to such advice, assistance and representation as the interests of justice require. Schedule 3 contains provisions on the right to representation. The first principal amendment is the insertion of a new paragraph 2A in Schedule 3, which confers a power on the Lord Chancellor to make regulations enabling the LSC to grant rights to representation in prescribed criminal proceedings. By an amendment to section 25(9) of the 1999 Act, such regulations are subject to the affirmative resolution procedure. The power is exercised in the Criminal Defence Service (Representation Orders and Consequential Amendments) Regulations 2006

- 4.2 The second main amendment is the insertion of a new paragraph 3B in Schedule 3, which provides that the power to grant a right to representation may only be exercised where a person is financially eligible, under regulations, to be granted such a right. A new section 25(9A) provides that these regulations are to be subject to the affirmative resolution procedure. The power is exercised in the Criminal Defence Service (Financial Eligibility) Regulations 2006.
- 4.3 The Government stated during the passage of the Bill that these powers would be exercised, in the first instance, in relation to criminal proceedings in magistrates' courts.
- 4.4 Paragraph 4 of Schedule 3 to the 1999 Act gives a right of appeal against a decision not to grant a right to representation and paragraph 3B(4)(c) empowers the Lord Chancellor to make regulations providing for reviews of decisions on financial eligibility. The Criminal Defence Service (Representation Orders: Appeals etc) Regulations 2006 deal with appeals and regulation 13 of the Criminal Defence Service (Representation Orders and Consequential Amendments) Regulations 2006 deals with reviews. Both are subject to the affirmative resolution procedure under section 25(9) and (9A) of the 1999 Act.
- 4.5 Paragraph 2A(3) of Schedule 3 to the 1999 Act empowers the Lord Chancellor to make consequential amendments or repeals of enactments. The power is subject to the affirmative resolution procedure under section 25(9). The power is exercised in regulations 13 to 16 of the Criminal Defence Service (Representation Orders and Consequential Amendments) Regulations 2006.

## **5. Extent**

- 5.1 The statutory instruments apply only to England and Wales.

## **6. European Convention on Human Rights**

The Parliamentary Under Secretary of State for Constitutional Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Criminal Defence Service (Financial Eligibility) Regulations, the Criminal Defence Service (Representation Orders: Appeals Etc) Regulations, and the Criminal Defence Service (Representation Orders and Consequential Amendments) Regulations are compatible with the Convention rights.

## **7. Policy background**

7.1 Criminal public funding helps defendants to get access to justice. The availability of suitable representation for defendants in criminal trials is of paramount importance in the criminal justice system. The aim of the CDS Act and associated regulatory framework is to give effect to the Government's firm belief that those who can afford to pay for the costs of their own legal defence, should be asked to do so. It will also help to address the current legal aid budget overspend, and so deliver a more financially sustainable legal aid system. Implementation of the means testing scheme in the Magistrates' Courts will in due course deliver projected annual savings of at least £35 million. In addition, transferring to the LSC the power to grant representation will ensure greater consistency in this process. Whilst responsibility for the grant of representation will pass to the LSC, in practice the day-to-day operation of the new means testing scheme is to be delegated back to court staff under a service level agreement.

7.2 The cost of providing criminal legal aid has continued to rise markedly over recent years. Criminal legal aid expenditure in 2004/05 reached £1.192 billion; this compares to £616 million in 1995/96 and £873 million in 2000/2001. Even allowing for the effect of inflation, this increase is still significant. However, criminal public funding is by its nature demand led. We cannot control the volume of cases entering the system - responsibility for policing, and the carriage of the criminal law, and the decision to prosecute rest elsewhere. It is only right, therefore, that the government should seek to carefully prioritise legal aid spending, not only to halt the rising costs associated with criminal legal aid, but also to prevent further erosion into the civil legal aid budget. Implementation of the provisions within the CDS Act is one way in which these problems can be tackled.

7.3 The legislative proposals have been subject to detailed scrutiny, as set out in the partial Regulatory Impact Assessment. Most recently, the revised draft regulations were published on the Department for Constitutional Affairs website and circulated to key stakeholders for their comments; these include The Law Society, Criminal Law Solicitors Association, the General Council of the Bar, Legal Aid Practitioners' Group (LAPG), London Criminal Courts Solicitors' Association, Criminal Law Solicitors Association, Criminal Bar Association, Magistrates' Association, senior members of the Judiciary, Liberty, Justice, Citizens Advice and the Justices Clerks Society.

7.4 The main comments to emerge from the responses were related to the Hardship Provision (on which the LSC will be consulting at the end of June), the Early Cover Scheme (on which the LSC is currently consulting) as well as questions around scope and eligibility. As a result, some changes have been made to the draft regulations.

7.5 These include revising the appeal process on the 'Interests of Justice' test to allow for the possibility of an oral hearing where the court deems it desirable (Regulation 3 of the Criminal Defence Service (Representation Orders: Appeals etc) Regulations). It also includes amending provisions relating to the review of a decision on financial eligibility (Regulation 13 of the Criminal Defence Service (Financial Eligibility) Regulations) so that straightforward allegations of miscalculation or administrative error can be dealt with by court staff rather than the LSC. An additional drafting change means that only important questions arising from a review of an applicant's financial eligibility can be referred by the LSC to the High Court. On

implementation, the Government is committed to keep these and all other aspects of the new scheme under active review.

## **8. Impact**

8.1 A partial Regulatory Impact Assessment (RIA) based on the Regulations sets out the Government's view that the benefits of the legislation outweigh the costs involved in the implementation and running of the new arrangements. The partial RIA was published for consultation alongside the draft regulations. A final assessment is being prepared to take into account comments received, and will be published as soon as possible.

8.2 There is an impact on business, namely solicitors' firms. The Government cannot identify what the impact will be on individual firms as this will be dependent on the type of work undertaken or the type of customer that the firm attracts. The Government is satisfied that the benefits of introducing the means test at the level set out in the regulations outweigh the impact on solicitors' firms.

8.3 Similarly, there will be an impact on the voluntary sector where individuals refused publicly funded representation may turn to voluntary groups for advice. The Government is satisfied that the impact on voluntary groups will be minimal, as estimates of the numbers of defendants who will be ineligible under the new arrangements represent only 1% of the total number of defendants coming before the courts.

## **9. Contact**

Stephen Gascoigne at the Department of Constitutional Affairs (tel 020 7210 8865, email [Stephen.Gascoigne@dca.gsi.gov.uk](mailto:Stephen.Gascoigne@dca.gsi.gov.uk)) can answer any queries relating to the instruments.