

**EXPLANATORY MEMORANDUM TO
THE CRIMINAL DEFENCE SERVICE (GENERAL) (NO.2)(AMENDMENT)
REGULATIONS 2006**

2006 No.2490

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 amend the Criminal Defence Service (General)(No 2) Regulations (SI 2001/1437) in consequence of the introduction of a test of financial eligibility for publicly funded representation in criminal proceedings in magistrates' courts, and of the transfer of responsibility for granting rights to such representation in such proceedings from the courts to the Legal Services Commission (LSC). They also make other minor amendments to the 2001 Regulations. They take effect on 2 October 2006, when the relevant amendments to the Access to Justice Act 1999 effected by the Criminal Defence Service Act 2006 come into force.

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. 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. The power is exercised in the draft 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. The power is exercised in the draft Criminal Defence Service (Financial Eligibility) Regulations 2006.

4.3 These two sets of draft instruments, together with the draft Criminal Defence Service (Representation Orders: Appeals etc) Regulations 2006, were approved by the House of Commons on 17 July 2006.

4.4 The amendments to the 2001 Regulations are made under the following provisions of the Access to Justice Act: section 13(1) (advice and assistance – regulation 9); section 15(2) (selection of representative – regulation 8 and 10); paragraph 2 of Schedule 3 (grant of right by court – regulations 2 to 7) and paragraph 3 of Schedule 3 (grant of right by commission – regulation 8 and 10). Regulations under each provision are subject to the negative resolution procedure under section 25(10).

5. Extent

5.1 The statutory instrument applies only to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

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 Regulatory Impact Assessment. Most recently, the regulations to which this memorandum relates, and the three draft instruments referred to in paragraphs 4.1 to 3 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.

8. Impact

8.1 A 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.

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) can answer any queries relating to the instrument.