

## Final Regulatory Impact Assessment

### Criminal Defence Service Act 2006

#### 1. Title

##### Criminal Defence Service Regulations:

- Criminal Defence Service (Financial Eligibility) Regulations 2006
- Criminal Defence Service (Representation Orders and Consequential Amendments) Regulations 2006
- Criminal Defence Service (Representation Order: Appeals etc) Regulations 2006
- Criminal Defence Service (General)(No.2)(Amendment) Regulations 2006

#### 2. Purpose and Intended Effect

##### Objective

2.1 These simple and clear Regulations provided by the Criminal Defence Service Act 2006 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). These regulations ensure that resources are targeted at those in greatest need and also ensure consistency in grant of the right to representation where it is in the interests of justice and so provide effective control of proper public expenditure.

##### Background

2.2 The Final Regulatory Impact Assessment for the Criminal Defence Service Act 2006 sets out the context in which the Act was introduced. Briefly, the creation of the Criminal Defence Service (CDS) was part of the Government's fundamental reform of the legal aid system, as set out in the Access to Justice Act 1999. The purpose of the CDS is to ensure access for individuals involved in criminal investigations or criminal proceedings to such advice, assistance and representation as the interests of justice require.

2.3 Primary legislation was required to enable the transfer of grant and to introduce a financial eligibility test, as there are no powers to do so under the Access to Justice Act 1999. The Act delivered two key enabling powers:

- the power to grant rights to representation to be conferred on the LSC instead of the court, and
- a test of financial eligibility for the grant of public funding and, in cases where eligibility exists, contributions based on means.

2.4 The Act is in four sections, two of which provide for the draft Criminal Defence Service Regulations:

- Section 1 deals with the grant of rights to representation, and enables regulations to be made to provide the Legal Services Commission with the powers to grant and withdraw rights to representation.
- Section 2 provides for the rights to representation to be granted only where an individual satisfies financial eligibility criteria.

2.5 The Act changes the arrangements for the grant of public funding for representation in criminal proceedings in England and Wales.

2.6 The Criminal Defence Service Regulations 2006 are the detail to the scheme provided for by the Act. The Regulations provide the framework for greater consistency over decision making, so leading to greater control over the grant of publicly funded representation in criminal cases. They also introduce a new financial eligibility test under which defendants who can afford to pay for their defence costs do so, while those people who cannot afford to pay for themselves continue to have their representation paid for by the state.

### Rationale for Government Intervention

2.7 The DCA introduced the enabling powers within the Act to assure the public that publicly funded representation is made available to those who most need it. The regulations ensure that valuable and finite resources are more effectively and fairly targeted at those defendants who most need them. Making no change to the CDS would have meant that the overspend on legal aid (and the imbalance between civil and criminal) would still exist, and would probably continue to rise. The underlying principle supported by the Act is that those who can afford to pay for their own defence should do so.

## 3. Consultation

3.1 The Criminal Defence Service Bill was published in draft in the Third Session of the last Parliament and underwent pre-legislative scrutiny in the spring of 2004. The draft Bill and the supporting policy were also published as part of a public consultation paper<sup>1</sup>. The Constitutional Affairs Select Committee (CASC) published the report of its inquiry into the draft Bill in July 2004 and the Department for Constitutional Affairs responded in November 2004. Proposals on how the detail of the scheme would look were set out in the consultation paper and were examined in detail at the CASC enquiry.

3.2 The detail of the scheme was developed taking into account the findings of CASC on the draft Bill, input from key stakeholders, comments received as part of the wider public consultation and further research in this area undertaken by both the Department for Constitutional Affairs and the LSC. Details of the proposed delivery model, were published in the Framework Document<sup>2</sup>. The proposed delivery model was further refined and draft regulations were published in the Supplement to the Framework Document<sup>3</sup>.

3.3 The Government consulted with key stakeholders on the draft regulations. An ongoing process of consultation occurred during the development of the scheme and involved the Justices' Clerks Society (JCS) as well as with the Law Society (TLS). Both JCS and TLS are members of a wider LSC stakeholder group set up to facilitate implementation of the new scheme. The draft regulations were circulated to key stakeholders for their comments. These included TLS, 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 JCS. A full list of consultees is attached at Annex A.

### Impact of consultation

3.4 The detail of the scheme has been amended following consultation. The Government accepts concerns expressed by stakeholders that there was a need for oral hearings on appeals against decisions made on the interests of justice test. The regulations have been amended to

---

<sup>1</sup> Draft Criminal Defence Service Bill Consultation Paper and Explanatory Notes May 2004 Cm 6194

<sup>2</sup> Criminal Defence Service Bill Framework Document May 2005 Cm 6572

<sup>3</sup> Criminal Defence Service Bill Supplement to the Framework Document October 2005 Cm 6678

provide that a court may have an oral hearing if required, although appeals will usually be made in writing to the court.

3.5 The LSC consulted separately on the proposed Early Cover Scheme. The responses received to the proposals were generally positive. In response to concerns raised about arrangements where defendants are remanded in custody and need to obtain and supply supporting documentary evidence for their application, the LSC have changed the proposed time allowed for submitting a completed application from 2 working days after charge to 5 working days.

3.6 The LSC are also consulting on the Hardship Review Provision separately and that process is ongoing.

3.7 The Government will keep the working of the new scheme under review, and will continue to work with stakeholders on developing guidance on the workings of the scheme.

## 4. Options

4.1 The Department considered achieving its objectives by means of the following options:

- Option 1 – Do nothing
- Option 2 – Introducing primary and secondary legislation
- Option 3 – Introducing a voluntary code of practice; self-regulation and an education and information campaign for both courts and solicitors

### Option 1 – Do nothing

4.2 This is not an option as primary legislation is already in place. The Act provides the enabling powers to transfer the power to grant publicly funded representation from the courts to the LSC, and the power to introduce a new financial eligibility test. Regulations are required to allow for the detail of how the grant of publicly funded representation will operate.

### Option 2- Introducing regulations in secondary legislation to implement the Act

4.3 Secondary legislation is required to allow the changes introduced under the Criminal Defence Service Act to be implemented. The four sets of regulations are to be implemented across magistrates' courts on 2 October 2006, when the relevant amendments to the Access to Justice Act 1999 as effected by the Criminal Defence Service Act 2006, come into force.

### Criminal Defence Service (Financial Eligibility) Regulations 2006

4.4 Section 2 of the Criminal Defence Service Act 2006 amends Schedule 3 to the Access to Justice Act 1999 to provide for financial eligibility. Section 20 of and paragraph 3B of Schedule 3 to the Access to Justice Act 1999 makes the Criminal Defence Service (Financial Eligibility) Regulations 2006, which 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.

4.5 Individuals in receipt of certain benefits such as income support are automatically financially eligible, as are those under the age of 16 or under 18 and in full-time education. If the individual has a partner, the partner's resources are to be treated as those of the individual, unless the partner has a contrary interest in the proceedings.

4.6 An individual is financially eligible for a representation order if his gross annual income, adjusted to take account of any partner or children, is £11,590 or less, and ineligible if it is

£20,740 or more. Where it falls between these amounts, the representation authority (either the LSC or its delegate) will calculate the individual's annual disposable income, making deductions in respect of any income tax, national insurance, council tax, housing expenses, child care costs, maintenance and cost of living expenses, from the applicant's adjusted income. The individual is financially eligible if his annual disposable income does not exceed £3,156.

4.7 Where there is a material change in an individual's financial circumstances, he must notify the representation authority of the change if he has been granted a representation order, and he may make a renewed application if his previous application had been refused because he was financially ineligible.

4.8 An individual may apply to the LSC for a review of a decision that he is financially ineligible, on the grounds that his income has been miscalculated or that he cannot afford to pay for legal assistance notwithstanding that he is financially ineligible. The LSC will have a power to refer an issue arising from the determination of the financial eligibility test to the High Court for its decision.

4.9 The Government's intent is that the test should be as simple and predictable as possible and consistent with the need for fairness. In drafting the regulations we have sought to ensure to the greatest extent possible that the new financial eligibility test enables us to be sensitive to an individual's circumstances and to meet our ECHR/HRA obligations.

4.10 ECHR article 6(3)(c) states 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. The Access to Justice Act 1999 provides that any question as to whether a right to representation should be granted shall be determined according to the interests of justice, and sets out the factors that must be taken into account in applying this test. The test is not amended by the Act, and any future decisions on grant will continue to be bound by it.

4.11 In the development of the detail of the scheme, stakeholders expressed some concern that the introduction of a new financial eligibility test would add a layer of bureaucracy and delay at a time when all parallel initiatives are designed to increase efficiency. The Government believes that the approach set out in the Criminal Defence Service (Financial Eligibility) Regulations 2006 militates against this.

#### The Criminal Defence Service (Representation Orders and Consequential Amendments) Regulations 2006.

4.12 Section 1 of the Criminal Defence Service Act 2006 enables the Lord Chancellor to confer power to grant rights to public funding to the LSC instead of the court. Section 20 and paragraphs 2A and 3A of Schedule 3 to the Access to Justice Act 1999 makes the Criminal Defence Service (Representation Orders and Consequential Amendments) Regulations 2006. These empower the LSC instead of the court to grant a right to publicly funded representation in criminal proceedings in magistrates' courts where it does not have that power already.

4.13 The Regulations set out the procedure to be followed by applicants for representation orders. The representation authority (either the LSC or its delegate) is to grant a representation order if the individual is financially eligible for such an order under the Criminal Defence Service (Financial Eligibility) Regulations 2006 and the interests of justice require him to be granted an order. Where a representation order is granted, the order extends to the Crown Court if the proceedings continue there.

4.14 The court may decide, during the proceedings, that it would be in the interests of justice for the individual to be represented, in which case, provided that the individual is financially eligible for a representation order, the representation authority must grant such an order.

4.15 The Regulations contain provisions about the withdrawal of representation orders similar to those in the Criminal Defence Service (General)(No.2) Regulations 2001; in addition, the representation authority must normally withdraw an order where an individual fails to provide evidence that has been requested. Where a subsequent application is made following the withdrawal of a representation order, the same representative must be selected unless the representation authority considers that there are good reasons why a different representative should be selected.

4.16 The Regulations also make amendments to legislation consequential on the transfer of responsibility for granting representation orders from the courts to the LSC.

#### Criminal Defence Service (Representation Orders: Appeals etc) Regulations 2006

4.17 These Regulations provide for appeals or renewed applications where an individual involved in criminal proceedings has been refused publicly funded representation on the grounds that the interests of justice do not require him to be granted an order giving a right to such representation.

4.18 In the case of proceedings in magistrates' courts, the individual may make an oral appeal to the court, or a written appeal. There is no appeal where the order has been refused because the individual is financially ineligible to be granted such an order. In the case of proceedings in other courts, he may make a renewed application to the same person or court which refused the application. Where a representation order is withdrawn the individual may apply for the withdrawal to be set aside.

#### Criminal Defence Service (General)(No.2)(Amendment) Regulations 2006

4.19 These Regulations amend the Criminal Defence Service (General) (No 2) Regulations 2001 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 court to the Legal Services Commission.

4.20 They also make other minor amendments to the 2001 Regulations.

#### Option 3 – Introducing a voluntary code of practice; self-regulation and an information and education campaign

4.21 It might have been possible to issue new guidance to courts to help them administer the interests of justice test to ensure consistent application of their decision making. However, there would be no guarantee that new guidance would achieve the savings required to bring sustainability to the legal aid budget. While a stricter application of the merits test might mean that public funding was no longer available for cases that did not meet the interests of justice test, the guidance would not be binding.

4.22 Furthermore, guidance alone could not have provided for the introduction of financial eligibility test, which is a key to ensuring that those who can afford to pay for representation themselves are made to do so.

4.23 However, under the new scheme being introduced, day to day responsibility for the grant of public funding will remain with court staff through an arrangement governed by a Service Level Agreement (SLA) between the LSC and HMCS. The SLA would provide the LSC with useful management levers to ensure control and consistency over grant rate and behaviour through the use of guidance, training and IT support. It is intended also that the revised and more robust guidance on the application of both the financial eligibility test and merits test should be published formally by the LSC, which would also be used by solicitors as a basis to advise their clients.

4.24 Under the new scheme being introduced by the Act, once a suspect is charged, he will be expected to apply for representation immediately. In the majority of cases, it is anticipated that correctly completed forms will be processed well ahead of the first hearing so that a defence solicitor knows from an early stage whether or not his client is eligible for public funding. However, where there is a delay in reaching this determination, the Early Cover Scheme will allow for a fixed fee payment of £75 to defence solicitors to cover initial preparatory work and representation at their client's first hearing. The procedure for claiming for pre-order work where an application is refused on the interests of justice remains unchanged, and a fixed fee of £50 is payable in those circumstances.

## 5. Costs and benefits

### Sectors and Groups Affected

#### Businesses

5.1 Every solicitors' firm that works within criminal law will be affected by the changes. Those particularly affected are firms with a General Criminal Contract. There are currently around 2600 solicitor offices with a General Criminal Contract in England and Wales.

5.2 In developing the regulations, the Department has listened to stakeholders' concerns about the detail of the scheme. The Government has investigated concerns about the impact that the introduction of a new financial eligibility test may have on solicitors' income. The level of income at which an individual becomes ineligible for public funding is linked to the private income that solicitors' firms can expect to receive. If the eligibility limit is too low, individuals who are ineligible for public funding may also not be able to afford to pay private rates and so choose to represent themselves.

5.3 The eligibility limits have been developed to identify those individuals who can afford to pay, and those who need help in meeting their legal costs. The upper limit for the first limb of the test is set at a level where the Government is satisfied that they will have sufficient disposable income to pay their legal fees in the vast majority of cases.

5.4 It is difficult to identify whether some firms will be more affected than others, as this will be dependent on the type of work undertaken, or the type of customer that it attracts. For example, firms that represent a greater proportion of their clients in straightforward matters at the magistrates' court may be more affected than firms representing clients in serious cases in the Crown Court, as there may be a greater number of defendants who are ineligible for public funding for the less serious cases. The Department accepts that there may also be a risk that those defendants who are refused public funding due to their means, are unable or unwilling to pay for the help they receive at private rates.

5.5 Similarly introducing a financial eligibility test may have a beneficial affect on firms with offices in more affluent areas, as individuals may become ineligible for public funding but be more prepared to pay private rates.

5.6 Proposals to pay £75 under the Early Cover Scheme as provided under the General Criminal Contract is intended to be a share of the risk that any solicitor may take in representing someone where the outcome of the application for representation is not known. Where representation is granted the work will be rolled into the standard fee. Where a representation order is not granted because the client's financial circumstances are such that they are deemed to have sufficient means to pay for their own defence, it is expected that the client will pay for any shortfall that the £75 does not cover. The LSC have undertaken to review this policy and the level of remuneration in light of the implementation of means testing.

5.7 There will be some additional work for solicitors. The LSC is working closely with the legal profession to ensure that solicitors become familiar with the new scheme as soon as possible. Solicitors will also have access to means test guidance and an online ready reckoner which will allow them to calculate swiftly and accurately whether or not their client will qualify for legal aid. This will mean that solicitors will be more likely to take the risk of representing their client before a decision has been made. The Government is satisfied that solicitors face little financial risk from undertaking work where a representation order is subsequently refused because of means.

### Consumers

5.8 From 2 October 2006, defendants who appear before the magistrates' court will be subject to a financial eligibility test. Research conducted by both the DCA and the LSC clearly suggests that direct savings will be obtained from determining the eligibility of those who apply for legal aid and disqualifying that proportion of the population who can clearly and affordably pay for the costs of their own defence. The CDS (Financial Eligibility) Regulations ensure that those who cannot afford to pay for their own defence costs still have their rights protected and will have access to legal aid, but those defendants who can afford to pay will be required to do so.

5.9 Under the initial filter test, an individual will be financially eligible for a representation order if his gross annual income, adjusted to take account of any partner or children, is £11,590 or less, and ineligible if it is £20,740 or more. Where it falls between these amounts, a more detailed assessment will be carried out whereby the representation authority will calculate the individual's annual disposable income, making deductions from the applicant's adjusted income, in respect of any income tax, national insurance, council tax, housing expenses, child care costs, maintenance and cost of living expenses. The individual is financially eligible if his annual disposable income does not exceed £3,156.

5.10 The Government calculates that under the eligibility limits set out in the draft regulations, 46% of defendants subject to the financial eligibility test would be ineligible for public funding. This comprises 21% of applicants being ineligible because their gross annual income exceeds the upper threshold with a further 25% being determined ineligible following application of the second limb of the financial eligibility test.

5.11 The Government is satisfied following consultation with key stakeholders that those applicants that need help in meeting the cost of their legal representation will receive public funding. Where those defendants are refused legal aid because of their means, regulations will allow the applicant to seek a review of that determination. In addition, a defendant will have recourse to an application under the Hardship Review Provision, which allows an individual to appeal against refusal to grant based on their means, but who consider that they remain genuinely unable to meet their defence costs due to the particular circumstances or where the costs of the case are especially high. The Legal Services Commission are consulting separately on this matter, and that process is ongoing. In addition, the LSC will have a further power to refer an issue arising from the determination of the financial eligibility test to the High Court for its decision.

5.12 The Government will keep the working of the new scheme under review. If factors such as costs of transport to work, regional variations in housing costs or judgement debts or fines regularly prove decisive in determining successful hardship applications, the new means test scheme could be modified to take these into account.

5.13 In response to concerns raised about arrangements where defendants are remanded in custody and need to obtain and supply supporting documentary evidence for their application, the proposed early cover scheme has been extended to 5 working days after charge so not to disadvantage those defendants who need to apply for representation.

### Voluntary Groups

5.14 Voluntary groups that offer help to individuals accused of a crime may be required to offer advice as to the availability of help under the new arrangements. However, it is anticipated that under the new scheme, individuals will get the appropriate advice from legal representatives at the right time.

5.15 Correctly completed forms will be processed well ahead of the first hearing so that a defence solicitor knows from an early stage whether or not his client is eligible for public funding in the majority of cases. However, where there is a delay in reaching this determination, the Early Cover Scheme will allow for a fixed fee payment to defence solicitors to cover initial preparatory work and representation at their client's first hearing. If legal aid is subsequently refused, the solicitor will be able to offer the defendant advice as to how to either pay for legal representation privately or how to contest the decision if appropriate.

5.16 As mentioned above, it is anticipated that 46% of defendants subject to the financial eligibility test will not satisfy the financial eligibility criteria. This equates to approximately 132,000 defendants who would not be publicly funded. Whilst it is not possible to arrive at accurate estimates, it is reasonable to assume that a percentage of these defendants would choose to represent themselves rather than pay for their defence costs privately.

5.17 In 2003, over 2 million defendants were subject to proceedings in the magistrates' courts. This includes summary, motoring and indictable offences<sup>4</sup>. However, less than 30% of all defendants before the magistrates' courts receive public funding. This means that even if, for example, 20% of the 132,000 defendants choose to represent themselves, this would still represent just over 1% of the total number of defendants coming before the courts. The Government therefore considers that under these proposals there will only be a minimal impact on voluntary groups that currently provide help for individuals who are ineligible for public funding.

5.18 Voluntary groups, including Citizens Advice, were invited to comment on the details of the regulations and the impact assessment. The Government did not receive any comments on this assessment or any other aspects of the regulations from any of these groups.

### Race equality

5.19 There is no direct race equality impact as a consequence of the Regulations. While statistics suggest that there are clear ethnic disparities in the criminal justice system, it has not been possible to estimate the number of the BME population that may be affected by the financial eligibility test as the information available refers only to ethnicity in the population as a whole rather than amongst the defendant population. Similarly, information as to the financial circumstances of defendants who are from BME communities might be different to that for the defendant population as a whole.

5.20 The Government accepts that a BME group is more likely to suffer socio-economic disadvantage, that this population may have a low educational achievement or attainment. The introduction of a financial eligibility test may appear to disadvantage individuals from these groups. This perception may arise due to the complexities of the application forms, failing to understand the requirements of the financial eligibility test and the production of the proper supporting documentation. However, the Government is satisfied that the financial eligibility test is straightforward and can be easily understood, similarly the requirement to produce supporting evidence has been kept to a minimum. To assuage concerns that an individual may be left unrepresented at his first hearing, the Early Cover Scheme as introduced by the LSC as an amendment to the General Criminal Contract will give solicitors a duty to advise an individual to apply for a representation order once a suspect is charged. This will mean that by the time the

---

<sup>4</sup> Criminal statistics England and Wales 2003 Cm6361

individual has his first hearing, either the court or LSC would have made its decision on the application, and so the individual will have a representation order in place, subject to satisfying the financial eligibility criteria and the interests of justice. Where a decision has not been made, the individual will not be disadvantaged because he will still be represented by a solicitor for that first hearing.

5.21 The Government is satisfied following consultation with key stakeholders, including the Commission for Racial Equality and Equal Opportunities Commission that the new scheme will enable those defendants that need help in meeting the cost of their legal representation will receive public funding. Where defendants are refused legal aid because of their means, regulations will allow the applicant to seek a review of that determination. In addition, a defendant will have recourse to an application under the Hardship Provision.

5.22 Where a defendant has not applied for public funding, or appears unrepresented for the first hearing, he will be entitled to representation through the Court Duty Solicitor scheme. Free advice from the Court Duty Solicitor will reduce any additional burden on the voluntary groups as unrepresented defendants will be able to get the appropriate advice they require at the time of their court appearance.

5.23 Comments were invited from amongst others, the Commission for Racial Equality and the Equal Opportunities Commission, as to the impact the regulations may have on a BME group. The Government did not receive any comments as to its assessment of the likely impact that the introduction of the regulations would have on any BME group.

5.24 The Government will keep the working of the new scheme under review.

#### Public sector

5.25 The regulations set out that the representation authority to assess the individual's application will be the court, or the LSC. The relationship between the LSC and the HMCS will be governed and enforced by a Service Level Agreement. A close working relationship will be established to ensure the success of the revised arrangements.

5.26 The estimated additional running costs of the implementation of the CDS Act and supporting Regulations to the LSC and to HMCS is around £2.0m for the first year (2005/06), rising to £5m the year after (2006/07).

5.27 The ongoing running costs are estimated at up to £10m, but around £5m of that is already within the HMCS budget, for the administration of the interests of justice test.

5.28 There is some risk that there will be an increase in the number of unrepresented defendants because some applicants will be refused legal aid on the grounds of their means. However, the scheme was devised to identify those defendants who should have sufficient disposable income to pay for their legal fees in the majority of cases; and in the last resort some defendants who could afford to pay for representation may choose to represent themselves.

5.29 We have no evidence on the number of individuals refused public funding who will choose to represent themselves. Currently over 70% of defendants who appear before the courts are not publicly funded, and so either pay privately or represent themselves. If 20% of defendants who are refused public funding, subsequently choose to appear in person that is just over 1% of the total number of defendants who are brought each year before all the magistrates' courts in England and Wales.

5.30 There is some risk that means testing may lead to adjournments to some early hearings scheduled before a representation order has been granted, an increase in the number of unrepresented defendants, and an increase in the number of elections to the Crown Court. Where

applications are referred to LSC by court staff because they are complex or high risk, or where a hardship review has been requested, that additional time will pose a risk to targets for the majority of first hearings to take place within 3 days of charge, if not the next day.

5.31 Because of the potential impact on courts, a number of mitigations have therefore been built in to the system to minimize these risks, including the Early Cover scheme and low evidential burdens for the supporting documentary evidence. The Government is also looking further at supporting evidence from defendants remanded in custody, to reduce any risk of delay to such applications. Work is also in hand to ensure that effective processes are in place for monitoring the impact after implementation so the system can be actively managed, should any of the risks be realised.

5.32 Further to the risk of an increase in elections to the Crown Court, the Government is currently developing proposals to enhance the Recovery of Defence Costs Orders scheme so ensuring that those defendants who elect Crown Court trial to avoid the means test in the magistrates' court will be required to pay towards the cost of their representation.

5.33 There will also be an impact on the LSC in its relationship with the courts. The SLA will address the need for the LSC and HMCS to work closely together to ensure the effectiveness of the grant process and for the Commission to provide support, guidance and training to the courts. to remove the potential for drift and inconsistency. This features in the SLA and require the LSC and HMCS to work closely together.

#### Economic

5.34 The proposed introduction of the financial eligibility test will result in savings for the Government and the legal aid fund. Under the financial eligibility test, court staff consider the applicant's gross annual income, adjusted to take account of any partner or children in the scale set out in Schedule 1 to the regulations. The purpose of this test is to identify an individual's genuine ability to pay. Where the gross annual income as adjusted falls below £11,590 the individual is eligible for public funding, but where the gross annual income falls above £20,740 the individual will be ineligible.

5.35 Where the gross annual income falls between these two limits, the individual's annual disposable income is calculated. These calculations will include deductions in respect of income tax, national insurance, council tax, housing expenses, child care costs, maintenance and cost of living expenses. Having taken all these into account, the individual is financially eligible if the annual disposable income is less than £3,156.

5.36 It has been assessed that setting the financial limits at this level will generate gross annual savings in the region of £58m based on those that are ineligible for public funding who currently receive legal help at an average cost of £515 per case. Preliminary analysis of the impact of the introduction of the financial eligibility test shows that savings can be anticipated from those applicants who are refused legal aid on the basis of means, having applied, and those who do not choose to apply because they have been advised, or anticipate, that they would not pass the test. It is not possible to estimate the impact that the introduction of the means test will have on deterring individuals applying in the first place. The Government will monitor closely the management information to effectively monitor the new scheme.

5.37 In arriving at the estimated net savings of £35m, the Government has reduced the gross savings by the anticipated increase in costs to central funds. The Government has assessed that the number of non-eligible defendants who pay private rates for representation who are subsequently found not guilty will be just over 12,500. Following their acquittal, these individuals could seek to recover their legal expenses from central funds, and this sum is estimated at approximately £13m, where it is assumed that the cost of privately funded cases will be twice the average legal aid cost.

5.38 In addition to the costs to central funds, it is anticipated that the Early Cover Scheme and the Administration costs for the new scheme will amount to £5m for each. The total net savings to the legal aid fund following the introduction of the means test at the limits set out in the regulations is £35 million.

#### Environmental

5.39 Not applicable

#### Social

5.40 Not applicable

#### Analysis of Costs and Benefits

5.41 The benefits of the new financial eligibility test, as set out in the regulations, are that the scheme would be administratively simple and straightforward to operate. Under the old legal aid scheme governed by the Legal Aid Act 1988, all details of a defendant's income and outgoings had to be provided to the court with supporting documentary evidence prior to the court granting criminal legal aid.

5.42 Under the scheme for the new financial eligibility test, the Government has been sensitive to concerns that some defendants might be denied representation. However the Government is confident that they have developed a scheme whose calculations fully take into account an individual's family circumstances. Through the Hardship Provision, we have also responded to wider concerns that the new scheme should be able to provide for the small number of applicants whose unique circumstances mean that, although they have failed the financial eligibility test, they are genuinely unable to pay for the cost of their own defence. The detail of this scheme is currently being consulted upon by the LSC. The LSC are currently setting up a dedicated unit to deal with applications referred to them by the court because they are complex, or where applicants are appealing under the Hardship Provisions. The LSC anticipate between 50,000 and 70,000 such applications a year. Regulations are not required to deal with the hardship provisions as the detail of the scheme will be done by a change to the General Criminal Contract. The Government agrees to review the criteria for referral under the Hardship Provisions to ensure that the system is not used for the purpose of abusing court procedure and so cause delay to the proceedings.

5.43 The proposed initial filter assessment of the applicant's means takes into account the number of children and other dependants in the family. This system allows each applicant's financial position to be more sensitively assessed, therefore overcoming the arbitrary nature of the earlier proposed gross income thresholds.

5.44 Following the initial financial eligibility assessment, where an applicant's adjusted income falls within the two thresholds as set out above, a further more rigorous assessment of the applicant's financial position will be carried out in order to determine eligibility. This assessment will deduct a series of allowances and actual costs, and the residual net income will be measured against an annual disposable income threshold of £3,156.

5.45 Further work undertaken by the Government estimate the cost of administering the new scheme will be £5m. The LSC will estimate the likely cost of administering the high risk, complex case and hardship unit following consultation on this aspect of the scheme. The Government also estimates that the cost of running the Early Cover Scheme will be £5m.

## Costs

5.46 The estimated additional running costs of the implementation of the CDS Act and supporting Regulations to the LSC and to HMCS is around £2.0m for the first year (2005/06), rising to £5m the year after (2006/07).

5.47 The ongoing running costs are estimated at up to £10m, but around £5m of that is already within the HMCS budget, for the administration of the interests of justice test.

5.48 There is no direct additional cost to businesses under the proposed draft regulations, as solicitors will not conduct the financial eligibility test. While practitioners will have to explain the practicalities of the scheme to defendants, guidance will be issued by the LSC to make the process as simple as possible and to alert individuals to the evidence that they will be required to produce in support of their application. The Government is confident that the transparency of the initial filter test and the availability of an on line calculator will mean that solicitors will be able to advise their clients as to eligibility with relative ease. This, along with other aspects of the working of the scheme will be monitored.

## 6. Small Firms Impact Test

6.1 There is no significant or complex impact on small firms. Courts will continue to consider the interests of justice test and perform the new financial eligibility test in order to grant or refuse legal aid. Solicitors will be required to acquaint themselves with the scheme in order to advise their clients on the application process. The LSC has developed an Early Cover Scheme which allows for a fixed fee payment to defence solicitors to cover initial preparatory work and representation at their client's first hearing. Similarly, the Hardship Provision provides support to those individuals who have failed the means test who are unable to meet the costs of their case.

## 7. Competition assessment

7.1 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 regulations will not affect set up costs or lead to higher ongoing costs. The regulations will not restrict the ability of firms to offer a range of services.

## 8. The Legal Aid impact test

8.1 These proposals have a direct impact on criminal legal aid. As mentioned above, the estimated net annual savings to the criminal legal aid budget from implementation in the magistrates' courts are £35m.

8.2 The workload of the courts will be unaffected by the policy proposals, although court staff will be required to undertake a financial eligibility test for applicants for public funding which they currently do not do. Court staff are familiar with the interests of justice test, and will still be required to conduct this test under the guidance of the LSC. The LSC is working closely with HMCS to provide guidance on how to conduct the financial eligibility test, and on appropriate training. HCMS have identified the level of staff required to undertake the two tests, and are satisfied that the new tests can be met under current workload arrangements.

## 9. Enforcement, sanctions and monitoring

9.1 Individuals will be subject to the same sanctions under the Access to Justice Act 1999 where they provide false information in support of their application, namely facing criminal proceedings.

Where found guilty of misrepresentation an individual is subject to a fine not exceeding level 4 or imprisonment not exceeding 3 months.

9.2 The Legal Services Commission will be financially accountable for the process, but will in turn delegate the administration of the financial eligibility test and the interests of justice test to court staff. This relationship will be governed and enforced by a service level agreement between the LSC and HMCS.

9.3 The proposed approach provides substantial practical benefits. It places an obligation on the Commission to provide an agreed level of training and assistance, and an ongoing level of support and guidance to the grant teams.

9.4 In turn the courts will be required to provide the Commission with improved management information so enabling the LSC to monitor and predict grant trends, and manage the working of the system. The SLA would provide the Commission with useful management levers to ensure control and consistency over grant rate and behaviour through the use of guidance, training and IT support.

9.5 Courts will be responsible for conducting the financial eligibility test, and will be subject to audit over their decision-making. Sanctions, as such, will not be necessary in these circumstances, as internal audit will identify weaknesses and internal guidance and assistance will address any identified weaknesses.

9.6 The LSC has also developed a fraud strategy to help combat potential abuse of the new scheme. This includes verification by the Department for Work and Pensions of all applications where a passported benefit has been declared, the creation of a new specialist unit within the LSC to deal with high-risk applications, and a random retrospective check of 5% of non-passported cases.

## 10. Implementation and Delivery Plans

10.1 The draft regulations have been consulted on with key stakeholders. The new regulations will come into force on 2 October 2006.

10.2 While regulations will set out the scheme, guidance issued to defendants, practitioners and court staff will facilitate the application and decision making process. As part of the guidance it is intended to develop new forms to promote early application and early decision making. These forms will replace the existing application form for criminal public funding. It is anticipated that guidance and forms will be available on-line as well as being available as hard copies.

10.3 Training for court staff will begin in August and September. The LSC will be running training sessions for solicitors in September. HMCS has also produced a communication strategy, agreed with DCA and LSC. Communications activities have already started, which aims to engage court staff and solicitors in the delivery of the new process, including helping to communicate with key audiences. It will also provide a public information service for defendants.

## 11. Compensatory Simplification

11.1 The new regulations do not remove any existing requirements as set out in current regulations, but provide for new arrangements for grant, a financial eligibility test and appeal and review of courts' decisions.

11.2 The financial eligibility test will take place as soon as a legal aid application is made based on a simple assessment of gross income, which is highly transparent and easy to understand. However, in acknowledgement of concerns that a scheme predicated on a system of cut-offs

inevitably lacks sensitivity and may give rise to unfairness, the Department has developed a scheme which adjusts the applicant's income through the application of a simple weighting factor, taking into account family circumstances; for example the age and number of children an individual has.

11.3 Following the initial filter test for financial eligibility, a full financial eligibility test will assess the applicant's disposable income, net of tax and deduct a series of allowances and actual costs, including welfare benefits, housing, childcare and maintenance costs from the applicant's gross adjusted income.

11.4 The Government acknowledges that a scheme based on a series of flexible eligibility limits could not be as sensitive as a scheme which comprehensively investigated the means of every applicant. However, we do believe that the new approach, which despite adding a small degree of complexity to the financial eligibility test, is on balance fairer and sensitive to the applicant's ability to pay.

11.5 In drafting the regulations, the Department has striven to keep them to a minimum and to make them as simple as practicable.

## 12. Summary and Recommendation

12.1 The Criminal Defence Service Act 2006 and the Criminal Defence Service Regulations enable the Government to halt the rising costs associated with criminal legal aid, while safeguarding the fundamental rights of the individual.

12.2 The risks to businesses are minimal and are outweighed by the Government's responsibility to the taxpayer to improve management of the legal aid system. The CDS regulations allows such control to be introduced.

12.3 The Regulations which include a Hardship Review Provision and an appeal and review mechanism protect the individual, and also ensure compliance with the Human Rights Act 1998.

## Declaration and publication

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs

Signed .....

Date

Minister's name, title, department

Contact point for enquiries and comments:  
Samantha Toyn  
Criminal Legal Aid Strategy  
Selborne House  
020 7210 8062