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Department for
Constitutional Affairs
Justice, rights and democracy

Criminal Defence Service Bill Supplement to the Framework Document



Criminal Defence Service Bill

Supplement to the Framework Document

Presented to Parliament by the Secretary of State for Constitutional Affairs
and Lord Chancellor

By Command of Her Majesty October 2005

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Introduction and Purpose

The Criminal Defence Service (CDS) Bill was first published in draft in the Third Session of the last Parliament, and underwent pre-legislative scrutiny in the spring of 2004. The Bill and accompanying Framework Document were published in December 2004, but the Bill failed to complete its passage in the curtailed session before the General Election.

The Bill was re-introduced in the House of Lords in May 2005, accompanied by a new Framework Document which took account of the findings of the Constitutional Affairs Select Committee and various stakeholder submissions.

The Government has undertaken to provide peers with details of the regulations that the Secretary of State proposes to make, should the Bill be passed by Parliament. The current draft of the regulations, which are attached at Annex A, will be subject to consultation with the Law Society, the Bar and other key stakeholders. This process of consultation may of course necessitate further amendments to the draft regulations.

The following sections supplement the Framework Document of May 2005 (Cm6572), outlining areas of evolution and change including details of the Crown Court scheme.

The Magistrates' Court Scheme

The proposed Magistrates' Court scheme was set out in the May 2005 Framework Document. During Second Reading and Committee Stage in the House of Lords, Peers raised a number of concerns which we have carefully considered. We now propose the following changes to the scheme.

Means Testing

In developing the new means testing model, the Government has consistently adhered to three key objectives:

- That the new scheme should be administratively simple and straightforward to operate (minimising the risk of delay to the wider criminal justice system)
- Against this background, that the scheme should be sensitive to the individual circumstances of the applicant (and ensure full compliance with the Government's ECHR obligations);
- That the scheme should be transparent and easily understood by practitioners, defendants and court staff alike.

The Government set out in an earlier Framework Document the basis on which it intends to conduct the means test. We have continued to refine and develop the proposed model in the light of improved data and more sophisticated modelling.

Our basic approach remains as outlined in the Framework Document published in May 2005. In consultation with the legal profession and other stakeholders we have sought to ensure to the greatest extent possible, that the new means test enables us to be sensitive to an individual's circumstances and to meet our ECHR/HRA obligations.

The Government also acknowledges some of the concerns that have been expressed by both Parliament and key stakeholders as to the efficacy of a system which relies, at least in part, on necessarily crude gross income thresholds.

In response to this, we are considering a mechanism by which the income of applicants might be adjusted or weighted to reflect their individual family circumstances. There are a number of different ways in which this type of adjustment might be simply achieved (to produce a similar outcome), but all rely upon the principle of weighting income according to household composition and affordability.

We have also sought to respond to some of the wider concerns of Parliament that the new scheme should adequately provide for the small number of applicants whose unique circumstances mean that, although they have failed the means test, they are genuinely unable to pay for the cost of their own defence. Our approach to this is explained under the heading of "Appeals/Review mechanism" below.

The revised scheme in detail

As with the previous proposals, the revised scheme relies on a two-stage test to determine financial eligibility.

Initial filter

This would provide an initial assessment of whether the applicant was within the income range in which a more detailed means test should be performed.

In the early model proposed in the first Framework Document (Cm 6572), it was proposed that there should be an upper eligibility threshold (based on gross income), above which all applicants would be ineligible for legal aid; this is equivalent to the civil means test income cap which has been robustly modelled, consulted on and has not been found to be contrary to the ECHR. There would also be a lower income threshold (before tax) below which all applicants would be eligible. This did not take account of actual living circumstances of applicants.

Where earnings fell between the gross income cap and the lower income threshold, a series of allowances would be applied to reflect individual circumstances. These allowances would be deducted from the gross income. Where income after these deductions was less than the lower income threshold, the applicant would become eligible for legal aid. The clear benefit of this scheme is that it would be highly transparent and easy to understand both for defendants and those responsible for administering it.

The Government recognises, however, that a scheme predicated on a system of cut-offs inevitably lacks sensitivity and may give rise to unfairness. Because the Government wishes to ensure that the final scheme provides an accurate assessment of the client's ability to pay, and following more detailed modelling, we favour a scheme which would retain this first filter as its basis but would enhance its sensitivity to the individual circumstances of the applicant.

This would be achieved by adjusting the applicant's income through the application of a simple weighting factor.¹ The factor applied would take account of the defendant's family circumstances (age and number of children etc).

The Government believes that this would allow for a much more meaningful comparison of relative incomes and a better assessment of affordability by taking account of the composition of the applicant's household. In practice, the adjustment process would recognise, for example, that a couple with dependent children need a higher income to achieve the same standard of living as a couple with no children.

This means that a childless single defendant would automatically qualify for legal aid if his gross annual income was below £11,590 – if his income exceeded £20,740 he would be disqualified. For a childless couple the income levels are £19,000 and £34,000 respectively. More details and worked examples are set out below.

Since this early adjustment allows each applicant's financial position to be more sensitively assessed in relation to their personal circumstances, we are able to overcome the arbitrary nature of schemes based on a system of individual gross income thresholds. As a result, we would be better able to determine which applicants can genuinely afford to pay for their defence costs.

Annex B describes in more detail the way in which a system of weighting might operate in practice and provides worked examples. The draft regulations now published in support of the CDS Bill also demonstrate how this type of system might be described in the secondary legislation.²

¹ See Annex B.

² See Annex A.

The Government recognises that this is an innovative use of some of the methodology upon which this relies, and therefore proposes to consult with key stakeholders in order to adopt a model which best meets the needs of clients, practitioners and those who operate the system.

The full means test

Where the adjusted income falls between these two thresholds, a more rigorous assessment of the applicant's financial position will be carried out in order to determine eligibility. The means test at this stage remains the same irrespective of the way in which the first filter is devised. The implementation of the second limb of the financial eligibility test assesses the applicant's disposable income net of tax and national insurance. It would do so by deducting a series of allowances and actual costs, including:

- Disregarded welfare benefits³
- Actual annual housing costs (including rent/mortgage costs and council tax);
- Actual annual childcare costs (as more fully defined in the draft regulations);
- Actual annual maintenance to former partners; and
- An annual living allowance adjusted according to the individual circumstances of the applicant.

In the earlier model of the scheme, the resulting disposable income figure would then be assessed against the same fixed upper and lower eligibility thresholds.

In the refined model, having assessed the applicant's income as indicated above, we are proposing to measure the applicant's residual net income against a disposable income threshold of £3,156. This would serve as the final determinant of the applicant's financial eligibility. Therefore, where the applicant's residual net income falls below £3,156, the applicant would qualify for legal aid. However, in those cases where this figure exceeds this threshold, the applicant would be financially ineligible.

We believe that a threshold of £3,156 reflects a level above which it is reasonable to ask the applicant to pay for their defence costs. Taking into account that private client defence costs will in all likelihood exceed the average cost of a publicly funded case in the Magistrates' Courts (currently £515), we consider that this threshold is fair. Nonetheless, as with other thresholds referred to in this document, we will be consulting to ensure that they are fixed at the correct and appropriate level.

³ These are listed at Annex C.

The Government acknowledges that even a scheme which is based on a series of flexible eligibility limits could not, by its very nature, be as sensitive as a scheme which comprehensively investigated the means of every applicant. Equally, the Government recognises that this new approach is innovative and inevitably adds, to a small degree, to the complexity of the means test. On balance, however, we believe that the advantages to be gained through enhancing the sensitivity of the test in this way (and in doing so reducing the risk of HRA challenges to the test) outweigh the relatively insignificant additional administrative burden.

The following case studies illustrate the way in which the scheme would work in practice.

Case study 1

A single adult with no children with a gross income of £24,000 would have an adjusted income of £39,344 (ie $£24,000 \div 0.61$) so above the £34,000 threshold and therefore **INELIGIBLE**.

Case study 2

A couple with no children and a joint gross income of £24,000 would have an adjusted income of £24,000 (ie $£24,000 \div 1.0$) would then be subject to the full means test.

Net income =	£17,876 –
	5,520 (actual housing costs @ £460 per month)
	8,684 (living allowance of £167 x 1.0 x 52)
	=====
Residual	
Income	£3,672

So above the residual income threshold and therefore **INELIGIBLE**.

Case study 3

A couple with 1 child aged 3 at the next birthday with a gross joint income of £24,000 would have an adjusted income of £20,339 (ie £24,000 ÷ 1.18) and would then be subject to the full means test.

Net income =	£17,876 –
	5,520 (actual housing costs @ £460 per month)
	10,247 (living allowance of £167 x 1.18 x 52)
	=====
Residual	
Income	£2,109

So below the residual income threshold and therefore **ELIGIBLE**.

Case study 4

A couple with 2 children aged 3 and 6 at their next birthdays and with a gross joint income of £24,000 would have an adjusted income of £17,266 (ie £24,000 ÷ 1.39) and would therefore be below the lower threshold and are therefore automatically **ELIGIBLE**.

Aggregation of Means

A key feature of a means testing model based on adjusted income is that it will take account of a partner's income in determining an applicant's ability to pay. Aggregating means in this way is the norm in means tested benefits in this country.

The Government was initially concerned that taking account of a partner's income might lead to additional complexity. In fact we are satisfied that the opposite is the case, since where household expenses and bank accounts are shared it is not always possible, and rarely straightforward, to apportion income and expenditure.

Additionally, we were concerned that a scheme relying on an assessment of individual income could give rise to the anomalous and undesirable situation whereby those defendants with partners who have considerable means are judged financially eligible for legal aid. Finally, since either model makes allowance for the increased cost of a two person household, it is equitable not only to recognise the full cost, but also the full income of the household.

However, we do acknowledge the concerns of those who argue that unfairness may arise in cases where there is a clear contrary interest on the part of the partner (eg in domestic violence cases). For this reason, we will build safeguards

into the new scheme to deal with situations in which a clear contrary interest between partners can be demonstrated. This follows what is done elsewhere in means testing for legal aid.

Passporting

As previously proposed, an applicant in receipt of Income Support, Income Based Job Seekers Allowance, or Guarantee State Pension Credit will automatically be passported into the new CDS scheme.

The Crown Court Scheme

Background

During Committee stage the Government undertook to provide Parliament with details of the proposed Crown Court scheme. The key elements of the scheme are outlined below, but will not be considered for introduction until the provisions for Magistrates' Courts have been fully implemented. A phased roll-out of this type will provide us with the opportunity to learn any lessons arising from implementation in the Magistrates' Courts, as well as providing scope to consult more fully with our DCA partners and other key stakeholders. It is likely that prior to the Crown Court scheme being rolled out, the Government will choose to pilot different means test options. This will ensure that a national model strikes the right balance between collecting contributions, administering the means test, and the wider interests of administering the criminal justice system.

Although the Government has published draft regulations for the Crown Court scheme, it is intended that these should be only indicative at this stage. As we will be consulting fully with the professions over the final detail of the Crown Court scheme, we will also want to listen carefully to the views of Parliament, and to retain the flexibility to make any subsequent changes to the draft regulations that may be required.

Eligibility

It is proposed to use the same basic test of eligibility as that described above and in the earlier Framework Document for the Magistrates' Courts.

On this basis, all defendants who qualify for legal aid in the Magistrates' Courts (either because they are passported or because they qualify when tested) will be entitled to free legal aid in the Crown Court (subject only to a possible capital contribution as noted below).

No defendant, however, would be altogether ineligible for legal aid in the Crown Court on the grounds of means, although those defendants who do not meet the financial eligibility requirements for free legal aid under the new means test will be liable to pay a contribution towards their legal costs. For the very wealthy, these contributions will be substantial and it may be that some affluent defendants will choose to fund their own defence rather than pay contributions.

Income-based Contributions

The Government believes that some contribution from income will be appropriate for Crown Court cases, reflecting the fact that, although only a few could be expected to bear the whole cost of a case, many more defendants could make a worthwhile contribution. We intend to listen carefully to the views of Parliament and practitioners before deciding on the precise model to be introduced. The Government may choose to pilot a model or models before finally adopting a nationwide scheme.

The key aim is to ensure that defendants in the Crown Court should generally be in no better or no worse financial position than a person who fails the means test in the Magistrates' Court and in so doing avoid creating any perverse incentives either to elect for Crown Court trial or to remain in the Magistrates' Court. It is also a key consideration whether the scheme would be capable of efficient delivery and whether it would represent value for money.

The level of the contribution would be calculated by adopting a similar banded contributory system to the one used under the civil legal aid scheme. As with the civil model, we envisage that contributions will be payable by the defendant every month for the duration of the case.

Instead of a regular monthly sum, an alternative would be to collect a single up-front contribution in a sum equivalent to a more expensive case in the Magistrates' Court. The final amount would need to be the subject of consultation but we expect that it would be in the region of £1,500.

The choice between these two methods will depend on further consultation with the professions and experience with the magistrates' scheme and pilots.

If we opt for monthly contributions, in order to ensure efficiency, we propose to introduce a *de minimis* rule based on the cost of collecting and enforcing contributions. This would ensure that contribution orders would only be made where collecting the contribution is cost effective. Where it is decided that a contribution order should be made, any subsequent default of payment could trigger an immediate application to the court for an attachment of earnings order, or other enforcement sanction. Unless the case had reached the full trial stage, when the withdrawal of representation would cause disruption, a failure to pay could lead to a withdrawal of state funding for the defendant.

As is currently the case, privately funded defendants who are acquitted will be able to apply to the court to have their legal costs refunded. The same will apply for legally aided defendants who have made contributions. In addition, a defendant who has paid more than the eventual full cost of their case will have the excess contributions refunded, even if they are convicted.

We believe that this model strikes the right balance between providing a safety net so that even the moderately wealthy can receive help in financing their defence in expensive cases and at the same time provide an incentive for those who can clearly afford to pay for their own defence costs to do so.

Where a contribution order was made, legal aid would only be available if the defendant met their obligation to pay (except for attendance at the police station and the 'early cover' scheme as described in the Framework Document of May 2005 (Cm 6572)). If the case then cost more than the contribution, the client would be liable to pay the balance through a Recovery of Defence Cost Order (RDCO).

Capital Contributions

In the Framework Document of May 2005, we gave detail of the Magistrates' Court scheme but not the Crown Court. We concluded for the Magistrates' Court that it was not appropriate to include a capital test on introduction. We still consider that to be the case. However, we do think that a limited 'liquid' capital test is feasible for the Crown Court scheme and should be included as a distinct element to the financial eligibility test. All applicants would be subject to this test, even where they have qualified for legal aid without being required to pay an income contribution.

The limited capital test will target those liquid assets held in cash accounts at bank and building societies. We propose that all such cash assets in excess of £8,000 will be the subject of a single one-off contribution. Whilst stocks, shares and property will not be considered as part of the capital test, information on these and other types of capital will still be sought as part of the intelligence gathering exercise under an enhanced RDCO procedure. Any over-payers would be refunded at the end of the case and under-payers pursued through this procedure.

We do not rule out a capital test for the future in the Magistrates' Court in the light of experience in rolling out the Magistrates' and Crown Court schemes.

Recovery of Defence Costs Orders

As previously indicated, as part of the proposed Crown Court scheme, we are planning to retain the mechanism of RDCOs.

Appeals/Review Mechanism

Review of the Application on the Grounds of Means

We do not intend to allow appeals to the court against decisions about financial eligibility. We firmly believe that these decisions are factual in nature and so do not call for fine judgements or opinions that warrant the intervention of the court. Rather, complaints alleging miscalculation or error will be dealt with administratively by the LSC in the form of a review. Applicants will also be free to re-apply should there be a fundamental or material change in their financial circumstances.

We are confident that this will provide more than sufficient protection for applicants who argue that their financial eligibility has been incorrectly assessed. Of course, where an applicant considers that a decision by a public body still remains uncorrected, the judicial review process will remain an option open to that individual.

Exceptional funding on the grounds of hardship

We acknowledge that despite our best efforts to develop a new means testing scheme more sensitive to individual circumstances, there will be occasions on which applicants who find themselves in unusual circumstances may fail the means test and yet may genuinely be unable to pay for their defence costs. This may be because they have particularly high outgoings (eg costs associated with providing care for disabled family members) or because the case is likely to be unusually expensive. As a result we will be designing a tightly drafted set of criteria under which applicants may apply to the LSC for their circumstances to be given special consideration.

Appeals on the Interests of Justice

The original scheme proposed that the court would only be able to provide an advisory opinion on the Interests of Justice test based on judicial review criteria. However, following the concerns articulated by members of the House of Lords both at the Second Reading and Committee Stages of the Bill, we have revisited this particular element of our policy.

After further consideration, we are now persuaded that the court should hear appeals on the grounds of misapplication of the Interests of Justice test, and that it should be empowered to substitute its own decision for that of the grant teams. In such circumstances, the court will be required to give reasons for substituting its decision.

However, we have not changed the policy on grant of legal aid. As the grant of representation depends on the applicant satisfying both the Interests of Justice test as well as the means test, any application will have to be referred back to the grant teams for a formal determination on means. Only once both limbs of the test have been met, will the grant teams be authorised to make a representation order.

The LSC will be charged with closely monitoring the application of this scheme. If at any point in the future, it appears that the Interests of Justice test is not being applied consistently across the country (or that applicants are being granted legal aid when it was not clear that the Interests of Justice test had been met), the LSC would issue guidance to court staff about the application of the test. Ultimately, the Government could amend Schedule 3 to the Access to Justice Act 1999 to clarify the working of the Interests of Justice test. Alternatively, it could choose to have the award of grant, including determination of the Interests of Justice test, administered solely and directly by the LSC, without the involvement of court staff.

Annex A

Draft New Part III of the Criminal Defence Service (General) (No2) Regulations 2001

APPLICATIONS FOR REPRESENTATION ORDERS⁴

Interpretation

6. In this Part of these Regulations –

‘gross annual income’ means total annual income from all sources which the person concerned has received or may reasonably expect to receive, other than the receipt of any of the following⁵ –

- (a) any of the following payments made under the Social Security Contributions and Benefits Act 1992:
 - (i) attendance allowance paid under section 64 or paragraph 4 or 7(2) of Schedule 8;
 - (ii) severe disablement allowance;
 - (iii) carer’s allowance;
 - (iv) disability living allowance;
 - (v) constant attendance allowance paid under section 104 as an increase to a disablement pension;
 - (vi) council tax benefit;
 - (vii) any payment made out of the social fund;
- (b) so much of any back to work bonus received under section 26 of the Jobseekers Act 1995 as is by virtue of that section to be treated as payable by way of jobseeker’s allowance;
- (c) any direct payments made under the Community Care, Services for Carers and Children’s Services (Direct Payments) (England) Regulations 2003 or the Community Care, Services for Carers and Children’s Services (Direct Payments) (Wales) Regulations 2004;

⁴ Note: the present draft only covers proceedings in magistrates’ courts and in the Crown Court. Because it is intended to introduce the new scheme in the Crown Court only after it has been implemented in magistrates’ courts, the provisions applying to the Crown Court are more likely to be subject to change.

⁵ Note: the enabling provisions relating to some of these payments are to be clarified.

- (d) any exceptionally severe disablement allowance paid under the Personal Injuries (Civilians) Scheme 1983;
- (e) any pensions paid under the Naval, Military and Air Forces etc (Disability and Death) Service Pensions Order 1983;
- (f) any Independent Living Fund payments;
- (g) any financial support paid under an agreement for the care of a foster child;

‘partner’ means a person with whom the individual lives as a couple, and includes a person with whom the individual is not currently living but from whom he is not living separate and apart;

‘period of calculation’ means the period of one year ending on the date on which an application for a representation order is made;

‘person concerned’ means the individual or his partner;

‘representation authority’ means the Commission or a court officer or other person to whom the Commission, in accordance with section 3(4) of the Act, has delegated its functions under paragraph 2A of Schedule 3 to the Act;

‘statement of truth’ means a statement that the person putting forward a document believes the facts stated in the document to be true.

Proceedings in which representation order may be granted

7. The Commission may, at any stage of the proceedings, grant a representation order in respect of the criminal proceedings mentioned in section 12(2)(a) to (f) of the Act and in regulation 3(2).⁶

Relevant authority

8. The representation authority is the relevant authority for the purposes of sections 17A and 26 of, and paragraph 3B of Schedule 3 to, the Act.

Applications for representation order

9.–(1) An application for a representation order shall be made on such form as may be specified by the Commission and shall be verified by a statement of truth.

⁶ Consequential amendments will be required to a number of statutory provisions which refer to the court as the authority with power to grant a representation order.

(2) Where the individual is under the age of 18, the application for a representation order may be made by his parent or guardian on his behalf.

(3) The date of any representation order shall be the date upon which the form mentioned in paragraph (1), properly completed, is received in accordance with these Regulations.

Proceedings mentioned in regulation 3(2)(a) to (g) and (i)

10. An application for a representation order in respect of any of the proceedings mentioned in regulation 3(2)(a) to (g) and (i) shall be made in writing to the Commission.

Proceedings in a magistrates' court

10A. An application for a representation order in respect of any of the proceedings which are mentioned in section 12(2)(a) to (f) of the Act and in regulation 3(2)(h) and are in a magistrates' court shall be made in writing to the representation authority at the court office for that court.

Proceedings in the Crown Court

10B. An application for a representation order in respect of any of the proceedings which are mentioned in section 12(2)(a) to (f) of the Act and in regulation 3(2)(h) and are in the Crown Court shall be made in writing to the representation authority and may be made –

- (a) at the court office where that court is sitting;
- (b) at the court office for a magistrates' court –
 - (i) at the conclusion of any proceedings in that court;
 - (ii) where that court is inquiring into the offence as examining justices or sending for trial under section 51 of the Crime and Disorder Act 1998;
 - (iii) where that court has been given a notice of transfer under section 4 of the Criminal Justice Act 1987;
 - (iv) in the case of an appeal from that court to the Crown Court;
 - (v) where that court has committed the applicant for trial in the Crown Court under section 6(2) of the Magistrates' Court Act 1980 and the applicant had been granted a representation order for proceedings in a magistrates' court; and
- (c) at the court office for a court which has ordered a retrial under section 7 of the Criminal Appeal Act 1968.

Notification and record of decisions

10C–(1) The representation authority shall notify the individual of the decision on an application for a representation order and, where an application is refused, shall provide to him written reasons for the refusal, and

- (a) where the refusal is on the grounds that his financial resources are not such that he is eligible to be granted a representation order, details of the review process, or
- (b) where the refusal is on the grounds that the interests of justice do not require him to be granted a representation order, details of the appeal process.

(2) The Commission shall keep a record of every application for a representation order, and of its outcome.

(3) The Commission shall send to the Secretary of State such information from the record mentioned in paragraph (2) as the Secretary of State may request.

Assessment by representation officer

10D.–(1) The representation authority shall assess whether the financial resources of the individual are such that he is eligible to be granted a representation order –

- (a) in accordance with this regulation and regulations 10F to 10I, in respect of proceedings in a magistrates' court, and
- (b) in accordance with this regulation and regulations 10F, 10G and 10K, in respect of proceedings in the Crown Court.

(2) The representation authority shall treat an individual who is under the age of 16 or who is under the age of 18 and in full-time education as financially eligible for a representation order and paragraphs (3) to (5) of this regulation, regulation 10E(1) (b) and (c) and (2) and regulations 10F to 10T shall not apply in such a case.

(3) Where the representation authority is satisfied that the individual is directly or indirectly in receipt of a qualifying benefit, it shall take that person's disposable income as not exceeding the sum for the time being specified in regulation 10H(2).

(4) The following are qualifying benefits for the purposes of paragraph (3) –

- (a) income support;

- (b) income-based jobseeker's allowance;
- (c) guarantee state pension credit under section 1(3)(a) of the State Pension (Credit) Act 2002.

(5) Except where paragraph (2) or (3) applies, the representation authority shall calculate the gross annual income and the annual disposable income of the individual and, where appropriate, of any partner –

- (a) in accordance with Regulations 10F to 10I, in respect of proceedings in a magistrates' court, and
- (b) in accordance with Regulations 10F, 10G and 10K, in respect of proceedings in the Crown Court.

Furnishing of information

10E.–(1) The individual shall provide the representation authority with the information necessary to enable it to –

- (a) determine whether he satisfies the condition set out in regulation 10D(2) or 10D(3);
- (b) calculate, where relevant, his gross annual income and his annual disposable income; and
- (c) calculate, where relevant, what contribution order is to be made under regulation 10R.

(2) The representation authority shall not carry out any of the functions in paragraph (1) unless it has all the information necessary to enable it to do so.

Resources of partner

10F. In calculating the income of the individual, the representation authority shall treat the resources of his partner as his resources unless the partner has a contrary interest in the matter in respect of which he is seeking a representation order.

Deprivation etc of resources

10G. If it appears to the representation authority that the person concerned has, with intent to reduce the amount of his income, whether for the purpose of making himself eligible for a representation order, reducing his liability to pay a contribution order or otherwise –

- (a) directly or indirectly deprived himself of any resources;
- (b) transferred any resources to another person; or
- (c) converted any part of his resources into resources which under these Regulations are to be wholly or partly disregarded;

the resources of which he has so deprived himself, or which he has transferred or converted shall be treated as part of his resources or as not so converted as the case may be.

Financial eligibility – magistrates’ court

10H.–(1) Where an individual applies for a representation order in respect of proceedings in a magistrates’ court, the representation authority shall calculate the gross annual income of the individual and of any partner and shall divide the total according to the scale set out in Part 1 of Schedule 3 to these Regulations.

(2) An individual is eligible for a representation order if his gross annual income, as adjusted under paragraph (1), is £19,000 or less.

(3) An individual is not eligible for a representation order if his gross annual income, as adjusted under paragraph (1), is £34,000 or more.

10I.–(1) Where an individual’s gross annual income, as adjusted under regulation 10H(1), is more than £19,000 and is less than £34,000, the representation authority shall calculate the individual’s annual disposable income in accordance with paragraph (2).

(2) There shall be deducted from the gross annual income of the person concerned –

- (a) any income tax paid or payable in respect of the period of calculation;
- (b) any contributions estimated to have been paid under Part I of the Social Security Contributions and Benefits Act 1992, in respect of the period of calculation;
- (c) any council tax paid or payable in respect of the period of calculation;
- (d) either –
 - (i) any annual rent or annual payment (whether of interest or capital) in respect of a mortgage debt or hereditament, payable by him in respect of his only or main dwelling, less any housing benefit paid under the Social Security Contributions and Benefits Act 1992, or

- (ii) the annual cost of his living accommodation;
- (e) any child care costs⁷;
- (f) if the individual is making bona fide payments for the maintenance of a former partner, a child or a relative who is not (in any such case) a member of his household, the amount of such payments paid or payable in respect of the period of calculation;
- (g) an amount representing cost of living expenses, calculated in accordance with the provisions of Part 2 of Schedule 3 to these Regulations.

(3) An individual is eligible for a representation order if his annual disposable income, as calculated under this regulation, does not exceed £3,156.

Extension of representation order

10J.–(1) A representation order granted to an individual in accordance with regulations 10H and 10I in respect of proceedings in a magistrates' court shall extend to the Crown Court if the proceedings continue there.

(2) Where paragraph (1) applies –

- (a) regulation 10R(1) applies to an individual who has been granted a representation order in accordance with regulation 10H(2);
- (b) regulation 10R(2) applies to an individual who has been granted a representation order in accordance with regulation 10I(3).

⁷ It is currently proposed to base the definition of 'child care costs' on that used for the calculation of income and capital in the Housing Benefit (General) Regulations 1987 and the Council Tax Benefit (General) Regulations 1992, although it may be possible to simplify it –

“‘child care costs’ means the costs of care which is provided by one or more of the following care providers –

- (a) a school on school premises, out of school hours,
- (b) a local authority, out of school hours –
 - (i) for children who are not disabled, in respect of the period beginning on their eighth birthday and ending on the day preceding the first Monday in September following their 15th birthday;
 - (ii) for children who are disabled, in respect of the period beginning on their eighth birthday and ending on the day preceding the first Monday in September following their 16th birthday;
- (c) a child care provider approved by an organisation accredited by the Secretary of State under the scheme established by the Tax Credit (New Category of Care Provider) Regulations 1999;
- (d) persons registered under Part XA of the Children Act 1989;
- (e) persons referred to in paragraph 1 or 2 of Schedule 9A to the Children Act, in schools or establishments referred to in those paragraphs;
- (f) persons prescribed in regulations made pursuant to section 12(4) of the Tax Credit Act 2002; other than costs paid in respect of the child's compulsory education or by a claimant to a partner (or vice versa) in respect of any child for whom either or any of them is responsible in accordance with regulation 14 of the Housing Benefit (General) Regulations 1987, or in respect of care provided by a relative of the child wholly or mainly in the child's home.”

Financial eligibility – Crown Court

10K. (1) Where regulation 10J does not apply and an individual applies for a representation order in respect of proceedings in the Crown Court, the representation authority shall calculate his gross annual income and shall divide it according to the scale set out in Part 1 of Schedule 3 to these Regulations.

(2) Where an individual's gross annual income, as adjusted under paragraph (1), is £19,000 or less, he is eligible for a representation order, and regulation 10R(1) applies to him.

(3) Where an individual's gross annual income, as adjusted under paragraph (1), is more than £19,000, he is eligible for a representation order, and regulation 10R(2) applies to him.

Duty to report change in financial circumstances

10L. An individual shall forthwith inform the representation authority of any change in the financial circumstances of the person concerned of which he is, or should reasonably be, aware, which has occurred since any calculation of his resources, and which might affect the terms on which he was assessed as eligible to be granted a representation order.

Amendment of assessment due to error

10M. Where –

- (a) it appears to the representation authority that there has been some error in the calculation of the income of the person concerned, or
- (b) new information which is relevant to the assessment has come to light (whether under regulation 10L or otherwise),

the representation authority may re-calculate the income or, as the case may be, amend the assessment and in the latter case the amended assessment shall for all purposes be substituted for the original assessment.

Renewal of application

10N. An individual who has been refused a representation order on the grounds that his financial resources are not such that he is eligible to be granted such an order may renew his application if, but only if, there is a material change in the financial resources of the person concerned.

Review of decision

10O. (1) An individual who has been refused a representation order on the grounds that his financial resources are not such that he is eligible to be granted such an order may apply for a review of the decision on either or both of the following grounds –

- (a) that there has been a miscalculation of the income of the person concerned or other administrative error;
- (b) that the refusal to grant a representation order would cause the individual exceptional financial hardship if he were to pay for the cost of representation himself.

(2) An application for a review shall be made to the Commission on such form as the Commission may specify and, where the grounds of the application are those mentioned in paragraph (1)(b), the individual shall provide particulars of his income and expenditure and a certificate by a solicitor as to the likely costs of the proceedings of the individual.

(3) On a review the Commission shall either uphold the decision or determine that the individual is financially eligible for a representation order.

(4) The determination of the Commission shall be final.

(5) Where the grounds of the review are those mentioned in paragraph (1)(b) and the Commission determines that the individual is financially eligible for a representation order, it may require the individual to pay a contribution in respect of the cost of his representation of such amount as it considers reasonable.

Determination by court of interests of justice

10Q. (1) Where an individual has not applied for a representation order the court may, at any stage in the proceedings, determine that it would be in the interests of justice for the individual, were he to be financially eligible to be granted a representation order, to be granted such an order.

(2) Where the court makes such a determination, the individual may apply to the representation authority for a representation order and, if the individual is financially eligible to be granted a representation order, the representation authority shall grant the order.

(3) Where an application for a representation order has been refused on the grounds that the interests of justice do not require the individual to be granted a representation order, the court may, at any stage in the proceedings, if it is satisfied that there has been a change in the circumstances of the case,

determine that it would be in the interests of justice for the individual, were he to be financially eligible to be granted a representation order, to be granted such an order.

(4) Where the court makes such a determination, the individual may apply to the representation authority for a representation order and –

- (a) if the individual states in writing, verified by a statement of truth, that the financial resources of the person concerned have not changed materially since the representation authority last considered his financial circumstances, the representation authority shall grant the order, or
- (b) if the financial resources of the person concerned have changed materially, the representation authority shall determine whether the individual is financially eligible to be granted a representation order and, if he is so eligible, shall grant the order.

Contributions – liability

10R (1) An individual to whom this paragraph applies and who has been granted a representation order shall make, in respect of the cost of his representation, where the total of his capital in any current bank or building society accounts exceeds £8000 at the date of the calculation, a contribution of the amount by which his capital exceeds £8000.

(2) An individual to whom this paragraph applies and who has been granted a representation order shall make the following contributions in respect of the cost of his representation –

- (a) where the total of his capital in any current bank or building society accounts exceeds £8000 at the date of the calculation, a contribution of the amount by which his capital exceeds £8000, and
- (a) where his monthly disposable income, as calculated under paragraph (3), exceeds £272 –
 - (i) one quarter of any such income between £268 and £400 inclusive;
 - (ii) one third of any such income between £401 and £531; and
 - (iii) one half of his remaining disposable income,

except where that quarter, third or half amounts to less than £x.

(3) The representation authority shall calculate the monthly disposable income of an individual to whom paragraph (2) applies by –

- (a) calculating his annual disposable income in accordance with regulation 10I;
- (b) subtracting the sum of £3,156, and
- (c) dividing the resulting sum by 12.

Contributions – general

10S. (1) All contributions shall be payable to the Commission.

(2) All contributions payable under regulation 10R(1) and (2)(a) shall be payable upon assessment.

(3) All contributions payable under regulation 10R(2)(b) shall be payable monthly until the conclusion of the proceedings.

(4) Where an individual fails to make a contribution payable under regulation 10R(1) or (2), the representation authority may, subject to paragraph (5), withdraw his right to a representation order.

(5) The representation authority shall not withdraw the individual's right to a representation order under paragraph (4) unless, after giving the individual an opportunity to make representations, it is satisfied that –

(a) he was able to pay the contribution when it was due; and

(b) he is able to pay the whole or part of it but has failed or refused to do so.

(6) Where an individual whose right to a representation order has been withdrawn under paragraph (4) pays the amount of the contribution that is due, the representation authority shall re-instate the order.

(7) At the conclusion of the proceedings or where a representation order is withdrawn and, in either case, where the contribution made by the individual exceeds the cost of the representation incurred under the representation order, the Commission shall refund the excess to the individual.

(8) At the conclusion of the proceedings –

(a) where the individual has been acquitted or the proceedings were discontinued or withdrawn, the Commission shall refund any contribution made by the individual;

(b) the Commission may remit any contribution which falls to be paid after the conclusion of the proceedings.

(9) The Commission may enforce the liability of the individual to make a contribution in any manner which would be applicable to a civil debt between parties, and may add any costs incurred in connection with the enforcement to the amount to be paid as a contribution.

Contributions – variation, discharge and review

10T.–(1) Regulations 10L and 10M apply where an individual is liable to pay a contribution as they apply where he applies for a representation order.

(2) The representation authority may discharge an individual from his liability to make a contribution or vary the amount of the contribution to be paid if there is a material change in the financial resources of the person concerned.

(3) An individual who is liable to make a contribution may apply to the Commission for a review of his liability on the grounds that

(a) that there has been a miscalculation of the income of the person concerned or other administrative error; or

(b) the order will cause him exceptional financial hardship.

(4) On such a review the Commission may confirm his liability or discharge him from it.

(5) An individual whose representation order has been withdrawn under regulation 10S(4) may apply to the Commission for a review of that withdrawal.

(6) On such a review the Commission may uphold the decision to withdraw the representation order or re-instate the order.

SCHEDULE 3

PART 1

(Scale for the purposes of regulation 10H(1))

Where the individual is a single adult, divide by 0.61

Where the individual has a partner/spouse, add 0.39 to 0.61 and divide by the total

For each child of the individual in his household, add the relevant figure below to 0.61 or 1.00, as appropriate, and divide by the total

Each child aged 0-1	0.09
Each child aged 2-4	0.18
Each child aged 5-7	0.21
Each child aged 8-10	0.23
Each child aged 11-12	0.25
Each child aged 13-15	0.27
Each child aged 16-18	0.36

PART 2

(Calculation of cost of living expenses under regulation 10I(2)(g))

See Annex D to the Framework Document

DRAFT REGULATIONS ON APPEALS

1.–(1) In this Regulation “court” means the court in which the proceedings in respect of which the individual is seeking a representation order are to be heard.

(2) An individual may appeal to the court against a decision to refuse to grant a representation order on the grounds that the interests of justice do not require such an order to be granted.

(3) Notice of appeal shall be on such form as the Commission may specify.

(4) The individual shall provide such further particulars and documents as the court may require in relation to an appeal under paragraph (2).

(5) The court shall either –

(a) uphold the decision; or

(b) substitute its own decision as to the interests of justice.

(6) Where the court substitutes its own decision it shall give written reasons for its decision.

(7) Where the court substitutes its own decision, the individual may apply to the representation authority for a representation order and –

(a) if the individual states in writing, verified by a statement of truth, that the financial resources of the person concerned have not changed materially since the date of his application, the representation authority shall grant the order, or

(b) if the financial resources of the person concerned have changed materially, the representation authority shall determine whether the individual is financially eligible to be granted a representation order and, if he is so eligible, shall grant the order.

2. An appeal shall not lie against a decision to refuse to grant a representation order on the grounds that the individual is not eligible financially to be granted such an order.

Annex B

Identifying affordability among applicants: A model for adjusting/weighting income

In designing a new means test model, we are seeking to identify an effective tool to fairly measure affordability among applicants. One way we believe this can best be delivered is through adopting a methodology known as ‘equivalisation.’ This allows for a much more meaningful comparison of relative incomes by using a weighted scale to take account of the composition of the applicant’s household. In practice, ‘equivalisation’ recognises, for example, that a couple with dependent children will need a higher income to achieve the same standard of living as a couple with no children.

Since ‘equivalisation’ allows each applicant’s financial position to be more sensitively assessed in relation to their personal circumstances, we are able to overcome the arbitrary nature of schemes based on a system of individual gross income thresholds. As a result, we will be better able to determine which applicants can genuinely afford to pay for their defence costs.

We believe that ‘equivalisation’ offers the fairest and most effective mechanism on which to found the new means test and are keen to discuss these proposals with Parliament as well as consulting more widely with key stakeholders. As a methodology, ‘equivalisation’ has significant academic standing and is already widely recognised across Europe. Within the UK it has been adopted by DWP in order to estimate the number of children living in poverty, and also serves as a key element of the methodology underpinning the series of DWP Reports on Households Below Average Income.⁸

McClements Equivalence Scale

For the purposes of a means test to identify eligibility for criminal legal aid representation, we are proposing to adopt the McClements Equivalence Scale

Head/Single Adult	0.61
Partner/Spouse	0.39
Each child aged 0-1	0.09
Each child aged 2-4	0.18
Each child aged 5-7	0.21
Each child aged 8-10	0.23
Each child aged 11-12	0.25
Each child aged 13-15	0.27
Each child aged 16-18	0.36

⁸ The 16th edition of Households Below Average Income 1994/5 – 2003/04 explains the key function and role of equivalisation at Chapter 1.

Case Studies

Case study 1

A single adult with no children with a gross income of £24,000 would have an adjusted income of £39,344 (ie $£24,000 \div 0.61$) so above the £34,000 threshold and therefore **INELIGIBLE**.

Case study 2

A couple with no children and a joint gross income of £24,000 would have an adjusted income of £24,000 (ie $£24,000 \div 1.0$) would then be subject to the full means test.

Net income = £17,876 –
 5,520 (actual housing costs @ £460 per month)
 8,684 (living allowance of $£167 \times 1.0 \times 52$)

=====

Residual
Income £3,672

So above the residual income threshold and therefore **INELIGIBLE**.

Case study 3

A couple with 1 child aged 3 at the next birthday with a gross joint income of £24,000 would have an adjusted income of £20,339 (ie $£24,000 \div 1.18$) and would then be subject to the full means test.

Net income = £17,876 –
 5,520 (actual housing costs @ £460 per month)
 10,247 (living allowance of $£167 \times 1.18 \times 52$)

=====

Residual
Income £2,109

So below the residual income threshold and therefore **ELIGIBLE**.

Case study 4

A couple with 2 children aged 3 and 6 at their next birthdays and with a gross joint income of £24,000 would have an adjusted income of £17,266 (ie $£24,000 \div 1.39$) and would therefore be below the lower threshold and are therefore automatically **ELIGIBLE**.

Annex C

Table of Disregarded Benefits

1. Disability living allowance
2. Attendance allowance paid under section 64 or Schedule 8 of the Social Security Contributions and Benefits Act 1992
3. Constant attendance allowance paid under Section 104 of the 1992 Act as an increase to disability pension
4. Carers Allowance
5. Council Tax benefit
6. Housing Benefit; and
7. Any payment made out of the social fund
8. Any back-to-work bonus under section 26 of the Jobseekers Act 1995
9. Payments under the Community Care (Direct Payments) Act 1996
10. Severe disablement allowance paid under the Social Security (Severe Disablement Allowance) Regulations 1984
11. Exceptionally Severe Disablement Allowance paid under the Personal Injuries (Civilians) (Amendment) Scheme 1983
12. Any war pension paid under the Naval, Military, Air Forces etc (Disability & Death) Service Pensions Order 1983
13. Independent Living Fund Payments under the Social Security Contributions and Benefits Act 1994; and
14. Any fostering allowance paid under the Children Act 1989 (to the extent that it exceeds the relevant dependants allowance made under the relevant regulations)

Annex D

The Annual Living Allowance

The proposals on which we intend to consult envisage that the annual living allowance should be based on the Expenditure and Food Survey conducted by the Office for National Statistics. This Survey breaks down weekly household expenditure into 12 distinct categories (see overleaf).

In order to determine the most appropriate level at which to set the living allowance, we will be suggesting that it is fair to discount several of the categories identified under this Survey. This includes, for example, household expenditure on:

- Hotels and restaurants
- Recreation and culture
- Alcohol and tobacco

Based on the figures from the Survey conducted in 2003/04, this would result in a weekly allowance for a single adult of approximately £102.

We believe that this would be a fair allowance, particularly given that our proposals under the means test already take into account the defendant's actual housing costs, including council tax (see page 6).

In common with the broad thrust of our proposals for means testing in the Magistrates' Courts, we believe it is only fair that the living allowance should also be weighted to reflect household composition. As has already been noted in the Framework Document and Annex B, we will be consulting on exactly which weighting mechanism it is most appropriate to adopt.

**Table of Expenditure Categories
under the Expenditure and Food Survey**

1. Food & non-alcoholic drinks
2. Alcoholic drinks & tobacco
3. Clothing & footwear
4. Housing*, fuel & power
5. Household goods & services
6. Health
7. Transport
8. Communication
9. Recreation & culture
10. Education
11. Restaurants & hotels
12. Miscellaneous goods & services

(* Net of mortgage payments, rent and council tax)



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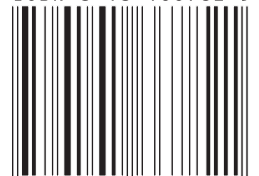
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