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Department for
Constitutional Affairs
Justice, rights and democracy

Criminal Defence Service Bill Framework Document



Criminal Defence Service Bill Framework Document

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

By Command of Her Majesty May 2005

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Introduction and Purpose

The purpose of this paper is to provide a more detailed description of the scheme which the Department for Constitutional Affairs (DCA) and the Legal Services Commission (LSC) would develop under the powers conferred by the Criminal Defence Service Bill, if they are granted by Parliament. The intention is to help Parliament's consideration of the Bill. The final detail of the scheme would be the subject of a further public consultation in advance of the introduction of the secondary legislation necessary to introduce the scheme. Parliament would have a second opportunity to approve the scheme when it considers those parts of the scheme which require regulations, particularly those subject to affirmative procedure.

This paper also reflects areas in which the policy and the design of the final scheme has evolved since publication of the Bill in the Fourth Session of the last Parliament.

Because of this Bill's early introduction and the fact that the policy has evolved to some degree since the Bill was introduced in the last session, it will not be possible to publish draft regulations alongside the Bill. Instead, it is intended that this document will provide a clear indication of the way in which the final scheme will operate and a framework for the Secondary Legislation.

The Bill is required to enable the creation of a scheme that will be both fair and simple to operate. By definition, therefore, we need to ensure that the new scheme retains an element of flexibility that will enable the Legal Services Commission to respond to changes in both the Criminal Justice System and the legal services market.

Background to the Bill – Pre-legislative scrutiny and consultation

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 paper¹. The Constitutional Affairs Select Committee published the report of its inquiry into the draft Bill on 27 July 2004² and the Department of Constitutional Affairs responded in November 2004 (Cm 6410)³.

¹ Cm 6194

² HC 746-I&II

³ Cm 6410

The Criminal Defence Service 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 proposed scheme, as described here, was developed taking account of the findings of the Constitutional Affairs Committee (CASC) on the draft Bill, input from key stakeholders, comments received as part of the wider public consultation and further research in this area on the part of both the DCA and the LSC.

Although this paper reflects an evolution in the thinking around the way in which the final scheme will operate (in the months between the Bill's first introduction and reintroduction in the current session) it is worth emphasising that, with the exception of a small number of technical consequential amendments, the Bill itself and the key powers it is intended to confer remain unchanged.

Summary of the New Powers under the Bill

The CDS Bill itself delivers two key enabling powers, which in turn facilitate:

- the transfer of responsibility for the power to grant representation from the courts to the Legal Services Commission; and
- the reintroduction of a test of financial eligibility (means test).

Both powers relate only to criminal cases.

Clauses 1 and 2 of the Bill confer these powers by amending Schedule 3 to the Access to Justice Act 1999. The text of Schedule 3, as it would read when amended by the Bill, is annexed to this paper.

Clause 3 takes the power to impose contribution orders and is required for the purposes of both the future Crown Court scheme and for the arrangements for dealing with unusually high cost cases (see below).

The Bill now contains a number of consequential amendments to other legislation to facilitate the operation of the new scheme.

Outline of the New Scheme

The scheme to be developed under the powers provided by the Bill will take the following shape:

Transfer of grant

- granting legal aid would cease to be an almost wholly judicial function and would become the responsibility of the Legal Services Commission (LSC). Financial accountability for both the means and merits test would lie with the LSC (subject to the appeals process described in this paper). In practice court staff, who already have substantial experience on the grant of legal aid, would remain responsible for its day-to-day operation in an arrangement to be governed by a Service Level Agreement with the Legal Services Commission; and
- there would be an appeal to the court (on prescribed grounds) against a decision to refuse representation based on the interests of justice test.

The means test in the Magistrates' Court

- an early means test as soon as a legal aid application is made based on an assessment of gross income⁴ (determining qualification or disqualification from the scheme) and on a number of eligibility allowances designed to reflect average costs of living and calculated on the individual circumstances of the applicant; there would be no contributory element, apart from in exceptional circumstances involving high cost cases⁵;
- a limited number of eligibility allowances would be introduced to ensure that the scheme is fair and sensitive to individual circumstances and reflects capacity to pay;
- means information would be collected from defendants at the earliest opportunity after entry into the criminal justice system on a consolidated application form covering both the early advice and assistance scheme and the grant of representation;
- under the new two-tier scheme, defendants would be able to apply for legal aid under an extended advice and assistance scheme running up to and including the first hearing at which time a means tested representation order would come into force. Eligibility for this scheme would be determined on merits alone; applicants would not be tested for means.

⁴ A definition of gross income as it will apply in this test can be found in **Annex A**.

⁵ See arrangements for funding of high cost cases below.

The Crown Court

We do not believe that this would be an efficient model for means testing in the Crown Court. In the short term, we therefore plan to strengthen further and enhance the existing system of Recovery of Defence Costs Orders (RDCOs) both in terms of their administration and their enforcement as well as making greater use of the courts existing power to restrain people from disposing of their assets.

The Bill does, however, confer the power to introduce formal means testing into the Crown Court. The eventual scheme will rely on a combination of powers within existing legislation and new powers taken by the Bill. The scheme itself is still under development and will form the second part of a phased introduction only once the Magistrates' Court scheme has been implemented.

It is likely that one feature of this scheme will be a contributions regime and the Bill makes one small consequential amendment in support of this to allow us to make use of attachment of earnings orders in support of any future use of contribution orders.

The Government will publish a more detailed model for the Crown Court Scheme in due course and repeats its firm undertaking to consult further and widely on these proposals

The New Scheme in detail

Basis on which the means test will be developed.

It is our intention that means testing should be as simple and predictable as possible consistent with the need for fairness.

Evidence of income will be established by producing to the grant teams recent payslips, bank statements, company accounts or other readily available confirmation of income.

In order to make the scheme easy to understand both for defendants and those responsible for administering it, the scheme will be based initially on gross income rather than net income (the current basis of our civil legal aid means tests).

There will be an upper threshold of £27,500 a year (before tax), beyond which all applicants will be ineligible for legal aid; this is equivalent to the civil means test income cap which has been robustly modelled, consulted on and found to be ECHR compliant. There will be a lower income threshold (before tax) below

which all applicants will be eligible. We propose that the lower threshold should be set at £15,000⁶ (although the precise level will be subject to consultation). The intention of this test is to ensure that only those who demonstrate an appropriate level of disposable income when tested will become ineligible. The average cost of a publicly funded case in the Magistrates' Courts is currently £515.

Where earnings fall between the gross income cap and the lower income threshold, a series of allowances will be applied to reflect individual circumstances. These allowances will be deducted from the gross income. Where income after these deductions is less than the lower income threshold (proposed at £15,000) the applicant will become eligible for legal aid.

The proposed allowances⁷ will be as follows:

- £1,650 if the applicant has a partner with no independent means;
- £2,204 p.a. for each dependant, whether a child, or a dependant aged over 16 (derived from allowances given in Schedule 2 to the Income Support (General) Regulations 1987); and
- an allowance for housing costs, net of any housing benefit⁸.

The final parameters of the scheme, as implemented, will be a matter for further consultation before introduction of the draft regulations. As is the case with all existing means-tested legal aid schemes, the level of both the income cap and the eligibility allowances will need to reflect the prevailing economic conditions at the time of introduction.

Capital

The financial eligibility test proposed as part of the new CDS scheme does not, as currently designed, feature a test of capital or fixed assets. The LSC and DCA have carefully studied the functioning of the capital element of the original means test (as it existed prior to abolition under the Access to Justice Act) as well as exploring a number of different models for a new capital test within the new scheme. Under present conditions, we have concluded that there is a risk that any savings likely to be derived from a capital test would be outweighed by the cost of administering this part of the scheme. Although a good deal of progress has been made in this area, the problems associated with the evidential requirements and subsequent auditing this part of the scheme have led us to believe that more work is required before a capital test could become a cost-effective feature of the scheme.

⁶ This figure is also a good deal higher than that which features in the Civil Scheme (£7,452).

⁷ For the reasons expressed in the body of the paper, the figures expressed here are indicative and will be the subject of further consultation.

⁸ Where there are no dependants, the maximum is generally £6,540 p.a. in the civil scheme. Further research and modelling is required to determine a fair level at which to set this allowance.

Exceptional funding for high value/complex cases

The Department proposes to develop exceptional funding arrangements for cases of unusually high cost, duration or complexity to be determined by application of a simple set of criteria. These cases will be paid at the same hourly rates as non-standard legally aided cases are currently paid. The LSC will assume that these rates apply to the whole case. It is currently proposed that the mechanism for achieving this will allow a defendant (previously disqualified on grounds of means) to make an application for representation once case costs have exceeded a pre-determined limit⁹.

Passporting

An applicant in receipt of Income Support, Income Based JSA, or Guarantee State Pension Credit automatically satisfies both the gross and disposable income tests in civil applications. It is proposed that receipt of these benefits should also automatically passport applicants under the new CDS scheme. Therefore, no formal assessment would be needed in these cases.

Eligibility of children and young persons

It is proposed that applicants under 16 years of age should be also be passported through the criminal means test in the Magistrates' court. The means of defendants aged 16 and over would be subject to the same means and merits test as described above.

Index Linking Eligibility Levels

Account should be taken annually of inflation in income levels and general inflation of costs (for allowances/deductions). It is recommended that the Rossi index be used for this purpose. The Rossi index is the all items index (RPI) less rents, mortgage interest payments, council tax and depreciation costs. Income related benefits (e.g. IS & JSA) are usually updated in line with the Rossi index.

Transfer of responsibility

The delivery model developed in support of the powers taken under the Bill means that accountability for the grant of representation should transfer from the Courts to the Legal Services Commission but that the conduct of the test should be placed, in practice, with the court-based grant teams alongside

⁹ To be agreed through consultation.

their existing role of conducting the merits test. The process would cease to be a wholly judicial function and become an administrative function carried out by court officers. Financial accountability and overall responsibility for the process would be transferred to the Commission who would delegate the administration of the test to court staff. This relationship would be governed and enforced by a service level agreement between the LSC and the Magistrates Courts Service within the new HM Court Service (HMCS); a close working relationship will be established to ensure the success of the revised arrangements. Such a service level agreement already exists between HMCS and LSC for the administration of Crown Court payments.

The Service Level Agreement (SLA)

The primary purpose and function of the SLA would be to set and maintain standards and service delivery. The actual quality and performance targets will be agreed between the LSC and HMCS. The SLA would allow the Commission to gain much better management information about, and exercise management control over, the grant process and to provide improved support and guidance.

There would be a single SLA, between the LSC as purchaser and HMCS as service provider. This would form the basis for performance standards in each Magistrates' Court where interests of justice and financial eligibility tests are applied in the determination of the right to a representation order.

The SLA will contain a number of key components:

- Environment: the background to and context of the service;
- System: the services to be provided and the services to be excluded;
- Input: the labour, materials and assets required to perform the service;
- Output: the quantity of activity or workload and the performance standards;
- Process: the tasks and procedures to be performed to deliver the service outputs; and
- Control: the procedures for monitoring the service.

The specification will clearly set out the duties and responsibilities of each party in a form that is capable of being monitored (e.g. "it is the responsibility of each Magistrates' Court to correctly consider, determine and notify decisions regarding applications for Representation Orders within 2 working days of receipt in 95% of cases).

As recommended by the Audit Commission, we aim to include between 6 and 20 quality targets within the specification, to encompass user satisfaction levels (clients and other stakeholder perceptions), joint complaints procedure, response times for oral and written enquiries, availability, system and service targets, monitoring procedures (liaison; access; information provision, e.g. Representation Orders by offence type; monitoring procedures, including the consistency of decision making).

The SLA will also contain a method statement that will specify the staff, materials and assets required to deliver the service to the required standard. For each service provided, the process for delivery down to the level of each key task will be specified.

The Appeals Mechanism

Appeals against refusal on merits

The framework for appeal already exists at paragraph 4 Schedule 3 of the Access to Justice Act 1999. It is proposed that where the Commission decides that it is not in the interests of justice to grant representation, the applicant may apply to the court before which the proceedings are taking place for a review of that decision. The basis for the review would be similar to that which would apply in proceedings for judicial review in the Administrative Court¹⁰. Following such a review the court will either refer the decision back to the Commission or allow the decision to stand.

Review of applications rejected on means

In cases where an application is refused on the grounds of financial disqualification, the new scheme proposes that there should be no route of appeal to the court but that defendants may apply to have the means decision reviewed on two grounds:

- where there has been a material change in the defendant's financial circumstances; or
- where there is a suspected miscalculation by the grant team or some other evidence of maladministration of the test.

¹⁰ This allows a defendant whose application has been refused by the Commission on interests of justice grounds to ask the court for a review of the decision. The court would not revisit the decision afresh but instead would check that it was not irrational, was reached fairly, within the Commission's powers and in accordance with the Convention rights. The court would not be able to grant representation, but instead would refer the case back to the Commission to reconsider its decision.

This review would be an internal process conducted by the Regional Director (or other nominated member of the Commission's staff¹¹) and would not involve a full hearing before a Funding Review Committee. This would replicate the position as it currently exists within the civil scheme as set out in the Commission's Funding Code. As with existing schemes, the Regional Director's decision would be subject to Judicial Review.

Contribution Orders

As drafted, the Bill seeks to take the power to include contribution orders as a part of the new scheme. Contribution orders will not be a factor in the overwhelming majority of claims as applicants will simply be deemed eligible or ineligible for full funding. As indicated above, however, the Government does recognise the need to develop as part of the new scheme, a mechanism for dealing with cases carrying an unusually high cost. One means of dealing with such cases in a flexible and equitable fashion may be through the device of contribution orders. We also expect that contribution orders will form some part of the eventual scheme to be introduced into the Crown Court.

Conclusion

The final model will be the subject of further consultation as part of the consideration of Secondary Legislation and later for those aspects of the scheme which impact on the General Criminal Contract.

The Government believes that the delivery model set out in this document strikes an appropriate balance between fairness to the individual and operational simplicity. The new model is swift to administer and transparent in design. It proposes a readily understood set of eligibility criteria and is sensitive to individual applicants' capacity to pay. The powers the Government seeks to take under the Criminal Defence Service Bill will ensure that those who can afford to pay do so, and that those who cannot will continue to receive access to justice. It will provide a sustainable basis on which to build a criminal legal aid system for the future.

¹¹ This internal process might also be delegated back to the court-based teams by the LSC through the service level agreement.

Annex A: Definition of Gross Income and Allowances

There are various definitions of gross income, including gross income that might apply to means testing. For means testing in the Grant of Representation Orders in the Magistrates Court, we would define gross income in the same way as defined in the civil means test to provide some consistency.

Gross income would be assessed according to the applicant's circumstances at the point of application. There would be no requirement to re-assess income during the duration of the case, along the lines of the civil legal help model. Gross income is therefore defined as total income from all sources which a person has received, or may reasonably expect to receive, during the calculation period, whether from employment, state benefits – including tax credits – and elsewhere, (eg. assistance from friends or relatives), before the deduction of tax, NI or any other allowances.

The proposed calculation period is the calendar month leading up to the application, keeping it consistent with the civil test. We may wish to consider a shorter period, for example, for the weekly paid and we may be able to consider a single wage slip. However, certain benefits are disregarded when determining gross income in civil cases and this should be consistent in the criminal means test. The main disregarded benefits are:

- Disability living allowance;
- Attendance allowance paid under Section 64 or Schedule 8 of the Social Security Contributions and Benefits Act 1992;
- Constant attendance allowance paid under Section 104 of the 1992 Act as an increase to disability pension;
- Carers Allowance;
- Council Tax benefit;
- Housing Benefit; and
- Any payment made out of the social fund.

In addition to these disregarded benefits, a number of further benefits and payments are also disregarded:

- Any back to work bonus under Section 26 of the Jobseekers Act 1995;
- Payments under the Community Care (Direct Payments) Act 1996;
- Severe disablement allowance paid under the Social Security (Severe Disablement Allowance) Regulations 1984
- Exceptionally Severe Disablement Allowance paid under the Personal Injuries (Civilians) (Amendment) Scheme 1983;
- Any war pension paid under the Naval, Military, Air Forces etc (Disability & Death) Service Pensions Order 1983;
- Independent Living Fund Payments under the Social Security Contributions and Benefits Act 1994; and
- Any fostering allowance paid under the Children Act 1989 (to the extent that it exceeds the relevant dependants allowance made under regulation 20(2)(b).

Annex B: Schedule 3 to the Access to Justice Act 1999 as amended by The Criminal Defence Service Bill

(text inserted by the Bill is shown in bold and existing text deleted by the Bill is shown struck out)

SCHEDULE 3: CRIMINAL DEFENCE SERVICE: RIGHT TO REPRESENTATION

Section 14

Individuals to whom right may be granted

- 1 (1) A right to representation for the purposes of any kind of criminal proceedings before a court may be granted to an individual such as is mentioned in relation to that kind of proceedings in section 12(2).
- (2) A right to representation for the purposes of criminal proceedings may also be granted to an individual to enable him to resist an appeal to the Crown Court otherwise than in an official capacity.
- (3) In this Schedule “court” includes any body before which criminal proceedings take place.

Grant of right by court

- 2 (1) A court before which any criminal proceedings take place, or are to take place, has power to grant a right to representation in respect of those proceedings **subject to sub-paragraph (1A)** ~~except in such circumstances as may be prescribed.~~

(1A) The power under sub-paragraph (1) shall not be exercisable:

(a) in relation to proceedings in respect of which the Commission has power to grant a right to representation under paragraph 2A, unless regulations otherwise provide, or

(b) in such other circumstances as may be prescribed.

- (2) Where a right to representation is granted for the purposes of criminal proceedings it includes the right to representation for the purposes of any related bail proceedings and any preliminary or incidental proceedings; and regulations may make provision specifying whether any proceedings are or are not to be regarded as preliminary or incidental.

- (3) A court also has power to grant a right to representation for the purposes of criminal proceedings before another court in such circumstances as may be prescribed.
- (4) The form of the application for a grant of a right to representation under this paragraph, and the form of the grant of such a right, shall be such as may be prescribed.
- (5) **Subject to sub-paragraph (5A),** a right to representation in respect of proceedings may be withdrawn by any court before which the proceedings take place; and a court must consider whether to withdraw a right to representation in such circumstances as may be prescribed.

(5A) Sub-paragraph (5) does not apply where the Commission has power to withdraw the right to representation in respect of the proceedings.

- (6) The powers of a magistrates' court for any area under this paragraph may be exercised by a single justice of the peace for the area.

Grant of right by commission

2A (1) Regulations may

- (a) **provide that the Commission shall have power to grant rights to representation in respect of criminal proceedings of a prescribed description;**
 - (b) **provide that the Commission shall, except in such circumstances as may be prescribed, have power to withdraw any rights to representation granted in respect of proceedings of a description prescribed under paragraph (a).**
 - (2) **In sub-paragraph (1)(a), the reference to criminal proceedings does not include proceedings prescribed under section 12(2)(g).**
 - (3) **Regulations under sub-paragraph (1) may make such consequential amendment or repeal of any enactment, including an enactment contained in subordinate legislation (within the meaning of the Interpretation Act 1978) as the Secretary of State may consider appropriate.**
- 3 (1) Regulations may provide that the Commission shall have power to grant rights to representation in respect of any one or more of the descriptions of proceedings prescribed under section 12(2)(g), and to withdraw any rights to representation granted by it.

~~(2) The form of any application for a grant of a right to representation under this paragraph, and the form of the grant of such a right, shall be such as may be prescribed.~~

~~(3) Regulations under sub-paragraph (1) may make such transitional provisions as the [Secretary of State] may consider appropriate.~~

3A (1) The form of the grant of a right to representation under paragraph 2A or 3 shall be such as may be prescribed.

(2) Regulations under paragraph 2A or 3 may make such transitional provision as the Secretary of State may consider appropriate.

Financial eligibility

3B (1) Power under this Schedule to grant a right to representation may only be exercised in relation to an individual whose financial resources appear to the relevant authority to be such that, under regulations, he is eligible to be granted such a right.

(2) Power under this Schedule to withdraw a right to representation shall be exercised in relation to an individual if it appears to the relevant authority:

(a) that his financial resources are not such that, under regulations, he is eligible to be granted such a right, or

(b) that he has failed, in relation to the right, to comply with regulations under this paragraph about the furnishing of information.

(3) Regulations may make provision for exceptions from sub-paragraph (1) or (2)(a).

(4) Regulations under this paragraph may include:

(a) provision requiring the furnishing of information;

(b) provision for the notification of decisions about the application of:

(i) sub-paragraph (1) or (2), or

(ii) regulations under sub-paragraph (3);

(c) provision for the review of such decisions;

(d) such transitional provision as the Secretary of State may consider appropriate.

Appeals

- 4 Except where regulations otherwise provide, an appeal shall lie to such court or other person or body as may be prescribed against a decision to refuse to grant a right to representation or to withdraw a right to representation.

Criteria for grant of right

- 5 (1) Any question as to whether ~~a right to representation should be granted~~ **power to grant a right to representation should be exercised** shall be determined according to the interests of justice.
- (2) In deciding what the interests of justice consist of in relation to any individual, the following factors must be taken into account—
 - (a) whether the individual would, if any matter arising in the proceedings is decided against him, be likely to lose his liberty or livelihood or suffer serious damage to his reputation,
 - (b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law,
 - (c) whether the individual may be unable to understand the proceedings or to state his own case,
 - (d) whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the individual, and
 - (e) whether it is in the interests of another person that the individual be represented.
- (3) The Secretary of State may by order amend sub-paragraph (2) by adding new factors or varying any factor.
- (4) ~~A right to representation shall always be granted in such circumstances as may be prescribed.~~ **The grant of a right to representation shall be taken to be in the interests of justice in such circumstances as may be prescribed.**



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