EXPLANATORY MEMORANDUM TO

THE CRIMINAL DEFENCE SERVICE (FINANCIAL ELIGIBILITY) (AMENDMENT) REGULATIONS 2007 No. 777

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

2. Description

2.1 These regulations provide for an increase in the financial eligibility limits in respect of the new means test for criminal legal aid that was implemented in the magistrates' courts on 2 October 2006.

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

3.1 None.

4. Legislative Background

4.1 Paragraph 3B of Schedule 3 to the Access to Justice Act 1999, as inserted by the Criminal Defence Service Act 2006, provides that the power to grant a right to representation may only be exercised where a person is financially eligible, under regulations, to be granted such a right. The power is exercised in the Criminal Defence Service (Financial Eligibility) Regulations 2006 (S.I. 2006/2492). Whilst the first set of regulations under paragraph 3B of Schedule 3 were subject to the affirmative resolution procedure, subsequent regulations can be made in accordance with the negative resolution procedure (section 25(9A) and (10) of the 1999 Act).

5. Extent

5.1 The Regulations apply only to England and Wales.

6. European Convention on Human Rights

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

7. Policy background

7.1 The aim of the Criminal Defence Service Act 2006 and associated regulatory framework was to give effect to the Government's policy that those who can afford to pay for the costs of their own legal defence, should be asked to do so.

7.2 Under the new means testing scheme, where the applicant's gross annual income, 'weighted' to reflect family and household circumstances, exceeds £20,740, the applicant is automatically financially ineligible for legal representation; where it is less than £11,590, the applicant is financially eligible. If the applicant's 'weighted' gross annual income falls between the two thresholds, a more detailed assessment of the applicant's disposable income is carried out. This calculation includes provision of a cost of living allowance of £5,304, 'weighted' to take account of any partner or children that the applicant may have. Provided the applicant's annual disposable income does not exceed £3,156, the applicant is financially eligible for a representation order.

7.3 The Government has been committed to raising the financial eligibility thresholds for legal aid to take account of wider inflationary trends. The amendments set out in the new regulations reflect this commitment. The Retail Price Index (3.6% as at September 2006), which is used for most contributory and non-contributory benefits, has been used to increase the upper and lower threshold, as well as the threshold governing annual disposable income. However, the cost of living allowance has been raised by the ROSSI index (3% as at September 2006), which is based on the RPI less housing costs. As the detailed assessment of an applicant's disposable income already reflects the applicant's actual housing costs, it would be inappropriate to base an up-rating of the cost of living allowance on the RPI.

8. Impact

8.1 No Regulatory Impact Assessment has been prepared because there is no regulatory impact on the private or voluntary sector. There are no implications for the Exchequer.

9. Contact

9.1 Any enquiries about the contents of this memorandum should be addressed to David Stobie, Legal Aid Strategy Directorate, at the Department of Constitutional Affairs (tel 020 7210 8686; email david.stobie@dca.gsi.gov.uk).