EXPLANATORY MEMORANDUM TO

The Criminal Legal Aid (Recovery of Defence Costs Orders) Rules (Northern Ireland) 2012

SR 2012 No. 268

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Department of Justice to accompany the above Statutory Rule, which is laid before the Northern Ireland Assembly.

1.2 The Statutory Rule is made under the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and is subject to the negative resolution procedure.

2. Purpose

2.1 These Rules provide for Recovery of Defence Costs Orders (RDCOs) to be made against legally-aided defendants who have been convicted in the Crown Court. The purpose of such an order is to recover such part of the costs of the representation provided under the criminal aid certificate as is reasonable in all the circumstances of the case, including the financial resources of the defendant.

2.2 The Rules provide for the provision of information so that the judge may make the order, and for the freezing of assets where such information is required.

3. Background

3.1 In Northern Ireland where a person is charged with a criminal offence, they are initially brought before a magistrates' court to face the charge. Less serious offences are dealt with in the magistrates' court, whilst more serious offences are dealt with in the Crown Court.

3.2 When a defendant appears before the court, they have the right to apply for free legal aid. Where they do so, the court has to apply two tests before legal aid can be granted – a financial means test and an interests of justice test.

3.3 In respect of the financial means test, the court must consider whether the defendant's means are insufficient to enable them to pay for their own representation. A person applying for criminal legal aid may be required to submit a prescribed statement of means form to enable the court to decide whether they meet the test.

3.4 Where this test is met, the court must then be satisfied that the defendant meets the interests of justice test, based on the *Widgery* criteria which have regularly been endorsed by the higher courts. In brief, they require that the court should have regard to whether:

- the person applying for legal aid is likely to face a loss of their liberty, livelihood or reputation;
- the person would be unable to understand the proceedings or state their own case;
- there is some complexity involved (in the form of a need to trace and interview witnesses, a substantial question of law, or the need to cross-examine prosecution witnesses); or
- it is in the interests of someone else (e.g. a complainant in a rape case) that the applicant be represented.

3.5 Where legal aid is granted, the defendant's legal costs will be met out of public funds.

3.6 The Department believes that there are cases in which the financial circumstances of legally assisted defendants, who are eventually convicted, should be investigated further. These include cases in which there may be an incentive for a defendant to withhold information on the true extent of their financial assets.

4. Consultation

4.1 In February 2012 the Department published a consultation document together with draft Rules. Eleven responses were received.

4.2 The responses generally supported, or expressed no objection in principle to, the proposals. The two main issues raised involved clarification of the policy and assurance that a defendant's right of access to justice would not be affected.

5. Equality Impact

5.1 The Department decided to carry out a full Equality Impact Assessment (EQIA). The assessment is attached at **Appendix A**.

5.2 In an attempt to obtain new information on Recovery of Defence Costs Orders the Department conducted an equality impact consultation on the draft Rules for a period of 12 weeks ending on 27 April 2012. The Department received no responses to this consultation.

5.3 The EQIA exercise, which was completed using incomplete data from a survey conducted in 2009, concluded that the proposed Rules did not breach section 75 of the Northern Ireland Act 1998. The Department is content that the proposals as set out in the Rules do not raise any equality issues.

6. Regulatory Impact

6.1 The proposals do not impose any restriction on businesses. They merely regulate the circumstances where convicted defendants in the Crown Court, who are in receipt of criminal legal aid, will be required to pay back some or all of the costs of their defence. Consequently a Regulatory Impact Assessment was not required. An Impact Assessment is attached at **Appendix B**.

7. Financial Implications

7.1 This proposal is part of a programme of legal aid reforms designed to deliver value for money and reduce legal aid expenditure. The proposal also contributes to a net reduction in expenditure by the Northern Ireland Legal Services Commission to meet a reduced budget of £75m by 2015/16.

7.2 The Department is forecasting net savings of £200k by 2015/16 on foot of these proposals.

7.3 There are no major investment costs associated with these proposals. The Commission may incur some modest costs in implementing minor changes to its IT system but the amount is unlikely to be significant. Annual running costs are estimated at £50k consisting of administration costs of £37k and £13k support costs. This will be netted off recovery rising to £250k by 2015/16 giving a net saving of £200k per annum.

8. Section 24 of the Northern Ireland Act 1998

8.1 The proposal is considered to be compatible with section 24 of the Northern Ireland Act 1998.

9. EU Implications

9.1 Not applicable.

10. Parity or Replicatory Measure

10.1 Not applicable

11. Additional Information

11.1 Not applicable.

Appendix A

Recovery of Defence Costs Orders in the Crown Court - Equality Impact Assessment (EQIA)

1.0 Introduction

1.1 Under Section 75 of the Northern Ireland Act 1998, the Department is required to have due regard to the need to promote equality of opportunity:

- Between persons of different religious belief, political opinion racial group, age, martial status or sexual orientation;
- Between men and women generally;
- Between persons with a disability and persons without; and
- Between persons with dependants and persons without.

1.2 In addition to this obligation public authorities are required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

1.3 This legislation requires the Department to consider whether any policy has a differential impact upon the relevant groups, the nature and extent of that impact and whether such impact is justifiable.

1.4 The proposals in the Recovery of Defence Costs Orders consultation documentation have therefore been the subject of an equality screening exercise. In this case, the Department concluded that a full EQIA should be carried out on the proposals and sought information from interested parties in a 12 week public consultation exercise that closed on 27 April 2012. The equality consultation document for the proposed changes is available on the Department's website at www.dojni.gov.uk.

2.0 Overview of Proposal

2.1 The proposals make provision for recovering costs where, on conviction, a defendant has sufficient means to pay some, or all, of the costs of their defence representation.

2.2 The system will operate along the following lines:

a) orders will only be made at the Crown Court and only against defendants who have been convicted;
b) orders will be made against those who, on conviction, have sufficient means to pay some, or all, of the costs of their defence representation;
c) applications for orders will be made by the Northern Ireland Legal Services Commission (the Commission);

d) the amount to be recovered will be assessed by the court;
e) investigation into the means of a defendant will be carried out by the Commission;
f) provisions will require defendants to provide information or evidence to the court and/or Commission;
g) where appropriate, persons may be prohibited from dealing with property relating to information or evidence sought; and
h) there will be a right of appeal against such orders.

3.0 Amendment to the proposals following consultation

3.1 Following the consultation process, the Department has concluded that it would be appropriate to make some further changes to the proposals set out in the consultation document. The Financial Means form will not be prescribed in the Rules but the Rules shall provide that the Commission shall direct the form to be completed by an assisted person. This will enable the Commission to amend the form as required without further legislative changes. The Rules will now provide that an RDCO shall not be made against any defendant who has not been convicted. The former proposal included only those who had been acquitted. The new proposals included those against whom prosecution has not proceeded.

4.0 Consultation responses

4.1 The Department did not receive any responses to the EQIA consultation.

5.0 Conclusion

5.1 The Department issued the EQIA consultation in an attempt to obtain further information in respect of any impact on any of the section 75 groups. In issuing the consultation the Department considered that on the evidence available there was nothing to suggest that there would be any differential impact on any of the section 75 groups. It is intended that the proposals will apply to about 12 assisted persons per annum and as this represents such a small percentage of all Crown Court defendants it is not possible to predict its composition.

5.2 The Department has concluded that the proposals do not contravene any of the section 75 requirements

Appendix B

Recovery of Defence Costs Orders in the Crown Court - Impact Assessment

1.0 Introduction

1.1 Recovery of Defence Costs Orders (RDCOs) are a means of recovering costs from legally aided defendants in criminal proceedings. While an application for an RDCO could be made against any such defendant it is proposed that applications will be made in respect of Crown Court defendants and only where it is deemed cost-effective to do so.

1.2 The Department of Justice (the Department) consulted on the proposed rules for carrying into effect the provisions in respect of RDCOs as set out in Article 33A of the Legal Aid, Advice and Assistance (Northern Ireland) 1981 (the 1981 Order).

2.0 Background

2.1 In Northern Ireland where a person is charged with any criminal offence(s) they are initially brought as a defendant before a magistrates' court to face the charge(s). Less serious offences are dealt with in the magistrates' court, whilst more serious offences are dealt with in the Crown Court.

2.2 When a defendant appears before the court they have the right to apply for free legal aid. Where they do so the court has to apply two tests before legal aid can be granted - the means test and the interests of justice test.

2.3 Firstly, the court must consider whether the defendant's means are sufficient to enable them to pay for their own representation. An application for free legal aid is made by submitting to the court a statement of means form in which the defendant is required to set out their financial circumstances to enable the court to decide whether to grant legal aid. In practice, the means test will almost always be deemed to have been met where the application is on behalf of a defendant who is in receipt of a qualifying benefit. But a defendant who is not in receipt of such a benefit may also be deemed to have fulfilled the means test where the court considers that their financial means are insufficient for them to pay for their own legal representation.

2.4 Secondly, the court must be satisfied that the defendant satisfies the interests of justice test. This test is based on the long established Widgery criteria which have regularly been endorsed by the higher courts and in guidance issued by a variety of official bodies. In brief, they require that

decision-makers should have regard to whether a legal aid applicant is facing a likely loss of liberty, livelihood or reputation, or would be unable to understand the proceedings or state their own case, or there is some complexity involved (in the form of a need to trace and interview witnesses, a substantial question of law, or the need to cross-examine prosecution witnesses), or it is in the interests of someone else (e.g., a complainant in a rape case) that the applicant be represented.

2.5 Where legal aid is granted the defendant's legal costs will be met out of public funds.

2.6 While a case is being prepared for prosecution at the Crown Court it remains in the magistrates' courts until it is ready to go to the Crown Court. Then the prosecution will make an application to have the defendant committed to the Crown Court. At the committal hearing where a defendant has been in receipt of legal aid in the magistrates' courts their legal representative will normally make an application for free legal aid in the Crown Court (a defence certificate) and the application will normally be granted. On most occasions this will be an oral application. In practice, a further statement of means form will only be submitted at this stage on the rare occasions where a certificate has not been granted at the magistrates' courts and an application is made to the Crown Court.

2.7 The Department believes that there are cases in which the financial circumstances of legally assisted defendants should be investigated further, particularly where the defendant is subsequently convicted. These include cases in which there may be an incentive for a defendant to withhold information on the true extent of their financial assets.

3.0 Proposed Costs Recovery Scheme

3.1 These proposals make no changes whatsoever in respect of the eligibility of Crown Court defendants for criminal legal aid. The proposals merely make provision for recovering costs where, on conviction, a defendant appears to have sufficient means to pay some, or all, of the costs of their defence representation.

3.2 Section 81 of the Justice Act (Northern Ireland) 2011 amended the 1981 Order by inserting Article 33A. Article 33A makes provision, in certain circumstances, for the court to make an order requiring a defendant to pay some or all of the cost of their legal aid incurred up to the date of the order. It is proposed that such an order will be referred to as a Recovery of Defence Costs Order (RDCO). Article 33A also provides for rules to be made under Article 36 of the 1981 Order for the purpose of carrying Article 33A into effect.

3.3 It is proposed that rules will provide as follows:

a) orders may only be made at the Crown Court and only against defendants who have been convicted;
b) orders may be made against those who, on conviction, appear to have sufficient means to pay some, or all, of the costs of their defence representation;
c) applications for orders may be made by the Northern Ireland Legal Services Commission (the Commission);
d) the amount to be recovered will be assessed by the court;
e) investigation into the means of a defendant will be carried out by the Commission;
f) provisions will require defendants to provide information or evidence to the court and Commission;
g) persons may be prohibited from dealing with property relating to information or evidence sought;
h) there will be a right of appeal against such orders;
i) the person or body to whom payment is required by an order is made; and
j) the enforcement of such orders.

3.4 Where the Commission has been notified that a criminal aid certificate has been granted to a defendant in the Crown Court, it is proposed that the Commission will have the power to carry out an investigation into the financial circumstances of that defendant.

3.5 The Commission shall have power to request the defendant, where appropriate, to provide information by means of a prescribed form or otherwise, to enable it to confirm their financial circumstances.

3.6 The prescribed financial means form shall include an authority enabling the Commission to seek information from other persons or bodies in respect of the assisted person.

3.7 Where a person or body mentioned in paragraph 3.6 fails to provide information requested, it is proposed the Commission shall have power to require the defendant to provide that information.

3.8 Where the Commission has requested information or evidence from any person or body it may stipulate that that person or body is prohibited from dealing with property (i) until that person or body has provided the information or evidence; or (ii) until a decision whether to make an order, or as to the amount to be paid, has been made.

3.9 Where an RDCO has been made, the defendant has a right to apply to the Court of Appeal for leave to appeal.

4.0 Screening the Policy

4.1 This impact assessment covers the following areas:

SOCIAL

- Health
- Crime
- Community Safety &Victims
- Equality
- Human Rights
- Rural
- Social Inclusion

ECONOMIC

- Economic Appraisal
- Economic Impact assessment
- Regulatory Impact Assessment
- Legal Aid Impact
- State Aid Compliance Assessment

ENVIRONMENTAL

- Environmental Assessment
- Strategic Environmental Assessment

4.2 The Department has screened the policy for all impacts as identified in Government guidelines. There are some areas where the Department considers it appropriate to make comment and these are included in the body of this document below. Those areas for which comment is considered unnecessary are included in **Annex A**. An analysis of recent cases in the Crown Court indicates that the number of assisted persons in respect of whom RDCO applications will be made will be 12 per annum. Nevertheless, the Department is eager to receive views on any impact the proposals may have.

5.0 Social Impacts

Equality Impact Assessment

5.1 The Department considered that the policy has no relevance to equality of opportunity or good relations and screened the document out. However it

decided to seek views from interested parties in a Section 75 Equality Impact Assessment consultation document. A separate Equality Impact Assessment has been produced.

Human Rights Impact Assessment

5.2 Article 6(3) (c) of Schedule 1 to the Human Rights Act 1998 (HRA) provides that everyone charged with a criminal offence has the right to defend themselves in person or through legal assistance of their own choosing or, if they do not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. The Department considers that the proposals will not have any impact on a defendant's right under Article 6(3)(c).

Rural Impact Assessment

5.3 Rural proofing is recognised as a key element in policy development and evaluation. The rural proofing exercise allows policies to be assessed at design, development and review stages for their impact on rural communities.

5.4 The Department believes that the draft Rules will not apply disproportionately to rural communities.

6.0 Economic Impacts

6.1 There are no economic impacts.

Regulatory impact assessment

6.2 The proposals do not impose any restriction on businesses. They merely introduce new measures to recover costs from a small number of assisted persons. Consequently a Regulatory Impact assessment is not required.

Costs

6.3 When implemented the proposals will cost £50,000 per year to administer but it is expected that recovery on foot of RDCOs will rise to £250,000 by 2015/16 producing a net saving of £200,000.

7.0 Environmental Impact Assessment

7.1 There are no environmental impacts.

Annex A – IMPACT TABLE

IMPACT ON	SIGNIFICANT IMPACT(S)	COMMENTARY
EQUALITY IMPACT	Yes	A separate Equality Impact Assessment has been produced.
REGULATORY IMPACT	No	The Draft Rules would have no adverse impact on small/ medium sized enterprises.
HEALTH	No	The Draft Rules should have no impact on the general health of the population.
CRIME IMPACT	No	The Draft Rules should have no impact on crime.
RURAL IMPACT	No	The Draft Rules should have no effect on the rural communities.
COMMUNITY SAFETY	No	The Draft Rules should have no impact on Community Safety.
HUMAN RIGHTS	No	The Draft Rules should have no adverse impact on Human Rights.
VICTIMS	No	The Draft Rules should have no impact on Victims.
PUBLIC EXPENDITURE/SERVICE	No	The Draft Rules should have no impact as costs will not fall to any businesses.
REGIONAL DEVELOPMENT	No	The Draft Rules would have no adverse impact on The Strategic Planning (Northern Ireland) Order 1999.
STATE AID COMPLIANCE	No	The Draft Rules will have no impact