EXPLANATORY MEMORANDUM TO

THE CRIMINAL DEFENCE SERVICE (CONTRIBUTION ORDERS) REGULATIONS 2009

2009 No. [DRAFT]

THE CRIMINAL DEFENCE SERVICE (REPRESENTATION ORDERS) (AMENDMENT) REGULATIONS 2009

2009 No. [DRAFT]

THE CRIMINAL DEFENCE SERVICE (INTERESTS OF JUSTICE) REGULATIONS 2009

2009 No. 2875

THE CRIMINAL DEFENCE SERVICE (REPRESENTATION ORDERS: APPEALS ETC.) (AMENDMENT) REGULATIONS 2009

2009 No. [DRAFT]

THE CRIMINAL DEFENCE SERVICE (FINANACIAL ELIGIBILITY) (AMENDMENT) REGULATIONS 2009

2009 No. 2878

THE CRIMINAL DEFENCE SERVICE (GENERAL) (NO. 2) (AMENDMENT NO.4) REGULATIONS 2009

2009 No. 2876

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instruments

2.1 These instruments relate to the introduction of a new contributory scheme for criminal legal aid in the Crown Court

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

3.1 None

4. Legislative Context

4.1 These regulations are made under the Access to Justice Act 1999.

4.2 The main regulations that provide for contributions orders are the draft Criminal Defence Service (Contribution Orders) Regulations 2009, the draft Criminal Defence Service (Representation Orders) (Amendment) Regulations 2009 and the Criminal Defence Service (Interests of Justice) Regulations 2009. The first of these are the first regulations under s17A of the Act, and so have been laid before Parliament for approval by a resolution of each House of Parliament. The draft Criminal Defence Service (Representation Orders and Consequential Amendments)(Amendment) Regulations 2009 are also subject to the affirmative resolution procedure. The Criminal Defence Service (Interests of Justice) Regulations 2009 are subject to the negative resolution procedure.

4.3 Linked to these Instruments are the draft Criminal Defence Service (Representation Orders: Appeals etc) (Amendment) Regulations 2009, the Criminal Defence Service (General) (No. 2) (Amendment No. 4) Regulations 2009 and the Criminal Defence Service (Financial Eligibility) (Amendment) Regulations 2009, The first of these is subject to the affirmative resolution procedure and the other two to the negative resolution procedure. There will also be a seventh instrument, the Criminal Defence Service (Recovery of Defence Costs Orders) (Amendment) Regulations 2009, but this cannot be made yet because it refers to the Criminal Defence Service (Contribution Orders) Regulations 2009.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 Lord Bach, Parliamentary Under Secretary of State, has made the following statement regarding Human Rights:

In my view the provisions of the draft Criminal Defence Service (Contribution Orders) Regulations 2009, the draft Criminal Defence Service (Representation Orders) (Amendment)Regulations 2009, and the draft Criminal Defence Service (Representation Orders: Appeals etc.)(Amendment) Regulations 2009 are compatible with the Convention rights.

7. Policy background

7.1 In October 2006, a new means testing scheme for eligibility for criminal legal aid was introduced in the magistrates' courts. Courts and court users are now accustomed to working with this new scheme. The implementation of a Crown Court means test is a natural next step for controlling a Crown Court legal aid spend of approximately £680 million per year and ensuring that defendants contribute towards part or all of their defence costs in the Crown Court if they can afford to do so.

7.2 Under the new scheme, every defendant who appears for trial at the Crown Court will be granted a representation order provided they have submitted a completed application form. As part of the application process, defendants will be asked to

provide information about their income and capital assets, in a number of circumstances they will also be required to provide supporting evidence. All defendants before the Crown Court will automatically be deemed to have passed the Interests of Justice test. The Criminal Defence Service (Interests of Justice) Regulations 2009 provide for this and consequential amendments to the system for appealing against refusals to grant a representation order are made by the draft Criminal Defence Service (Representation Orders: Appeals etc) (Amendment) Regulations 2009 .

7.3 On assessment of a defendant's disposable income, the eligibility test will determine whether a defendant falls into one of four categories:

- Entitled to free legal representation;
- Exempt from the payment of an income-based contribution but liable for all or part of their legal aid costs following a conviction based on having capital or equity in excess of £30,000;
- Required to pay a capped income-based contribution only (disposable income is in excess of £3,398);
- Required to pay a capped income-based contribution and liable for the remainder of their legal aid costs following conviction because of the high value of their capital assets, including equity, in excess of £30,000.

7.4 The Government believes that the calculation of a defendant's annual disposable income is generous. The calculation incorporates a cost of living allowance that is weighted to reflect the defendant's actual family circumstances and number of dependants. The allowance, which is based on the categories of expenditure covered by the Expenditure and Food Survey, includes items such as food and non-alcoholic drinks, utility bills, clothing, footwear, health, education and transport. In addition, the test takes into account a defendant's actual costs for income tax and national insurance; council tax; rent and mortgage payments; childcare costs and maintenance payments. Having made these deductions, it will only be in those cases where the defendant's disposable income exceeds £3,398 that they will be liable to pay a contribution, pre-conviction, from their income.

A hardship route will act as an additional safeguard for those defendants who believe that they genuinely cannot afford to meet the terms of their income Contribution Order. For convicted defendants, the outstanding balance of their defence costs will be recovered from the value of capital assets in excess of the £30,000 threshold. This includes assets held jointly with a partner. For acquitted defendants, any income contributions paid under the scheme will be refunded with interest. However, a trial judge may consider that there are exceptional reasons why an individual who has been acquitted by the Crown Court should be liable to make payments towards the cost of his defence. Where a defendant in a multi-handed case has been convicted, or partially convicted, he or she can make an application to a judge to have their contribution reduced if they believe they should be liable for a lesser sum, given the level of their involvement in the offence. The same will apply to a single defendant case where he/she is convicted of one or more of a range of charges on the indictment (but not all), and where the conviction(s) are on the least serious of the offences charged. The draft Criminal Defence Service

(Contribution Orders) Regulations 2009 make it clear that, where apportionment takes place, the difference between the original contribution and the amended one will not be added to the contributions required from any other convicted defendant. Contributions are "defendant specific".

7.5 The Government is committed to supporting an effective and efficient justice system by minimising any risk of disruption to the courts and other parts of the criminal justice system. For this reason, a defendant will not have their Representation Order withdrawn if they fail to comply with the terms of a Contribution Order. Instead, the Government's policy is that the Legal Services Commission will be prepared to use a range of measures, including sanctions and effective enforcement of the contribution order, against a defendant. The range of measures proposed are those generally available to creditors seeking payment in the normal course of debt recovery.

7.6 In relation to committals for sentence, the Government has decided to extend the existing magistrates' court scheme to include committal for sentence hearings in the Crown Court. The means assessment in the magistrates' court will be used to confirm whether or not defendants are eligible for legal aid when the case is committed for sentence. Defendants who are not eligible for legal aid for a trial in the magistrates' court will not be eligible for legal aid for their committal for sentence hearing at the Crown Court, unless there has been a change in their financial circumstances. The Financial Eligibility Regulations have been amended to add committals for sentence to proceedings subject to the financial eligibility test.

7.7 In relation to appeals to the Crown Court these are treated as a separate set of criminal proceedings. Consequently, representation orders that are granted to a defendant in the magistrates' court do not extend to appeal hearings in the Crown Court. As part of the application process for legal aid, appellants will be required to pass the Interests of Justice test and be subject to an assessment of their disposable income as set down in the existing magistrates' court means test. The Government has decided that a flat rate contribution at the conclusion of proceedings is the fairest way of proceeding. Appellants with a truly disposable income above the threshold will be required to make a set contribution towards their legal aid, if their appeal is unsuccessful or abandoned

7.8 The amendments to the CDS (Representation Orders)(Amendment) Regulations 2009 and the Criminal Defence Service(General)(No 2) Regulations 2001 provide that in almost all cases the responsibility for granting representation orders for criminal proceedings in the Crown Court will move from the court to the LSC. The LSC will then delegate this responsibility to HMCS staff in the magistrates' court

7.9 A system of collection and enforcement of Contribution Orders based on a 3 stage approach – voluntary compliance (those defendants who will pay with little or no intervention), supported compliance (need some assistance before paying) and enforced compliance (for those defendants who require the use of

enforcement sanctions before payment is received). A range of sanctions will be available in the enforced compliance stage, including attachment of earnings orders, distress warrants, third party debt orders and charging orders. Defendants will also be required to pay the costs of any enforcement action, with interest if necessary. In the case of enforcement action against a defendant for non-payment of a contribution order the assessing authority will ask a judge for an order only against the defendant, and not his/her partner, thus preserving the position of the other.

7.10 The scheme will be implemented in 5 'early adopter' Crown Courts (Blackfriars, Norwich, Swansea, Preston, Bradford) in January 2010. At the end of the early adopter phase, the scheme will be phased in across courts board areas throughout April, May and June.

Consolidation

7.11 These orders amend the Criminal Defence (Representation Orders) Regulations, the Criminal Defence Service (Representation Orders: Appeals etc) Regulations, the Criminal Defence Service (Financial Eligibility) Regulations and the Criminal Defence Service (General)(No 2) Regulations. We are not proposing to consolidate the relevant legislation at this time.

8. Consultation outcome

8.1 The policy was the subject of a 12 week policy consultation from 6 November 2008 to 29 January 2009. The Government responded on 8 June 2009. Both documents can be found at www.justice.gsi.gov.uk/.

8.2 The regulations were published in draft for consultation on 14 July, and consultation closed on 5 October. A total of 15 responses were received, including from the Law Society and other bodies representing criminal solicitors, and from the Justices' Clerks Society.

8.3 The Government's response was published on 28 October 2009, and it is available at www.justice.gsi.gov.uk/. It sets out the views of respondents and the Governments response to these. In summary, while respondents supported the principle that those defendants who can afford to should contribute towards the cost of their publicly funded defence, mirroring responses to the policy consultation, concerns were expressed on a range of issues including: the level at which the thresholds have been set, what should be included or excluded for the purposes of calculating ability to pay, the policy of aggregating partners' income and capital and impact of this in terms of any enforcement action, the policy on resources of other persons, the length of time given to provide supporting evidence for legal aid applications.

8.4 Responses also included detailed comments on the regulations themselves. In response to consultation a number, the Government has made a number of minor drafting amendments and clarifications. In addition, we have amended the regulation 21 (application to the judge) to make clear that any reduction in the level of contributions for one defendant would not impact on the liability of any co-

defendants. We have also amended regulation 25 (resources of other persons) to make clear that it is only the actual amount paid to the defendant which would be treated as available, and removed the prospective element of the prevision.

9. Guidance

9.1 Guidance will be available to practitioners on the LSC website, and to HMCS staff.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is negligible.

10.3 Impact Assessments have been prepared to accompany the policy consultation and the consultation on the draft regulations, and can be found at: www.justice.gov.uk/

11. Regulating small business

11.1 There is no impact on small businesses.

12. Monitoring & review

12.1 There will be an evaluation of operational processes for administering the new scheme at the end of the early adopter phase, and a detailed post-implementation review after the first year of national roll out.

13. Contact

Helen Magill at the Ministry of Justice Tel: 020 3334 4259 or email: Helen.magill@justice.gsi.gov.uk can answer any queries regarding the instrument.