**EXPLANATORY MEMORANDUM TO**

**THE DRAFT CRIMINAL DEFENCE SERVICE (REPRESENTATION ORDERS: APPEALS ETC) (AMENDMENT) REGULATIONS 2010**

**2010 No. [Draft]**

**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 instrument

2.1 This instrument is about publicly funded representation in criminal cases in magistrates' courts. It provides for a right of review of a decision to refuse such representation on the grounds that the interests of justice do not require it, in addition to the existing right of appeal to the 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 powers conferred by section 26 of, and paragraph 4 of Schedule 3 to, the Access to Justice Act 1999. They are subject to the affirmative resolution procedure under section 25(9) of that Act.

## 5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

## 6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for the Ministry of Justice has made the following statement regarding human rights:

'In my view, the provisions of the draft Criminal Defence Service (Representation Orders: Appeals etc)(Amendment) Regulations 2010 are compatible with the Convention Rights.'

## 7. Policy background

7.1 The Criminal Defence Service was established following implementation of provisions in the Access to Justice Act 1999, as well as the associated framework of regulations. Under those arrangements, an individual whose legal aid application was rejected on the grounds of the interests of justice, was entitled to

renew their application to the appropriate court officer. If the latter did not grant a representation order, the application had to be referred to the court (The Criminal Defence Service (Representation Order Appeals) Regulations 2001/No. 1168).

7.2 The Criminal Defence Service Act 2006 amended the Access to Justice Act 1999 by transferring responsibility for the grant of legal aid from the courts to the Legal Services Commission. It also introduced means testing for defendants applying for legal aid. The new financial eligibility scheme was introduced in the magistrates' courts in 2006, with a contributions-based scheme being introduced in the Crown Court in 2010. As part of the package of changes implementing Crown Court means testing, all Crown Court defendants will now be 'passported' through the interests of justice test.

7.3 In order to protect the position of the legal aid applicant facing prosecution at the magistrates' court, the amendments to the legislative framework made under the Criminal Defence Service Act 2006 ensured that the applicant retained the right of appeal to the court in respect of the interests of justice determination (Criminal Defence Service (Representation Orders: Appeals etc) Regulations 2006/No.2494). This safeguard ensured that there remained appropriate judicial oversight following the transfer of responsibility for the grant of legal aid away from the courts.

7.4 The amendment introduced by this statutory instrument does not remove the applicant's right of appeal to the court following the interests of justice assessment. Rather, it is designed to facilitate the operational effectiveness of the application process by allowing the representation authority to re-consider the interests of justice decision without it going before the court. Only if the representation authority subsequently declines to grant the representation order, may there be an appeal to the court. Although the amendment adds a potential stage, it can only ever work in favour of the defendant, and its implementation may help save both court time and resource.

7.5 In cases where the court considers the application on appeal and decides that it is in the interests of justice for a representation order to be granted, the application must be referred to the representation authority to determine whether the applicant meets the financial eligibility criteria. If the applicant is financially eligible, the representation authority will grant the representation order.

## 8. Consultation outcome

8.1 The substantive policy governing the application process in respect of criminal legal aid representation was the subject of full consultation during 2005/2006 (http://www.dca.gov.uk/consult/crimdefregs/cpl0606.htm). As the change introduced by this statutory instrument is only a minor operational amendment and does not impact on the substantive policy, there is no requirement for a further consultation exercise.

## 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 The impact assessments in respect of the substantive policy can be found at: (http://www.dca.gov.uk/risk/ria.htm)

## 11. Regulating small business

11.1 There is no impact on small businesses.

## 12. Monitoring & review

12.1 As with all aspects of the criminal legal aid application process, these are monitored on an ongoing basis, and subject to periodic review.

## 13. Contact

Stephen Gascoigne at the Ministry of Justice Tel: 020 3334 4232 or email: stephen.gascoigne@justice.gsi.gov.uk can answer any queries regarding the instrument.