

EXPLANATORY MEMORANDUM TO
THE CRIMINAL DEFENCE SERVICE (RECOVERY OF DEFENCE COSTS ORDERS)
(AMENDMENT) REGULATIONS 2008

2008 No. 2430

1. 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

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

2. Description

2.1 This instrument relates to how courts order the payment of the costs of publicly funded representation from defendants in the Crown Court or above. Recovery of Defence Costs Orders (RDCOs) enable the court, upon conviction of a defendant, to make an RDCO requiring them to pay for all or some of the defence costs. This instrument amends the RDCO Regulations and will introduce a number of changes and refinements to the present procedure. These include clarity on when an RDCO cannot be made, the need for the defendant to provide accurate and complete information regarding his circumstances and failure to do so resulting in a full Order being made. The amendments also clearly set out which of the defendant's resources can now be taken into account when assessing his financial situation, together with that of the defendant's partner. Judges will now be obliged to give reasons for their decisions in respect of RDCOs, including those cases where no Orders are made.

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

3.1 None

4. Legislative Background

4.1 These Regulations amend the Criminal Defence Service (Recovery of Defence Costs Orders) Regulations 2001 (S.I.2001/856). They are made under Section 17 of the Access to Justice Act 1999, which enables regulations to provide description of individuals against whom an order may be made and the circumstances in which such an order may be made. They also provide the principles to be applied in deciding whether to make such an order, the amount to be paid and the determination of the costs of representation for the purposes of making of such an order. The regulations further provide for the furnishing of information and evidence to the court or the Legal Services Commission (LSC) for the purpose of enabling the court to decide whether to make such an order and the amount to be paid. The power was conferred by the 1999 Act on the Lord Chancellor, transferred to the Secretary of State and then transferred back to the Lord Chancellor. The instrument is subject to the negative resolution procedure (section 25(10) of the 1999 Act).

5. Territorial Extent and Application

5.1. The Regulations apply to England and Wales.

6. European Convention on Human Rights

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

7. Policy Background

7.1 Recovery of Defence Costs Orders were introduced in the Crown Court and the Court of Appeal in April 2001 following the abolition of the means test. They provide for the recovery of publicly funded representation from defendants in the Crown Court or higher courts. They enable the court, upon conviction of a defendant, to make an RDCO requiring them to pay for all or some of the defence costs. Since their introduction, the system of RDCOs has been monitored and reviewed. A number of changes have been made to the scheme, but there is evidence to suggest that RDCOs are not used as effectively as they could be. Despite changes in 2004 and improved guidance offered to court staff and a practice direction for the judiciary, the number of RDCOs made remains low. These regulations are intended to clarify the circumstances in which an RDCO can be made by removing any ambiguity as to the link between means and the judge's power to make an Order.

7.2 The Regulations also set out the following changes –

- a. They extend the scope of the scheme to allow an RDCO to be made against defendants who appeal against sentence in the Crown Court. This will remove the current anomaly whereby a defendant appealing against sentence in the Court of Appeal may have an RDCO made against them, but not where they appeal against sentence in the Crown Court.
- b. They clarify when an RDCO cannot be made, namely when a funded defendant has been acquitted (other than in exceptional circumstances); is directly or indirectly in receipt of one or more of the following passporting benefits – guarantee credit, income support, income-based jobseeker's allowance, or income-related employment and support allowance; is under the age of 18; has none of the following assets – available capital over £3000, equity in principal residence over £100,000, gross annual income over £22,235.
- c. They clarify the judge's discretion to not make an RDCO. Where the judge hearing the case is satisfied that based on the information provided by the funded defendant or evidence supporting that information, it would not be reasonable to make an RDCO, or where due to the exceptional circumstances of the case ordering the payment of an RDCO would involve undue financial hardship the judge has the discretion to not make an RDCO.
- d. There is no judicial discretion to not make an RDCO for full costs where the defendant does not provide information or evidence when required to do so. The

defendant is under a duty to provide information or evidence in all Crown Court cases other than where the defendant is committed for sentence to the Crown Court. If the defendant does not provide this information or further evidence or information requested by either the court or the LSC, the judge has a duty to make a full costs order, even if the defendant would otherwise fall within one of the exemptions named above at paragraph (b).

- e. They also clarify the resources that the judge, the appropriate officer of the court or the Legal Services Commission can take into account when assessing or estimating the value of the resources available to the defendant. These include resources that a funded defendant has directly or indirectly deprived themselves of so as to avoid the payment of an RDCO. Similarly, the value of the resources or expectations of which a funded defendant has deprived themselves to avoid the payment of an RDCO may also be considered as still being available to the defendant.
- f. They further clarify the resources that can be taken into account when the court considers making an RDCO. They include the amount or value of every source of income, and every resource of a capital nature and include the amount or value of every source of income and every resource of a capital nature available to the defendant's partner, unless the partner has a contrary interest in the criminal proceedings, namely where the partner is a witness for the prosecution or is the victim in the proceedings. In determining the amount of the resources available the court will consider available capital over £3000, and available equity above £100,000 and gross annual income over £22,235.
- g. They also set out that judges are required to give reasons when an RDCO is made or where discretion has been exercised at the end of the proceedings. Where the judge makes an Order s/he is required to give reasons for the terms of the Order, that is setting out the resources that have been taken into account when making the Order for that particular value. Where, in exceptional circumstances, an RDCO is made against an acquitted defendant the judge shall consider whether it is reasonable in all the circumstances of the case to make an RDCO and also give reasons for the decision to make an Order in those circumstances. Where the judge has exercised his discretion to not make an Order, as set out in paragraph (c) above, the judge is also required to give reasons for the decision he has made.

7.3 The Regulations were subject to a public consultation from 30 August to 21 November 2007. The Law Society (TLS), Criminal Law Solicitors Association, the General Council of the Bar, Legal Aid Practitioners' Group (LAPG), London Criminal Courts Solicitors' Association, Criminal Law Solicitors Association, Criminal Bar Association, Magistrates' Association, senior members of the Judiciary, the Council of Circuit Judges, Liberty, Justice, Citizens Advice, the Commission for Racial Equality and the Justices' Clerks Society were all consulted, and the paper was available alongside the draft regulations on the Department's website. Following the consultation period, the Department received 11 responses. The Regulations have been drafted following consideration of these responses and working closely alongside HMCS and LSC to improve the overall effectiveness of RDCOs.

8. Impact

8.1 A Full Impact Assessment is attached to this memorandum.

9. Contact

Samantha Toyn and Helen Magill at the Ministry of Justice Tel: 020 7210 8062 or e-mail: Samantha.toyn@justice.gsi.gov.uk or helen.magill@justice.gsi.gov.uk can answer any queries regarding the instrument.

Summary: Intervention & Options		
Department /Agency: Ministry of Justice	Title: Impact Assessment of Criminal Defence Service (Recovery of Defence Costs Orders)(Amendment)Regulations 2008	
Stage: Final Proposal	Version: 0.1	Date: 8 August 2008
Related Publications: i. Consultation Paper ii. Consultation response paper iii. Partial Regulatory Impact		

Available to view or download at:

<http://www.justice.gov.uk/publications>

Contact for enquiries: David Stobie

Telephone: 0207 210 8686

What is the problem under consideration? Why is government intervention necessary?

Recovery of Defence Costs Orders (RDCOs) were introduced in the Crown Court and the Court of Appeal in April 2001 following the abolition of the means test . They enable the court, upon conviction of a defendant , to make an RDCO requiring them to pay for all or some of the defence costs . Despite some changes to the process, the numbers of RDCOs being made has remained at a low level. Intervention is therefore necessary to ensure maximim cost recovery.

What are the policy objectives and the intended effects?

The Regulations governing the Recovery of Defence Costs Orders will be amended to better target those defendants who can afford to pay some or all of their defence costs in the Crown Court and the Court of Appeal. It is intended that the changes will streamline the process and lessen the bureaucratic burden on court staff, and so better focus courts' resources. An increase in the volume and value of RDCOs will also help improve public confidence in the CJS, demonstrating a commitment to value for money for the taxpayer whilst maintaing a system that ensures Legal Aid is accessible to all.

What policy options have been considered? Please justify any preferred option.

3 policy options have been considered - (i) do nothing, (ii) introducing new regulations, (iii) introducing a voluntary code of practice;self-regulation and an information and education campaign. The preferred option is a combination of (ii) and (iii), as taken together they address the following key areas - improving efficiency in court processes, improving recovery processes and hence value for money, better targeting of defendants who can pay towards their defence costs and so increasing the numbers of Orders made by the Judiciary.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? After 1 year

Ministerial Sign-off :

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Lord Hunt

..... Date: 24.08.08

Summary: Analysis & Evidence	
Policy Option: (ii) and (iii)	Description: Introducing new regulations / Introducing a voluntary code of practice ; self regulation and an information and education campaign

COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' -	
	One-off (Transition)	Yrs	Estimated MoJ cost of circulating updated guidance of £2,000. Estimated HMCS administrative costs of approximately £750,000 Estimated LSC costs of approximately £350,000.
	£ 2,000		
	Average Annual Cost (excluding one-off)	Cost	Total Cost (PV)
	£ 1.1 million		
Other key non-monetised costs by 'main affected groups' N/A			

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups'	
	One-off	Yrs	Repayment of legal aid costs to the Legal Services Commission
	£ N/A		
	Average Annual Benefit (excluding one-off)	Benefit	Total Benefit (PV)
	£ 8 million		
Other key non-monetised benefits by 'main affected groups' Increase in public confidence in the CJS			

Key Assumptions/Sensitivities/Risks
That HMCS and the LSC identify those defendants who fall within scope.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate)
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What is the geographic coverage of the policy/option?	England & Wales
On what date will the policy be implemented?	06.10.08
Which organisation(s) will enforce the policy?	HMCS & LSC
What is the total annual cost of enforcement for these organisations?	£ 1.1 million
Does enforcement comply with Hampton principles?	Yes

Will implementation go beyond minimum EU requirements?				N/A	
What is the value of the proposed offsetting measure per year?				£ N/A	
What is the value of changes in greenhouse gas emissions?				£ N/A	
Will the proposal have a significant impact on competition?				No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large	
Are any of these organisations exempt?	No	No	N/A	N/A	

Impact on Admin Burdens Baseline (2005 Prices)				(Increase	-
Increase of	£ 0	Decrease of	£ 0	Net Impact	£ 0

Key: Annual costs and benefits: (Net) Present

Background

1. Recovery of Defence Costs Orders (RDCOs) were introduced in the Crown Court and the Court of Appeal in April 2001 following the abolition of the means test by the Access to Justice Act 1999. As a result, anyone who appears at the Crown Court or the Court of Appeal can apply for Legal Aid, and only needs to satisfy the court that it is on the interests of justice that legal aid be granted. At the end of the case, if the defendant is convicted, the court may, subject to regulations, make an order requiring the individual to pay all or some of the costs incurred in defending him. These powers are set out in Section 17 of the Access to Justice Act 1999.

2. RDCOs were originally targeted at defendants who could pay a significant sum towards their defence costs; those defendants who under the Legal Aid 1988, were refused legal aid because their means were such that they could afford to pay for their representation, or where the costs of the case were such that even though the defendant was relatively wealthy, legal aid was still granted with a significant contribution order.

3. Since their introduction, the system for RDCOs has been monitored and reviewed. A number of changes have been made to the scheme, but there is evidence to suggest that RDCOs are not used as effectively as they could be. A number of regulation changes in 2004 were aimed at ensuring all defendants who could afford to pay, did so. Despite changes made to the scheme and improved guidance offered to the judiciary in the form of a practice direction and guidance to HMCS staff at all courts, the number of RDCOs made is still low.

4. A number of reasons have been identified to explain why this may be, which include:

- The original policy was aimed at those defendants who had substantial assets who could be required to pay towards their defence costs;
- Primary legislation does not provide a compulsion that an RDCO shall be made in every case;
- Judicial discretion is exercised in a large number of cases to not make an Order;
- Lack of information about the defendant's means before the court to inform the decision about the value of the order;
- The fact that an RDCO can only be made after all other financial orders (fines, compensation orders, confiscation orders and prosecution costs) have been made against the convicted defendant;
- It is as part of this process of review that the Department has looked at the scheme again and identified areas that could be amended and tightened to increase the use of RDCOs by the courts and their effectiveness.

5. To further enhance the scheme and to support the underlying principles established in the Criminal Defence Service Act 2006 which introduced the means test in the magistrates' court, the Government

proposed a number of changes to the regulations to improve RDCOs and the supporting administrative systems.

6. The Ministry of Justice consulted on the following proposed changes to the regulations:

- To provide a discretion for judges to make no Orders for costs where the making of one may cause undue financial hardship or where there is some other compelling reason why an RDCO should not be made;
- Require judges to give reasons why no Order is being made;
- To remove from the scope of the scheme those defendants under the age of 16 years of age or under 18 and in full time education;
- Include express reference to the need to take into account the financial resources of the funded defendant; and those of his partner unless there is a contrary interest in the proceedings;
- Lower the financial threshold whereby a defendant will be eligible for an RDCO to be made against him to reflect the upper income threshold set out in the Criminal Defence Service(Financial Eligibility)Regulations 2006 (as amended);
- Remove the existing anomaly whereby a defendant appealing against sentence in the Court of Appeal may have an RDCO made against him, but not where he appeals against sentence in the Crown Court.

7. A copy of the consultation paper can be found on the MoJ website.

8. Comments were not sought on the underlying policy of RDCOs, means testing policy nor on how to better recover legal costs against the conflicting priorities of other financial orders.

9. The Government consulted on the proposed regulation changes with key stakeholders (a list can be found in the Consultation Response). In addition to listening to comments made on the paper, the Government has undertaken further work to improve the administration of the scheme to support the regulation changes, improve the cost effectiveness of the scheme and so better support the underlying policy to better target defendants who can afford to pay towards their defence costs.

10. The Department considered achieving its objectives by means of the following options:

Option 1 – Do nothing

Option 2 – Introducing primary and secondary legislation

Option 3 – Introducing a voluntary code of practice; self-regulation and an education and information campaign for both courts and solicitors

Option 1 – Do Nothing

11. RDCOs are aimed at those defendants who can afford to pay some or all of the costs of their defence. It is accepted that when this scheme was introduced the majority of defendants would not be able to pay towards their costs. However, since their introduction, the Department noticed that RDCOs have not been made in many cases where they could have been. This has been due to a number of factors, which include ambiguity in the regulations as to when an Order should be made, and the circumstances in which an Order should not.

12. To do nothing is not an option, as it is imperative that the Crown Court and the legal aid budget are not placed under undue pressure by defendants who do not pay towards their costs when they can afford to do so. It is the Government's intention to introduce a means test in the Crown Court as soon as it is practicable, but until that time RDCOs are the only mechanism by which defendants who can afford to pay for some or all of the costs of their representation do so.

13. Amended regulations are needed to tighten up the current scheme and clarify areas where there is doubt as to judicial discretion and the circumstances in which an Order can be made.

Option 2- Introducing new regulations

14. Regulations already exist which govern the RDCO scheme, and new amending regulations are necessary to deliver any changes to the scheme.

15. Following a public consultation, a number of regulation changes were considered to enhance the effectiveness of the scheme. The regulation changes that will be taken forward include amending the scope of the scheme to allow an RDCO to be made against defendants who appeal against sentence in the Crown Court.

16. The Department has also made an explicit link between receipt of a passporting benefit, a defendant's available income, capital or equity and the power to make an RDCO. Regulations have been amended so that an RDCO will not be made against a defendant who is directly or indirectly in receipt of a passporting benefit.

17. In addition, the regulations now make clear that only income or capital and equity above the limit can be used for the purposes of an RDCO, and further than originally proposed in the paper, the Department has made a regulation change which means that an RDCO cannot be made against a defendant who does not have available capital over £3000, equity in his principal residence over £100,000 or gross annual income over £22,325.

18. The Department has also increased the age limit where an RDCO shall not be made to all defendants under the age of 18 to reflect similar changes made to the Criminal Defence Service (Financial Eligibility) Regulations 2006.

19. The income limit whereby an RDCO cannot be made has been amended to reflect the current income limit set out in the Criminal Defence Service (Financial Eligibility) Regulations 2006 to align income limits for RDCOs and the means test in the magistrates' court. The limit is currently £22,235. Capital and equity limits remain unchanged.

20. Regulations to provide judicial discretion to not make an Order remain, where the making of one may be unreasonable or involve undue financial hardship. Proposals to provide judges with a duty to provide reasons for either the terms of the order that they have made, or where an Order has not been made where one could have been made also remain. The Department has not proceeded with the regulation change that would have created an obligation for judges to explain why an Order has not been made in all cases. This means that judges are still required to give reasons for the terms of an Order where one has been made. Similarly, where one hasn't been made following judicial discretion the judge must provide reasons.

21. Regulations now make clear that the court can consider any resources or expectations which the defendant has directly or indirectly deprived himself of. The definition of resources available to a partner has also been clarified to reflect the definition of those resources available to the publicly funded defendant.

22. The regulatory requirement for solicitors to provide an estimate of costs when required to do so remains. We do not accept that this creates an unnecessary burden on solicitors. The only change to

the current requirement will be an obligation to provide an estimate to the Legal Services Commission as well as the court.

Option 3 - Introducing a voluntary code of practice; self-regulation and an information and education campaign

23. Implementing this option would avoid the need to place an additional regulatory burden on businesses and public sector. However the RDCO regime is set out in primary and secondary legislation and any amendments to the scheme must be by way of amendments to that governing legislation.

24. Following on from these regulation changes, the Department has taken the opportunity to work closely with stakeholders to ensure that the scheme works as effectively as possible. Streamlining administrative processes in the courts will facilitate these changes. Court staff will focus on those defendants who have sufficient income and assets for judges to be confident that making an RDCO is appropriate. Targeted orders will also improve their recovery. The LSC can be confident that the orders made have been properly made against defendants who clearly have either income or capital assets available to pay towards an RDCO.

25. The Ministry of Justice, HMCS and LSC will continue to work closely with courts, the judiciary and legal practitioners to ensure that changes to the scheme and supporting processes are widely known and understood before implementation. The Department will continue to review RDCOs and their effectiveness so ensuring those defendants who can afford to pay for their defence do so.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	Results in Evidence Base?	Results annexed?
Competition Assessment	Yes	Yes
Small Firms Impact Test	Yes	Yes
Legal Aid	Yes	Yes
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No

Competition Assessment

26. The Department applied the Competition Filter test, which showed that the proposals are likely to have little or no effect on competition for solicitors' firms. No one firm has more than 10 % of the market, and existing firms will not be at an advantage over new or potential firms. The regulations will not affect set up costs or lead to higher ongoing costs. The regulations will not restrict the ability of firms to offer a range of services.

Small Firms Impact Test

27. There is no significant or complex impact on small firms

Legal Aid Impact Test

28. The income threshold above which an individual becomes liable for an RDCO has been lowered to match that at which an individual is ineligible for public funding in the magistrates' court. Under the current RDCO regulations an individual is liable for an RDCO where his gross annual income is £25,250 or above. Following on from the detailed work undertaken in setting the proper income limits under the CDS Act 2006, the financial limit for RDCOs have been lowered, and under the proposed regulation changes an individual will be liable for an RDCO where his income is above £22,235. The capital limit of £3000 and available equity in first property of £100,000 remain the same.

29. The Regulations have also been amended to make clear that those defendants in receipt of Income Support, income-based Job Seekers' Allowance and Guarantee State Pension Credit, and ESA, and defendants who are under the age of 18 will no longer be eligible for an RDCO.

30. These changes reflect the CDS means test in the magistrates' court, and have the additional benefit of ensuring that the administrative procedures that court staff and staff at the LSC have to follow are focused only on those defendants who have significant income or assets to make a significant contribution to their defence costs. Defendants who the State has recognised as being eligible for passporting benefits will no longer be at risk of having an RDCO made against them.

31. By explicitly excluding defendants who are in receipt of a passporting benefit, who have an income below the magistrates' court means test eligibility limit, who have a less than £3000 capital or less than £100,000 equity, the scheme will focus on the remaining defendants who can afford to pay a significant contribution towards the costs of their case.

32. The Department has undertaken research into the financial profile of Crown Court defendants and has built a statistical model from the details of 200,000 defendants that were

committed, sent or transferred to the Crown Court between 2003 -2007, using postcodes, age and sex to model their financial, domestic and socio- economic circumstances.¹

33. Research suggests that by removing from scope those defendants who fall below the income, capital or equity limits, only 43% of defendants will be eligible for an RDCO. 18% of Crown Court defendants are in receipt of a passporting benefit², a further 1.7% is under the age of 18. The table below breaks down the financial profile of Crown Court defendants.

Financial profile	% of CC defendants ³	Number of guilty CC defendants	Potential cost recovery ⁴
Income exceeds £21,487 ⁵	3%	1,865	£5,389,688
Income exceeds £21,487 and capital greater than £3000	2%	1057	£3,490,393
Income exceeds £21,487 and home owner with greater than £100k equity	3%	1346	£4,461,271
Income exceeds £21, 487, capital exceeds £3000 and equity in excess of £100k	2%	1266	£4,668,718
Capital only in excess of £3000	5%	3183	£5,534,270
Capital exceeds £3000 and equity exceeds £100k	3%	1934	£6,986,444
Equity only exceeds £100k	13%	8501	£26,240,001
None of the above	69%	46735	£0
Totals	100	65,887	£56,770,789

34. The proposed changes to the regulations mean that 25,536⁵ defendants will now be eligible for an RDCO. Previously all defendants could have an RDCO made against them, which meant

¹ The modelling is based on a detailed analysis of Crown Court defendant profiles based on the details of over 200,000 defendants extracted from the Crest IT system over the past 5 years. The first phase of his modelling involves linking the defendant post-codes to 1 of 32,482 Lower Super Output Areas. These are small geographic areas defined by the Office of National Statistics, typically comprising 400 households. These LSOA are then further linked to the index of Income Deprivation which is developed by the Department for Communities and Local Government. Phase 2 links the derived information collected within CREST about income deprivation above, together with the age and sex of the defendant to the Family Resources Survey sponsored by the Department for Work and Pensions, which collects detailed information about the financial, domestic and socio-economic circumstances at an individual, household and benefit unit level.

² Based on latest spreadsheet figures for CC eligibility (16791/90380%)

³ Calculated from Peter's guilty defendant profile being 66% of CC population and that profile is the same for guilty and acquitted defendants.

⁴ Where total assets are less than the total case costs, value of the RDCO matches the assets available rather than the case costs. Full case costs recovered where assets exceed cost of case.

⁵ Sum of category 1 –7 x 33% for full CC population rather than guilty population.

that the courts' and the LSC's resources were not focused on those defendants who do have sufficient means to pay towards their defence costs.