

**EXPLANATORY MEMORANDUM TO
THE CRIMINAL DEFENCE SERVICE (INFORMATION REQUESTS)
REGULATIONS 2009**

2009 No. 391

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 and the Select Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 This instrument relates to the assessment of a defendant's financial eligibility for criminal legal aid in magistrates' courts. It will allow requests to be made by the Legal Services Commission (LSC) to Her Majesty's Revenue and Customs (HMRC) and the Department for Work and Pensions (DWP) in order to verify particular information about a defendant's financial status. These 'data gateway' arrangements will be placed on a proper statutory footing so as to support and enhance the verification process.

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

3.1 None

4. **Legislative Context**

4.1 These Regulations are made by the Lord Chancellor under section 26 of, and paragraph 6(2)(f), 3(d) and (4) of Schedule 3 to, the Access to Justice Act 1999. They are subject to the affirmative resolution by virtue of section 25(9) of that Act.

4.2 The Regulations refer to a related instrument, the Criminal Defence Service (Information Requests) (Prescribed Benefits) Regulations 2009, which are subject to the negative resolution procedure and which will be made before these Regulations. These regulations can be read together. The latest draft of the related instrument is attached to this Memorandum at Annex B.

4.3 The agreement of the Commissioners for HMRC to the main provision of the Regulations is required under paragraph 6(3)(d) of the 1999 Act and has been given.

5. **Territorial Extent and Application**

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Lord Bach has made the following statement regarding Human Rights:

6.2 In my view the provisions of the Criminal Defence Service (Information Requests) Regulations 2009 are compatible with the Convention rights.

7. Policy background

7.1 Under regulations made under Schedule 3 to the Access to Justice Act 1999 the LSC, or delegated court officers or other persons, is the authority responsible for granting rights to publicly funded representation for criminal cases in magistrates' courts. The authority is required to assess individuals' incomes in order to determine their eligibility for such representation. Paragraph 6 of Schedule 3, which was inserted by section 57 of the Criminal Justice and Immigration Act 2008, permits the relevant authority to make information requests to HMRC and the Secretary of State for information about the financial resources of an individual who has applied for representation, to facilitate the making of decisions regarding financial eligibility. Certain information which may be sought is specified in the paragraph, such as the individual's national insurance number and whether the individual is employed. Other information may be specified in regulations. These Regulations accordingly provide that requests may be made to HMRC for details about an individual's taxable income under the Income Tax (Earnings and Pensions) Act 2003 and the Income Tax (Trading and Other Income) Act 2005. They also permit requests to be made to the Secretary of State (effectively the Secretary of State for Work and Pensions) for information about the individual's benefit status during the two years prior to the request.

7.2 Previously a formal agreement existed between DWP and Her Majesty's Court Service (HMCS), which allowed HMCS to confirm whether the applicant was in receipt of a benefit which rendered them financially eligible without any further assessment of their income. There was also an informal agreement which allowed confirmation of other forms of income with HMRC. By putting the gateway arrangements with DWP and HMRC on a statutory footing and extending them to HMRC the Act allows access to an applicant's or, if relevant, their partner's records, to confirm whether either of them was on a passported or other benefit and details of their income.

7.3 The LSC has an obligation to verify the accuracy of information provided by defendants in magistrates' courts in order to determine their financial eligibility for criminal legal aid. Checks are currently undertaken by DWP and HMRC, on the basis of written consent provided by the defendant on the application form.

Consolidation

7.4 This is a new Statutory Instrument.

8. Consultation outcome

8.1 The consultation paper on the draft regulations under paragraph 6 of Schedule 3 to the 1999 Act attracted three responses. These came from the Crown Prosecution Service, the Law Society and the Justices' Clerks' Society and were supportive. A drafting amendment has been made to the draft statutory instrument in the light of one of the responses. This involved re-drafting the definition of 'application'. This was amended to refer to 'an application for the grant of a right to representation.' This provides greater consistency with the terminology used in the Access to Justice Act 1999.

9. Guidance

9.1 No guidance is necessary.

10. Impact

10.1 An Impact Assessment is attached to this memorandum at Annex A. This illustrated that there is no impact on business, charities, voluntary bodies or the public sector.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The policy will be reviewed one year after implementation of the full statutory framework, including secondary legislation..

13. Contact

David Stobie at the Ministry of Justice Tel: 020 3334 4280 or email: david.stobie@justice.gsi.gov.uk can answer any queries regarding the instrument.

ANNEX A Summary: Intervention & Options

Department /Agency: Ministry of Justice	Title: Impact Assessment of Section 57 of the Criminal Justice and Immigration Act 2008	
Stage:	Version:	Date: 1 August 2008
Related Publications:		

Available to view or download at:

<http://www.Justice.gsi.gov.uk>

Contact for enquiries: Brenda Keys

Telephone: 020 7210 2092

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

The Legal Services Commission (LSC) has an obligation to verify the accuracy of information provided by magistrates' courts defendants in order to determine their financial eligibility for criminal legal aid. Checks are currently undertaken by Department for Works and Pensions (DWP) and Her Majesty's Revenue and Customs (HMRC), on the basis of written consent provided by the defendant on the application form. The Government believes the 'gateway' arrangements should be placed on a proper statutory footing so as to facilitate and enhance the verification process.

What are the policy objectives and the intended effects?

To ensure criminal legal aid is only granted to those applicants who are financially eligible;
To ensure operational effectiveness of the means test and so support the Government's wider policy objective of Simple, Speedy Summary Justice;
To guard against potential fraud;
To provide better value for money to the tax-payer; and
To promote greater public confidence in the administration of criminal legal aid.

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

To do nothing would mean a potential additional cost to the legal aid fund if representation is granted to financially ineligible applicants;

Introducing primary legislation is the preferred option as it provides formal authority for the detailed sharing of information between the LSC and DWP and HMRC.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The policy will be reviewed one year after implementation of the full statutory framework, including secondary legislation.

Ministerial Sign-off For SELECT STAGE Impact Assessments:

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: 30/08/08

Summary: Analysis & Evidence

Policy Option:	Description: Introducing Primary and Secondary Legislation
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COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' £134K annual LSC staff resource cost £10K annual payment by LSC to DWP and HMRC for verification of financial information provided by legal aid applicants
	One-off (Transition)		
	£		
	Average Annual Cost (excluding one-off)		
	£ 144K	Total Cost (PV)	£

Other **key non-monetised costs** by 'main affected groups'

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' £134K annual LSC staff resource cost £10K annual payment by LSC to DWP and HMRC for verification of financial information provided by legal aid applicants.
	One-off		
	£		
	Average Annual Benefit (excluding one-off)		
	£ 144K	Total Benefit (PV)	£

Other **key non-monetised benefits** by 'main affected groups' financially eligible applicants will be granted legal aid; fraud will be reduced; savings will be delivered; Greater confidence for the tax payer that criminal legal aid is administered fairly and that it provides value for money.

Key Assumptions/Sensitivities/Risks Fraud will be reduced. Better use of taxpayers money

Price Base Year 0	Time Period Years 0	Net Benefit Range (NPV)	NET BENEFIT (NPV Best estimate)
		£	£

What is the geographic coverage of the policy/option?		England and Wales			
On what date will the policy be implemented?		Dec'08/Jan'09			
Which organisation(s) will enforce the policy?		N/A			
What is the total annual cost of enforcement for these organisations?		£ N/A			
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 - Decrease)			
Increase of	£ N/A	Decrease	£ N/A	Net Impact	£ N/A

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

Evidence Base (for summary sheets)

Criminal Defence Service amendments

Access to Justice Act 1999, as amended by section 57 of the Criminal Justice & Immigration Act 2008

What are the policy objectives and intended effects

The aim of the policy is to help ensure that criminal legal aid is accurately and properly granted to those applicants who meet the appropriate financial eligibility criteria. This will be achieved by providing a statutory basis upon which the LSC can verify the financial information submitted on the application form with DWP and HMRC.

Options

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

- Option 1 – Existing voluntary arrangements
- Option 2 – Introducing primary and secondary legislation

Option 1 – This option would have been reliant on the defendant giving their written consent so that financial information provided on the application form could be verified with HMRC and DWP. This process recognised the importance of protecting an individual's personal information and maintaining confidentiality. However, as this option restricts the ability to verify an applicant's financial status and so ensure that legal aid is correctly granted, a voluntary scheme was not seen as an appropriate way forward.

Benefits: Legislation not necessary

Costs: Legal aid could be incorrectly allocated
Fraud could go undetected

Option 2 – Primary/Secondary Legislation. This will provide the Government with a comprehensive mechanism through which to verify with DWP and HMRC the accuracy of information provided by individuals applying for publicly funded representation. This process recognises the importance of protecting an individual's personal information and maintaining confidentiality. This arrangement will allow the government to fulfil its wider policy obligation to ensure that legal aid resources are focused on those vulnerable individuals who most need them.

Benefits: Verification of an applicant's financial status can be carried out without their written consent.
Legal aid will be more accurately granted
Fraud should be quickly detected

Costs: Staff resource and time required to implement legislative framework.

Purpose and Intended Effect of statutory 'gateway' with DWP & HMRC

Some legal aid applicants can be automatically 'passported' through the means test if they are in receipt of Income Support, Income based Jobseeker's Allowance or guaranteed State Pension Credit. Equally, all youths under 18 are exempt from the means test.

Prior to section 57 of the Criminal Justice and Immigration Act 2008, LSC had a formal agreement with DWP to confirm whether an applicant was in receipt of a 'passported' benefit and an informal agreement with DWP and HMRC whereby they could access data about an applicant and confirm other forms of income in order to check their financial status. Access to an applicant or applicant's partner's records required written authorisation by the defendant.

The new legislative provision gives a statutory basis through which much more comprehensive information about an applicant's financial status can be disclosed to the LSC by DWP and HMRC.

Background

The Access to Justice Act 1999, as amended by the Criminal Defence Service Act 2006, provided for the reintroduction of a new means testing scheme for criminal legal aid.

The regulatory framework for the new means testing scheme was set out in secondary legislation and was implemented in magistrates' courts on 2 October 2006. The means test now sits alongside the existing 'Interests of Justice' test in determining an applicant's eligibility for criminal legal aid representation in magistrates' courts.

Rationale for Government Intervention

The Government believes that legal aid is a fundamental underpinning of the criminal justice system, enabling access to justice for those who cannot afford to pay for legal advice and representation.

The establishment of the new gateways with DWP and HMRC will ensure that:

Data can be verified quickly and accurately;

That legal aid is granted correctly to those who are financially eligible;

That adequate measures are put in place to protect against fraud or incorrect allocation of grant;

The new CJSSS system is supported by the swift turnaround of legal aid applications.

Legal aid provides value for money and inspires wider public confidence.

Data Protection Act 1998:

The Data Protection Act 1998 (DPA) puts in place a framework for the protection of personal data, balancing the privacy rights of individuals with the legitimate needs of organisations to make use of such data. It requires data controllers to comply with eight data protection principles when they process personal data unless they are able to claim an exemption from one or all of them. The principles provide a framework for respecting individuals' rights to privacy and keeps their personal information secure from abuse. It does not prevent lawful data sharing. Data sharing is essential to delivering efficient public services and has an important role to play in tackling potential criminal activities.

Of particular importance to this policy are the second and third data protection principles; the second provides that personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes. The third principle states that personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

Transformational Government aims to improve services to the citizen by driving more efficient and joined-up service delivery. This includes minimising the collection of new data by encouraging a move to a shared services culture, where data can be better safeguarded through the existence of fewer datasets

with better data protection and less duplication, rather than creating whole new data sets every time a new service is required.

Devolution

This change applies to England and Wales only. Scotland and Northern Ireland have legal aid separate schemes.

DWP Gateway

A formal agreement existed between DWP and HMCS, which allowed HMCS to confirm whether the applicant was on a passported benefit. There was an informal agreement between HMCS and DWP, which allowed them to confirm other forms of income. By putting the gateway arrangement with DWP on a statutory footing it would allow access to an applicant's or, if relevant, their partners records, to confirm whether either of them was on a passported or other benefit. An applicant would still need to sign the application form but court staff would not require the consent of the applicant to obtain access to their records and it would mean that the information currently used can also be more varied to identify the applicant/applicant's partner.

Prior to the implementation of the Act, if a client provided incorrect or inaccurate details, or was unable to recall exactly the type of benefit s/he received, court staff may have been unable to access and verify data on the relevant database. This could lead to :

- delay or
- legal aid incorrectly awarded or
- legal aid not being awarded when the client should be entitled.

In the longer term it was felt that a statutory gateway with DWP was necessary. It would ensure that applications made by defendants in receipt of 'passport benefits would be processed accurately by using not just the applicant's name, address and date of birth but by using other suitable appropriate information. It would provide a clear legal basis on which relevant information can be shared, and would ensure that the system works as effectively as possible with minimal burden on defendants, solicitors, court staff and DWP staff.

HMRC Gateway

By putting the agreement with HMRC on a statutory footing, it will allow access to an applicant or, where appropriate, applicant's partner's records in order to identify their full financial position. The gateway will provide access to a much wider range of financial information, which will enable a speedy decision on whether a defendant is financially eligible.

Conclusion

The statutory gateways with DWP and HMRC will only allow the sharing of relevant information for the specific purpose of administering the grant of legal aid (a function of the Legal Services Commission under schedule 3 to the Access to Justice Act 1999). The draft regulations setting out the detail of the new gateway arrangements will be the subject of a consultation exercise starting on 26 August 2008.

Specific Impact Tests: Checklist

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	No
Small Firms Impact Test	Yes	No
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

Annexes

Small Business Impact Test

There is not expected to be any additional work for small businesses as a result of this change. CDS application forms will continue to be completed by solicitors and signed by defendants, as was the case prior to the gateway arrangements between DWP, HMRC and LSC being placed on a statutory footing in the Criminal Justice and Immigration Act 2008. The gateway facility will ensure that a more accurate decision can be reached on an applicant's financial eligibility status, and this should help to build confidence among legal aid practitioners and reduce the need for reviews arising from the financial determination.

15.08.08

2009 No. 0000

**LEGAL SERVICES COMMISSION, ENGLAND AND
WALES**

**The Criminal Defence Service (Information Requests) (Prescribed
Benefits) Regulations 2009**

<i>Made</i>	- - - -	<i>2009</i>
<i>Laid before Parliament</i>		<i>2009</i>
<i>Coming into force</i>	- -	<i>2nd March 2009</i>

The Lord Chancellor makes the following Regulations in exercise of the powers conferred by section 26 of and paragraph 8(2) of Schedule 3 to the Access to Justice Act 1999(1).

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Criminal Defence Service (Information Requests) (Prescribed Benefits) Regulations 2009 and come into force on 2nd March 2009.

(2) In these Regulations—

- (a) “the 1992 Act” means the Social Security Contributions and Benefits Act 1992(2);
- (b) “the 1999 Act” means the Access to Justice Act 1999;
- (c) “the 2006 Regulations” means the Criminal Defence Service (Financial Eligibility) Regulations 2006(3);
- (d) “disregarded benefit” means a benefit excluded from the calculation of gross annual income as defined in regulation 2 of the 2006 Regulations;
- (e) “Independent Living Funds” has the same meaning as in the 2006 Regulations;
- (f) “qualifying benefit” means a benefit for the purposes of regulation 5(3) of the 2006 Regulations.

(1) 1999 c.22. Section 26 includes definitions of “prescribed” and “regulations”. The reference in that section to the Lord Chancellor was changed to the Secretary of State by the Secretary of State for Constitutional Affairs Order 2003 (S.I. 2003/1887) and was changed back to the Lord Chancellor by the Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (S.I. 2005/3429). Paragraph 8 of Schedule 3 was inserted by section 57 of the Criminal Justice and Immigration Act 2008 (c.4).

(2) 1992 c.4. Section 30A was inserted by section 1 of the Social Security (Incapacity for Work) Act 1994 (c.18), [and is prospectively repealed...]. Sections 39A and 39 B were inserted by section 55(2) of the Welfare Reform and Pensions Act 1999 (c.30). Sections 48A and 48B were inserted by section 126 of, and paragraph 3(1) of Schedule 4 to, the Pensions Act 1995 (c.26). Section 48BB was inserted by section 56 of the 1999 Act. Section 55A was inserted by section 50(1) of, and paragraphs 1 and 3 of Schedule 6 to, the 1999 Act. Parts 12ZA and 12ZB were inserted by sections 2 and 4 respectively of the Employment Act 2002 (c.22).

(3) S.I. 1996/3110, amended by S.I.

Prescribed benefits

2. The benefits prescribed for the purposes of paragraph 6(2)(e) of Schedule 3 to the 1999 Act are those listed in the Table in this regulation.

Prescribed benefits

<i>Qualifying benefit</i>	<i>Payable under</i>	<i>Provision</i>
Income support	The 1999 Act	Section 124
Income-based jobseeker's allowance	Jobseekers Act 1995(4)	Part I
Guarantee credit	State Pension Credit Act 2002(5)	Section 1(3)(a)
Income-related employment and support allowance	Welfare Reform Act 2007(6)	Section 1(2)(b)
<i>Disregarded benefit</i>	<i>Payable under</i>	<i>Provisoin</i>
Attendance allowance	The 1992 Act	Section 64
Severe disablement allowance	The 1992 Act	Section 68
Carer's allowance	The 1992 Act	Section 70
Disability living allowance	The 1992 Act	Section 71
Constant attendance allowance	The 1992 Act	Section 104 and paragraphs 4 and 7(2) of Schedule 8
Council tax benefit	The 1992 Act	Section 131
Any direct payment	Regulations under the Health and Social Care Act 2001(7)	Section 57(1)
Any direct payment	The Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004(8)	
Any exceptionally severe disablement allowance	The Personal Injuries (Civilians) Scheme 1983(9)	
Any pension	The Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 2006(10)	
Any payments out of the Independent Living Funds		
<i>Other benefits</i>	<i>Payable under</i>	<i>Provision</i>
Bereavement benefits	The 1992 Act	Sections 36, 39A and 39B
Incapacity benefit	The 1992 Act	Section 30A
Long-term incapacity benefit for widows and widowers	The 1992 Act	Sections 40 and 41
Industrial injuries benefit	The 1992 Act	Section 94
Contribution-based jobseeker's allowance	Jobseekers Act 1995	Part I
Contribution-based employment	Welfare Reform Act 2007	Section 1(2)(a)

(4) 1995 c.

(5) 2002 c.

(6) 2007 c.

(7) 2001 c.

(8) S.I.

(9)

(10)

and support allowance		
Maternity allowance	The 1992 Act	Section 35
Statutory maternity pay	The 1992 Act	Part XII
Statutory paternity pay	The 1992 Act	Part 12ZA
Statutory adoption pay	The 1992 Act	Part 12ZB
Category A and Category B retirement pension	The 1992 Act	Sections 44, 48A, 48B, 48BB and 51
Shared additional pension	The 1992 Act	Section 55A
Widow's benefit	The 1992 Act	Sections 37 and 38
Housing benefit	The 1992 Act	Section 130
Job grant, return to work credit or in-work credit	Employment and Training Act 1973(11)	Section 2

3. An information request made under paragraph 6 of Schedule 3 to the 1999 Act may include a request for the disclosure of the amount the individual is receiving by way of any prescribed benefit.

Signed by authority of the Lord Chancellor

Date

Name
Parliamentary Under Secretary of State
Ministry of Justice

EXPLANATORY NOTE

(This note is not part of the Regulations)

Under Schedule 3 to the Access to Justice Act 1999 the authority responsible for granting rights to publicly funded representation for criminal cases may make an information request to the Secretary of State for information about an individual who has applied for representation, to facilitate the making of decisions about financial eligibility. The information may include information about the individual's benefit status. These Regulations prescribe the relevant benefits and permit the authority to seek information about the amount of any prescribed benefits being received.