



# Criminal Proceedings in the Magistrates' Court: Exceptional Funding On The Grounds Of Hardship

A Consultation Paper

*Criminal  
Defence Service*



July 2006

# **Criminal Proceedings in the Magistrates' Court: Exceptional Funding On The Grounds Of Hardship**

## Contents

Foreword.....	2
1. Executive summary.....	3
2. How to respond.....	5
3. Criminal Defence Service Act 2006 .....	6
4. Means testing in the Magistrates' Court .....	6
5. Exceptional Funding on the Grounds of Hardship.....	7
6. Hardship Review Business Process.....	8
7. Hardship Review Criteria.....	10
8. Referral to the High Court... ..	14
9. Guidance and Management Information.....	14
Appendix 1 Consultation Questions... ..	15

## **Foreword**

The Criminal Defence Service Act 2006, which received Royal Assent on 30<sup>th</sup> March 2006, provides enabling powers to transfer responsibility for the grant of legal aid from the courts to the Legal Services Commission (LSC), and to introduce a new means test for legal aid applicants.

The means test will be introduced for criminal proceedings in the magistrates' court on 2 October 2006. The purpose of the financial eligibility review (to be known as the Hardship Review) is to allow legal aid applicants who fail the means test but believe that they are genuinely unable to pay for their defence costs to have their circumstances reviewed on the basis of whether they have sufficient means to afford the costs of their case.

We believe that the Hardship Review proposals will ensure that the resources made available to the legal aid fund are directed towards those in genuine financial need, and allocated in an efficient, consistent, transparent and fair way.

These proposals expand on the policy outlined in the 'Criminal Defence Service Bill: Supplement to the Framework Document' and the Criminal Defence Service Act Regulations published by the Department for Constitutional Affairs (DCA).

## **1. Executive Summary**

- 1.1 This paper sets out the proposed approach for introducing a review process for applicants who are refused legal aid under the financial eligibility criteria that will be introduced in magistrates' court criminal proceedings from 2 October 2006. It is proposed that the LSC create a business unit to handle all reviews and that the review be based on whether the applicant has sufficient means to pay for the costs of the case based on estimated case costs and the applicant's disposable income and liquid capital [see 7.13 for definition].
- 1.2 The objectives of the proposal are to provide a review process that is:
- Efficient and cost effective whilst ensuring the LSC meets its obligations under the Regulations and Article 6 ECHR;
  - Open, transparent and understandable for practitioners, applicants and court staff alike; and
  - Based on objective criteria to prevent complaints of unfairness and unreasonable decision-making.
- 1.3 It is proposed that the review process be known as the Hardship Review and the business unit that will carry out the process be known as the Hardship Unit.
- 1.4 It is proposed that applicants have the opportunity to submit a Hardship Application either:
- Concurrently with the initial application to the court for a representation order; or
  - After the initial application has been refused on the grounds of financial eligibility.
- 1.5 Where the Hardship Application is sent concurrently with the initial representation order application, the court will forward it to the Hardship Unit if the applicant is refused legal aid. Applicants who wish to submit a Hardship Application after having been refused legal aid will apply directly to the Hardship Unit. The results of any Hardship Review will be communicated to the applicant by the court.
- 1.6 The Hardship Review will assess both the applicant's disposable income and liquid capital, and determine his ability to meet the likely costs of the case from those resources. This is in recognition of the fact that a small number of magistrates' court cases are disproportionately expensive and could not be funded privately even by an applicant of substantial means.
- 1.7 The Hardship Review will require information on the applicant's financial circumstances (which has not been taken into account under the means test, including liquid capital in the form of cash savings) and

an estimate provided by the solicitor as to the likely costs of the case at both legal aid and private rates.

- 1.8 The Regulations provide the LSC with a power to refer a question to the High Court where a question of interpretation arises. It is proposed that the process for referral be governed by a Practice Direction drawn up by the DCA. It is proposed that the hearing be paper-based as opposed to oral and that the applicant be given the opportunity to make representations to the court.

## **2. How to respond**

- 2.1 Views are welcome on all aspects of the proposals. Wherever possible please provide evidence to support your comments.
- 2.2 When responding, please state whether you are responding as an individual, as a legal services provider or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled. The consultation paper is available from the LSC's website [www.legalservices.gov.uk](http://www.legalservices.gov.uk)
- 2.3 In accordance with the Freedom of Information Act 2000, the LSC may publish your name and content of your response unless you provide sufficient reasons for asking us not to. Please ensure that your response is marked clearly if you wish your response or your name to be kept confidential. In any event, confidential responses may still be disclosed in a summarised or anonymous format, and will be included in any statistical summary of the comments received and views expressed.
- 2.4 The closing date for consultation is 17 August 2006. Please send your response to:

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### **3. Criminal Defence Service Act 2006**

- 3.1 The Criminal Defence Service Act 2006, which received Royal Assent on 30<sup>th</sup> March 2006, provides enabling powers to transfer responsibility for the grant of legal aid from the courts to the LSC, and to introduce a new means test for applicants.
- 3.2 The LSC has a statutory responsibility under the Access to Justice Act 1999 to ensure that those facing criminal charges in the courts have access to effective legal representation, and that those who are unable to meet the costs of such representation are assisted from public funds. The right to legal representation is enshrined in the fair trial provisions of Article 6 of the European Convention of Human Rights, and underpinned by the Human Rights Act 1998.
- 3.3 However, the Government has a further responsibility to ensure that the resources made available to the legal aid fund are directed towards those in genuine financial need, and allocated in an efficient, consistent, transparent and fair way. There is a clear public interest in efficient use of public resources, while ensuring that criminal proceedings are fair and compliant with human rights standards. It is for this reason that the decision has been taken to reintroduce means testing in criminal cases to ensure that those who can afford to pay for their own defence are encouraged to do so whilst directing the resources available to the legal aid fund to those genuinely in need.

### **4. Means Testing in the Magistrates' Court**

- 4.1 Applicants automatically qualify financially for criminal legal aid if they:
- Receive Income Support, income-based Jobseeker's Allowance or a Guaranteed State Pension Credit;
  - Are under 16 years of age; or
  - Are under 18 years of age and in full-time education.

- 4.2 If the applicant does not qualify automatically a simple means test will be carried out: gross annual income ÷ weighting = adjusted income.

If the applicant's adjusted income is:

- Under £11,590, he qualifies
- Over £20,740, he does not qualify
- Between £11,590 and £20,740, a full means test will be carried out.

- 4.3 The weighting for a single adult is 1.00 + the total weighting for any children.

The weighting for a couple is 1.64 + the total weighting for any children.

The weighting for each child is based on their age at their next birthday:

- 0-1 years 0.15
- 2-4 years 0.30
- 5-7 years 0.34
- 8-10 years 0.38
- 11-12 years 0.41
- 13-15 years 0.44
- 16-18 years 0.59

4.4 The full means test involves deducting the following from the applicant's gross annual income to obtain the disposable income:

- Tax and National Insurance
- Annual housing costs
- Annual childcare costs
- Annual maintenance to former partners and any children and
- An adjusted annual living allowance (add the relevant figure for any children, as above, to 1.00 [or 1.64 for a couple] and multiply £5,304 by the total).

The applicant will qualify for criminal legal aid if his annual disposable income is less than £3,156.

## **5. Exceptional Funding on the Grounds of Hardship**

5.1 The Criminal Defence Service (Financial Eligibility) Regulations 2006 recognise that despite the Government's best efforts to develop a means testing scheme that is sensitive to the circumstances of the individual applicant there will be occasions on which applicants who find themselves in unusual circumstances may fail the means test and yet may genuinely be unable to pay for their defence costs.

5.2 Regulation 14 – Review of Decision – sets out in broad terms the way in which the Review will operate:

14. – (1) An individual who has been refused a representation order on the grounds that his financial resources are not such that he is eligible for such an order may apply for a review of the decision –

- (a) to the representation authority, on the ground that there has been a miscalculation of his income or an administrative error; or
- (b) to the Commission, on the ground that he does not have sufficient means to pay for the cost of legal assistance, notwithstanding that his financial resources are such

that he is not eligible for a representation order under these Regulations.

- (2) An application for a review must be made on such form as the Commission may specify.
- (3) Where the grounds of the application are those mentioned in paragraph (1)(b), the individual must provide full particulars of his income and expenditure and a certificate by a solicitor as to the individual's likely cost of the proceedings.
- (4) Where –
  - (a) the grounds of the application are those mentioned in paragraph (1)(a); and
  - (b) the representation authority is not the Commission,  
  
the representation authority may refer the application to the Commission for its decision.
- (5) On a review the representation authority or the Commission (as the case may be) must uphold the decision or grant the individual a representation order.
- (6) The Commission may, if it thinks that the application raises a question of such importance that it should be decided by the High Court, refer that question to the High Court for its decision.

5.3 The purpose of this paper is to set out

- the LSC's proposals as regards the processes that will enable applicants to have their circumstances reviewed;
- the criteria upon which the Review's decision-making functions will be based; and
- the procedure that will operate for those applications that are to be referred to the High Court for a decision.

## **6. Hardship Review Business Process**

6.1 In designing the process that will enable applicants to have their financial circumstances reviewed every effort has been made to ensure that it is efficient, effective and economical.

### Hardship Unit

6.2 In order for the LSC to ensure that it is providing the level of assurance required it is proposed that the work be carried out by a single unit ("Hardship Unit") in a limited number of sites. This is to ensure:

- Consistency in decision-making
- That appropriate controls are in place and can be exercised
- That expertise can be developed and maintained.

### Hardship Review Application Routes

6.3 It is recognised that delays to the court procedure can often result in great frustration and distress for defendants and their solicitors, as well as increasing operating costs for HMCS and the wider Criminal Justice System. The design of the Hardship Review process has been developed with the intention of avoiding delays wherever possible. It is proposed that there be two routes via which an applicant can apply for a Hardship Review:

#### Route A – Concurrent with initial application

6.4 In the interests of minimising any delays to the court process it is proposed that applicants be given the opportunity to apply for a review at the same point at which they initially apply to the court for a representation order. The means test has been developed in such a way that applicants and their solicitors will be in a position to make an informed assessment as to the applicant's financial eligibility. The LSC will also publish guidance to assist applicants and solicitors who wish to make such an assessment. If it is reasonably clear that the applicant is unlikely to satisfy the financial eligibility criteria under the means test that applicant may complete the Hardship Review form that will be made available alongside the means test form and submit both to the court.

6.5 The court will apply the means test and, if the applicant is deemed financially ineligible, will forward the Hardship Review form to the Hardship Unit. The Hardship Unit will carry out the review and the decision will be communicated to the court. The court will then inform the applicant and his solicitor of the status of the application for a representation order.

#### Route B – Following refusal of representation under the means test

6.6 Applicants who choose not to submit a Hardship Review form alongside their initial application to the court will have the opportunity to request a review if they are refused a representation order on the grounds of financial eligibility. In these cases the form will be submitted directly to the Hardship Unit who will carry out the review and communicate the decision to the court. As above it will be the court that will inform the applicant and solicitor of the status of the application for a representation order.

6.7 The Hardship Unit will further seek to minimise any delay and disruption to the court process by requiring all reviews to be completed within 2 working days of receipt of a properly completed form (with the

exception of those cases that require a question to be referred to the High Court). In order to assist applicants and their solicitors in completing the form the LSC will publish detailed guidance on the criteria upon which the review will be based and what evidence the applicant will be required to produce in support of an application.

Q1. Do you agree that applicants should be able to apply for a review concurrently with the initial application for a representation order as well as at the point where the initial application has been refused on the grounds of financial eligibility? And if not, why not? Are there any other points during the court process at which it would be appropriate for an applicant to be able to request a review?

## **7. Hardship Review Criteria**

- 7.1 The purpose of the Hardship Review, as set out in the *Criminal Defence Service Bill: Supplement to the Framework Document* is to allow applicants who fail the means test but who due to their unusual circumstances, are genuinely be unable to pay for their defence costs, to have their means reassessed on the basis of whether they have “sufficient means to pay for the cost of legal assistance.”
- 7.2 In order to be properly sensitive to the individual applicant’s circumstances the Hardship Review will assess each application on a case-by-case basis. This approach will necessarily involve a degree of discretion to be exercised by the Hardship Unit when assessing the impact that paying for the cost of legal assistance would have on the applicant’s financial circumstances. It is proposed that a review that contains such an element of discretion, whilst possibly being more time-consuming to administer, is preferable to a simpler administrative process in determining whether the individual applicant has sufficient means to pay.
- 7.3 However, in order to guide the Hardship Unit’s discretion and ensure that the decision-making process is consistent, justifiable and transparent, the Hardship Unit will operate within a framework of criteria and guidance. This framework will be published and made available to applicants and their solicitors.
- 7.4 The two areas that have been identified as most likely to give rise to an application for a Hardship Review are where the applicant has particularly high outgoings that are not taken accounted for under the means test and where, given the individual circumstances of the case, the solicitor’s costs are likely to be particularly expensive.
- 7.5 Therefore, the Hardship Review will be a two-stage process:
1. The applicant’s disposable income will be recalculated, taking into account any allowable outgoings and / or disregarding partner’s

income where not to do so would cause the applicant hardship. The applicant's liquid capital will also be taken into account.

2. Having recalculated disposable income and taken liquid capital into account it will be considered whether the applicant has sufficient means to pay the costs of the case.

- 7.6 The Hardship Review will also consider whether the applicant has sufficient means to pay the costs of the case where no recalculation of disposable income is requested but the case is likely to be particularly expensive.

#### Applicant's Outgoings

- 7.7 The means test will take into account the actual cost of a number of outgoings (e.g. income tax, NI, housing costs) and an equivalised annual living allowance when determining the applicant's disposable income. The Hardship Review will provide for situations where the applicant has outgoings that are not taken into account in the means test.

- 7.8 Outstanding debts are recognised as a factor that may have a significant impact on the applicant's ability to pay for legal assistance. The Hardship Review will have the discretion to discount debt repayments and other outgoings from the assessment of the applicant's disposable income.

- 7.9 The Hardship Review will operate under the presumption that the applicant should take measures to extend or postpone those payments. However, it is proposed that the nature of the loan be taken into account. Therefore, the requirement to extend or postpone repayments will be interpreted less strictly where the outgoings would be viewed as essential living costs. These will include:

- Arrears for rent / mortgage, utilities (electricity, gas, water), and council tax;
- Debt repayments that are a result of expenditure required to make the applicant's home habitable.
- Any loan necessarily secured on the applicant's home that pre-dates the case in question.
- Payments made under the terms of a court order or judgement.
- Special expenses incurred by sick or disabled people e.g. special diet, medical items or travel expenses to hospital for treatment that have been occasioned by the sickness or disability of the applicant, his partner, or his dependent children.
- Loans for essential household items such as refrigerators, cookers, washing machines etc where the loan is secured on the item.

For all other types of outgoing the applicant should make every effort to extend or postpone the payments.

7.10 Regardless of the nature of the outgoings, if the applicant contends that it is not possible for payment to be extended or postponed, the Hardship Review will require:

- Written confirmation of the loan and the terms of repayment from the lender.
- Evidence that regular payments are actually being made – in the form of copies of bank statements or some other independently verifiable evidence.

Q2. Do you agree with the proposed approach for taking account of the applicant's outgoings that are not considered under the means test? If not, why not and what would you propose instead?

### Aggregation of Income

7.11 The means test allows the applicant's partner's income not to be aggregated where the partner has a "contrary interest" in the case. It is recognised that there may be situations that do not fit with the definition of "contrary interest" provided by the Regulations e.g. where applicants believe they will be in danger of abuse from their partners if they ask for funds or where partners simply refuse to pay.

7.12 It is proposed that prescriptive criteria be avoided for the purpose of the Hardship Review and the applicant instead be allowed to make representations on the basis that, with reference to his individual circumstances, it would be unreasonable or inequitable to aggregate income. As when considering the applicant's debts and outgoings the Hardship Review would exercise its discretion in this matter on a case-by-case basis and all decisions would be recorded in order to develop a set of precedents that will ensure consistent and justifiable decisions are made in all cases.

Q3. Do you agree with the proposed approach for taking account of cases where the applicant contends that it would be unreasonable or inequitable to aggregate his income with that of his partner? If not, why not and what would you propose instead?

## Capital

- 7.13 It is proposed that the Hardship Review contain a limited capital test based on the applicant's (and his partner's where their means are aggregated under the means test) self-certified level of readily available cash savings – i.e. all cash held in bank and building society accounts. Whilst it is recognised that a more rigorous and wide-ranging capital test, which would include all liquid / fixed assets in the assessment, would provide a more definitive picture of the applicant's ability to pay for legal assistance, there are concerns that such a test would be expensive to administer, burdensome to the applicant and result in delays to the wider criminal justice system.

Q4. Do you agree that introducing a limited capital test will ensure that a more accurate assessment of the applicant's ability to pay for legal assistance is possible?

The case is likely to be unusually expensive

- 7.14 Based on the means test threshold level for disposable income it is proposed that the Hardship Review will operate under the presumption that an unusually expensive case will be one that is estimated to cost in excess of £2,000 (VAT not included) if it were paid at legal aid rates.
- 7.15 The Regulations require the solicitor to submit an estimate of costs with all applications to the Hardship Review. As the reintroduction of means testing will have a significant impact on the private market for criminal defence services the Hardship Review will require a mechanism to assess the reasonableness of the quoted costs. A reasonableness test is required to prevent a situation in which one applicant was granted legal aid because he had chosen a particularly expensive solicitor whilst another applicant, who had a similar case and financial circumstances, was refused on the basis that his chosen representative was less expensive.
- 7.16 It is proposed that the applicant's solicitor be required to submit an estimate of costs based on current legal aid rates which will be used as a proxy for the market rate by the Hardship Review. The solicitor should also provide an estimate of costs based on his own private payment rates. It is proposed that the LSC use the estimates based on private payment rates to establish reasonable market rates once the criminal defences services market has adjusted to the reintroduction of means testing.
- 7.17 The Hardship Review will require all estimates to provide details of offence type, initial plea and estimated profit costs and disbursements (plus VAT where applicable).

Q5. Do you agree with the proposed approach for identifying unusually expensive cases and assessing market rates? If not, why not and what would you propose instead?

## Payment Terms

7.18 It is proposed that the Hardship Review operate under the presumption that the payment terms offered by the applicant's solicitor will not usually be a factor in determining financial eligibility.

7.19 However, the applicant may request that the payment terms be taken into account where the costs of the case are estimated as being unusually expensive or where the applicant unusually high outgoings.

Q6. Do you agree with the proposed approach for taking account of the payment terms offered by the applicant's solicitor? If not, why not and what would you propose instead?

## 8. Referral to High Court

8.1 The Regulations provide the LSC with a power to refer a question to the High Court where a question of interpretation arises that will affect their decision. The process for referral will be governed by an amendment to the Part 54 Practice Direction which was recently approved by the Civil Procedure Rules Committee. It is anticipated that the hearing will be paper-based as opposed to oral and that the applicant will have the opportunity to present written representations to the court.

## 9. Guidance and Management Information

9.1 Given that the proposed process allows for a degree of discretion to be exercised by the Hardship Review the supporting guidance available to applicants and practitioners will be a living document that will be amended in light of decisions made by both the Review and, where required, the High Court. The Hardship Review will collect and store information on all decisions made and it is proposed that statistical bulletins be published on a regular basis in order to further assist applicants and practitioners with their submissions.

Q7. Do you agree that the supporting guidance should be continuously updated in light of decisions made by the review and, where required, the High Court?

## Appendix 1 – Consultation Questions

- Q1. Do you agree that applicants should be able to apply for a review concurrently with the initial application for a representation order as well as at the point where the initial application has been refused on the grounds of financial eligibility? And if not, why not? Are there any other points during the court process at which it would be appropriate for an applicant to be able to request a review?
- Q2. Do you agree with the proposed approach for taking account of the applicant's outgoings that are not considered under the means test? If not, why not and what would you propose instead?
- Q3. Do you agree with the proposed approach for taking account of cases where the applicant contends that it would be unreasonable or inequitable to aggregate his income with that of his partner? If not, why not and what would you propose instead?
- Q4. Do you agree that introducing a limited capital test will ensure that a more accurate assessment of the applicant's ability to pay for legal assistance is possible?
- Q5. Do you agree with the proposed approach for identifying unusually expensive cases and assessing market rates? If not, why not and what would you propose instead?
- Q6. Do you agree with the proposed approach for taking account of the payment terms offered by the applicant's solicitor? If not, why not and what would you propose instead?
- Q7. Do you agree that the supporting guidance should be continuously updated in light of decisions made by the review and, where required, the High Court?

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