

EXPLANATORY MEMORANDUM TO
THE CRIMINAL DEFENCE SERVICE (FUNDING) (AMENDMENT) ORDER 2007

2007 No. 3552

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. **Description**

- 2.1 This instrument is about the payment regime for publicly funded litigators in criminal cases in the Crown Court. The instrument amends the Criminal Defence Service (Funding) Order 2007 (“the 2007 Order”), which makes provision for the funding and remuneration of services provided as part of the Criminal Defence Service. This instrument omits the payment provisions for solicitors (and other appropriately qualified persons) for proceedings in the Crown Court, and replaces them with a new graduated fee scheme. It makes minor amendments to the Advocates’ Graduated Fee Scheme, contained in Schedule 1 of the 2007 Order, to clarify the provisions on discontinuance and dismissal and trials lasting over 40 days. It also removes references to Very High Cost Case from 14th January 2008, which on or after that date will be remunerated in accordance with contractual arrangements entered into with the Legal Services Commission.

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

- 3.1 There are no matters of special interest.

4. **Legislative Background**

- 4.1 This Order is made by the Lord Chancellor, under section 14(3) of the Access to Justice Act 1999 (“the 1999 Act”) and is subject to the negative resolution procedure under section 25(10) of that Act.

- 4.2 This instrument is being made to bring into effect the introduction of a Crown Court Litigators Graduated Fee Scheme, as recommended by Lord Carter of Coles in his independent review of legal aid procurement. The instrument also makes minor amendments to clarify some provisions in the Advocates’ Graduated Fees Scheme and removes references to Very High Cost Cases, which will be remunerated in accordance with contractual arrangements.

5. **Extent**

- 5.1 This instrument extends to England and Wales.

6. European Convention on Human Rights

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

7. Policy background

- 7.1 The policy objective of this instrument is to implement the introduction of a Litigators Graduated Fees Scheme (LGFS) for the Crown Court in line with the recommendations made by Lord Carter. Advocates are already remunerated either through an Advocates' Graduated Fees Scheme or, in common with litigators in complex cases, through the individual contracting arrangements for Very High Cost Cases. The Government set out its proposals for legal aid reform in *Legal Aid Reform: the Way Ahead*¹ published on 28 November 2006. This followed Lord Carter's final report "*Legal Aid A market based approach to reform*"² and the accompanying DCA / Legal Services Commission consultation paper "*Legal Aid: a sustainable future*"³, both of which were published on 13 July 2006. These further developed the Government's strategy for legal aid as set out in *A Fairer Deal for Legal Aid*⁴, published in July 2005 which set out the need to rebalance spending between civil and criminal legal aid.
- 7.2 Lord Carter noted that most litigation services performed by solicitors in the Crown Court are currently paid on an ex post facto basis, based on hourly rates. He also noted that this system of remuneration had proved to be expensive, with costs rising by 86%, in real terms, between 1997-98 to 2004-05. Ex post facto determination does not allow any overall control over rising costs.
- 7.3 Lord Carter proposed a graduated fees scheme for litigators that would provide suppliers with a fee for a case that is based on the complexity of the case, rather than the number of hours worked. Graduated fees are calculated with reference to proxies for case complexity and contain uplifts that appropriately reflect and remunerate differences in both costs and complexity.
- 7.4 The Government accepted Lord Carter's proposals. In addition to the wider public consultation undertaken in response to Lord Carter's report, the Legal Services Commission undertook consultation on detailed proposals for a Litigators Graduated Fees Scheme in June 2007 and published a response to that consultation in October 2007. A total of 32 responses were received to the consultation exercise (25 from individual solicitors or firms and 7 from representative bodies). Overall, respondents did not support the LGFS. Some respondents were not in favour of a graduated fee for litigators in any form; however, most of the representative bodies acknowledged that a graduated fee was a necessary, if unwelcome, step for greater control over legal aid expenditure.

¹ Department for Constitutional Affairs, *Legal Aid Reform: the way ahead* (November 2006) Cm 6993

² *Legal Aid: a market-based approach to reform* (July 2006)
<http://www.legalaidprocurementreview.gov.uk/publications.htm>

³ Department for Constitutional Affairs, *Legal Aid: a sustainable future* (July 2006) CP 13/06

⁴ Department for Constitutional Affairs, *A Fairer Deal for Legal Aid* (July 2005) Cm 6591

- 7.5 The Ministry of Justice also undertook statutory consultation on this instrument. In accordance with section 25(2) of the 1999 Act the Ministry has consulted the General Council of the Bar and Law Society about this instrument. Consultation took place over a period of six weeks. During discussions with the professional bodies we agreed to change the way that travel costs will be paid, at the request of the Law Society.
- 7.6 The changes set out in this instrument will bring all non contracted fees to litigators in Crown Court proceedings within a fixed and graduated fee system. Overall they will help the Ministry obtain greater control over future expenditure. They will provide better reward for the most efficient practitioners and greater value for money for the taxpayer. Practitioners will also benefit from having greater certainty of income and speedier payments.

8. Impact

- 8.1 A full impact assessment of the effect of this instrument on the costs of business and the voluntary sector is available from www.legalservices.gov.uk or from the Ministry of Justice.

9. Contact

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