

**EXPLANATORY MEMORANDUM TO
THE CRIMINAL DEFENCE SERVICE (FUNDING) (AMENDMENT) ORDER 2009**

2009 No. 1843

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 allows the Legal Services Commission (LSC) to pay litigators for work done under a provisional representation order for publicly funded representation (legal aid) at the investigative stage of a potential serious or complex fraud.

- 2.2 This instrument also corrects an anomaly in cases that cease to be classified under the Very High Cost Cases (VHCC) scheme. Such cases attract a full fee under the graduated fees schemes for both litigators and advocates, and this instrument provides for payments for preparation under the VHCC scheme to be deducted from a graduated fee, except for a fee for administrative work done to comply with the terms of the VHCC contract.

- 2.23 This instrument also makes a number of changes to the way litigators are paid in publicly funded cases in the Crown Court, following an interim review of the litigator graduated fee scheme by the LSC.

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

- 3.1 None.

4. **Legislative Context**

- 4.1 The main regulations that introduce provisional representation orders are the draft Criminal Defence Service (Provisional Representation Orders) Regulations 2009, which have been laid before Parliament for approval by a resolution of each House of Parliament.

As a consequence of that Instrument, there will also be amendments, by the negative resolution procedure, to the Criminal Defence Service (General) (No. 2) Regulations 2001.

- 4.2 The Criminal Defence Service (Funding) Order 2007 was amended by the Criminal Defence Service (Funding) (Amendment) Order 2007 to introduce a new scheme for the payment of litigators in the Crown Court.

5. **Territorial Extent and Application**

5.1 This instrument applies 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 draft Criminal Defence Service (Provisional Representation Orders) Regulations 2009 allow the provisional grant of a representation order at an earlier point in a criminal investigative process in order that the prosecution and defence may discuss and, in appropriate cases, agree the basis of a guilty plea following the Attorney General's Guidelines on plea discussions in cases of serious or complex fraud.

A prosecutor in a serious and complex fraud investigation may trigger such discussions. If a plea agreement is reached the case would then proceed to the Crown Court in the usual way and it would be a matter of judicial discretion whether or not the proposed plea agreement was acceptable in each individual case. This instrument sets out the fees that are payable for work under a provisional representation orders, which are the same as the fees payable for cases of serious or complex fraud under the VHCC contract.

7.3 The Attorney General's Guidelines on plea discussions in cases of serious or complex fraud will encourage discussions about guilty pleas in fraud cases to happen much earlier and more transparently. Avoiding costly and lengthy fraud trials would be beneficial for the criminal justice system as a whole and provide an earlier outcome for victims, witnesses and defendants.

7.4 The litigator graduated fee scheme, which provides remuneration to litigators in publicly funded Crown Court cases, was implemented in January 2008. It replaced the previous scheme, which paid a fee based on hourly rates for work done. Under the new scheme, litigators are paid a fee based on a number of factors, such as the type of case (e.g. trial or guilty plea), the offence, and the number of pages of prosecution evidence. Fixed fees are paid for committals for sentence and appeals from the magistrates' court.

7.5 When the scheme was implemented, the Government undertook to keep it under review to ensure it was meeting its objectives. A full review is currently under way, which will be concluded next year when further data has been collected, and an assessment of the correct level of fees can be conducted more accurately. In the meantime, an interim review has identified a number of areas where changes should be made in advance of the full review. Under the interim review, we are:-

- (1) introducing a cap of 10,000 pages on the number of pages of prosecution evidence that will qualify for a page-based fee, but providing for a special preparation fee where there are more than 10,000 pages, based on the time taken to read the additional pages, to bring this scheme into line with the advocates' scheme.

- (2) clarifying the situations in which a case is or is not to be treated as having been transferred from one litigator to another, so that, for example, where a litigator moves to another firm, and takes a case with him, although the representation order may be transferred to the new firm, there will not be a payment to each firm.
- (3) introducing a new fixed fee for certain hearings after the defendant has been sentenced, for example where certain sentences are varied.
- (4) extending the fee payable in breach proceedings to include the litigator who represented the defendant in the original proceedings. Currently, the original fee is intended to cover subsequent breach proceedings, but problems have arisen with unrepresented defendants where litigators are not prepared to represent their client in the new proceedings without further payment.
- (5) increasing the fees payable in committals for sentence and appeals from the magistrates' court. This follows a comparison of the amount of money being paid under the new scheme for these cases with that paid under the previous scheme.
- (6) making a small number of minor amendments to the funding order, for example to correct previous drafting errors, to clarify the fees payable should a case cease to be contracted under the VHCC scheme and to update references to the name of the contract litigators have with the LSC.

- ***Consolidation***

7.2 This order amends the Criminal Defence Service (Funding) Order 2007. We are not proposing to consolidate the relevant legislation at this time.

8. Consultation outcome

8.1 Plea discussions were the subject of a 12 week policy consultation by the Attorney General and a total of 20 responses were received. The proposals were supported by 80% of respondents (though some support was conditional upon implementation of requirements that have now been accommodated within the Attorney General's Guidelines).

8.2 The Law Society and Bar Council were consulted throughout the period of the litigators graduated fees scheme interim review.

8.3 The Ministry has consulted the General Council of the Bar and the Law Society on this instrument and both were broadly supportive of the principles.

9. Guidance

9.1 Guidance will be available to practitioners on the LSC website.

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is negligible.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 The impact on firms employing up to 20 people is minimal.

12. Monitoring & review

12.1 The full review of the litigators graduated fees scheme has started and will make recommendations by March 2010.

12.2 The main instrument, the Criminal Defence Service (Provisional Representation Orders) Regulations 2009 will cease to have effect on 31 December 2011. At that stage we envisage introducing a scheme based on graduated fees, in common with many other areas of legal aid, if plea discussions are producing earlier guilty pleas. Consequential amendments may need to be made to the Criminal Defence Service (Funding) (Order) 2007.

13. Contact

James MacMillan at the Ministry of Justice Tel: 020 3334 4258 or email: james.macmillan2@justice.gsi.gov.uk can answer any queries regarding the instrument.