

EXPLANATORY MEMORANDUM TO

THE CRIMINAL DEFENCE SERVICE (FUNDING) (AMENDMENT) ORDER 2010

2010 No. 679

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. **Purpose of the instrument**
2.1 This order amends the fees payable to litigators (primarily solicitors) for representing individuals in the magistrates' court whose cases are then committed to the Crown Court for trial. These fees are payable as part of the Criminal Defence Service maintained by the Legal Services Commission (LSC) which runs the legal aid scheme in England and Wales.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
3.1 None.
4. **Legislative Context**
4.1 This Order is made under powers conferred by section 14(3) of the Access to Justice Act 1999. That provision empowers the Lord Chancellor to order the LSC to comply with its duty to fund services for individuals, which it may do by entering into contracts with providers of services, in accordance with the order. The Order is subject to the negative resolution procedure under section 25(10) of that Act.
4.2 It is being made in order to implement a new fee for committal proceedings in the magistrates' court as part of the Litigators Graduated Fee Scheme (LGFS). Payments to litigators for work done in the Crown Court under the LGFS are determined under the Criminal Defence Service (Funding) Order 2007 (S.I. 2007/1174), which is amended by this Order.
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 Access to Justice Act 1999 provides for the provision of publicly funded advice and assistance to individuals appearing in criminal cases before the magistrates' court and the Crown Court.
7.2 At present, whereas the fees payable to litigators for the Crown Court trial are set out in the 2007 Order, the fees payable to them for representing clients in the magistrates' court, whose cases are subsequently committed to the Crown Court, are set out in contracts made between the LSC and firms of solicitors. The contract provides for varying fees for these committal proceedings depending on the location of the magistrates' court and the length of time spent on the case. The Order will remove fees for committal proceedings in the magistrates' court from the

scope of these contracts where the case is subsequently committed to the Crown Court, and will apply to the LSC's existing contracts with suppliers, which expire in July 2010.

7.3 The Government has decided that it is necessary to introduced a new single fixed fee of £318 for this work, as part of the LGFS, both to achieve savings to the legal aid budget but also to reflect the fact that committal proceedings in the magistrates' court are, in general, less substantive than in the past. The new arrangements are similar to those that apply to indictable only cases that are sent to the Crown Court without any committal proceedings. In indictable only cases, work done in the magistrates' court is accounted for as part of the LGFS and is therefore included in the fee for the substantive Crown Court element of the case.

- *Consolidation*

7.4 The Ministry has no plans to produce a consolidated version of the 2007 Order and the amendments to it.

8. Consultation outcome

8.1 Changes to committal fees were the subject of a full three month consultation between August and November 2009. The consultation paper proposed a new fixed fee of £318 for this work. A copy of the consultation paper and response is on the Ministry of Justice website at www.justice.gov.uk. Respondents to the consultation included the Law Society and the Bar Council, other bodies representing solicitors, as well as individual practitioners. Most of the respondents were opposed to the fee change, although a few did not object in principle provided the fee was set at the right level.

8.2 In response, the Ministry stated that, as the current system did not reflect the fact that committal hearings were much more routine now than had been the case in the past, there was an element of duplication of payment under the current arrangements. The Ministry also stated that the new fee remained necessary as legal aid savings needed to be found. The Ministry is required to find £1 billion of efficiency savings in the period to March 2011. In addition, the Pre-Budget Report in December 2009 announced a further £360 million of efficiency savings to be realised in the Criminal Justice System, in part through reforming legal aid. The legal aid budget is under significant pressure and the Ministry therefore believes it is necessary to bring in measures to reduce the costs of criminal legal aid as early as possible during 2010/11, which will help to protect civil legal aid expenditure during the economic downturn.

8.3 The Ministry consulted the main professional bodies, the Law Society and the Bar Council, on the wording of the draft Order. The LSC also consulted the Law Society on draft revisions to its contract with suppliers designed to put into effect the requirements of the Order. The Law Society has stated that it believes that the Order will give rise to an inappropriate use of the amendment clause in the LSC's contracts with suppliers if the LSC amends its contracts in line with the requirements of the Order. The Ministry's position is that the LSC's contracts expressly provide for the LSC to amend its contracts in response to any UK legislation, that the Lord Chancellor's power in section 14(3) is clear, and that this is therefore a legitimate use of the amendment clause.

9. Guidance

9.1 The LSC is issuing a notice of the contract change implementing the new fees to all its contract holders, who will have four weeks' notice of the change.

10. Impact

10.1 There is no impact on charities or voluntary bodies. The impact on businesses is to reduce the fees paid to solicitors' firms by an estimated average (mean) of £5928, or a median value of £2559. The total estimated annual reduction in fees is £11.8 million.

10.2 The impact on the public sector is negligible.

10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 The Ministry has not taken any specific steps to minimise the impact of the requirements on firms employing up to 20 people.

11.3 The Order does not place additional regulatory burdens on small firms, but rather governs the fee paid to litigators where they choose to offer their services under the terms of the LGFS. Many of the solicitors' firms for whom these litigators work are small firms. It would not be possible to exempt small firms from the fee reductions as it would have an unfair impact on larger firms who would receive a lower fee for providing exactly the same services.

12. Monitoring & review

12.1 Legal aid expenditure is reviewed regularly by the Ministry and by the LSC and the impact of the fee reductions on expenditure will be monitored as part of this ongoing process. The LSC will review the impact on suppliers by assessing the level of demand for new contracts following the next tender round.

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.

Summary: Intervention & Options

Department /Agency:
Ministry of Justice

Title:
Impact Assessment of single fixed fee for
committals for trial

Stage: Consultation response

Version: Final

Date: 16 December 2009

Related Publications: The consultation paper, Legal Aid: Funding Reforms, was published on 20 August 2009.

Available to view or download at: www.justice.gov.uk

Contact for enquiries: Annette Cowell

Telephone: 020 3334 4217

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

Legal aid resources are finite and under significant pressure. The Ministry of Justice (MoJ) is required to contribute £1 bn of efficiency savings towards wider Government savings targets, and this includes savings from legal aid. As part of a broader suite of consultation proposals, MoJ would like to replace the current fee for committals paid as part of the magistrates' court standard fee scheme with a single fixed fee paid under the Litigators Graduated Fee Scheme (LGFS) to avoid any element of duplication between the two fee schemes. Government intervention is necessary because legal aid is funded by the taxpayer and therefore any changes to it would have to be made by Government.

What are the policy objectives and the intended effects?

The objective is to protect the civil fund as far as possible from any rise in criminal legal aid spend in the short to medium term. This is intended to support the Government's broader objective of helping as many people as possible with their civil law problems. Government aims to achieve this by prioritising criminal legal aid expenditure more effectively than at present by replacing the existing mechanism for the payment of committals for trial with a single fixed fee as part of the LGFS.

What policy options have been considered? The following options have been assessed against the base case of "no change" to the existing mechanism for the payment of committals for trial.

Base Case / Option 0 – "Do Nothing"

Option 1 – Single Fee - £318 excluding VAT

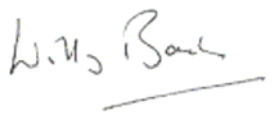
When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

If this policy was to be taken forward, the impact of any preferred option would be evaluated for its effectiveness within five years of policy implementation.

Ministerial Sign-off consultation 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:



16 December 2009

Summary: Analysis & Evidence

Policy Option: 1

Description: Single Fee - £318 excluding VAT

COSTS	ANNUAL COSTS		<p>Description and scale of key monetised costs by 'main affected groups'</p> <p>Costs to providers from a reduction in payment for committals are estimated at £11.8m annually and discounted over the next 10 years. The total discounted costs are estimated to be £109.7m over the appraisal period. The impact on administrative costs would be minimal and has therefore not been assessed.</p>
	One-off (Transition)	Yrs	
	£ 0	1	
	<p style="text-align: center;">Average Annual Cost (excluding one-off)</p>		
£ 11.8 m		10	Total Cost (PV)
£ 109.7m			
<p>Other key non-monetised costs by 'main affected groups' There would be potential indirect costs on society in the form of a possible impact on the service provided by litigators, and potential market exit. If corrective action was undertaken in the long term, this might also impose costs on taxpayers.</p>			

BENEFITS	ANNUAL BENEFITS		<p>Description and scale of key monetised benefits by 'main affected groups'</p> <p>The financial benefit to Government in terms of cost savings for the legal aid budget is estimated at £11.8m annually and discounted over the next 10 years. The total discounted benefits are estimated to be £109.7m over the appraisal period.</p>
	One-off	Yrs	
	£ 0	1	
	<p style="text-align: center;">Average Annual Benefit (excluding one-off)</p>		
£ 11.8 m		10	Total Benefit (PV)
£ 109.7m			
<p>Other key non-monetised benefits by 'main affected groups' There would be potential indirect benefits in the form of a potentially more equitable and efficient allocation of resources in the criminal legal aid services market resulting from the correction of existing institutional inefficiencies. The freeing up of financial resources would potentially allow Government to spend it in other areas.</p>			

Key Assumptions/Sensitivities/Risks The net present value is sensitive to assumptions on administration costs; modelled volumes and fee rates data; and behavioural responses as discussed in the main body of the Impact Assessment.

Price Base Year 2009	Time Period Years 10	Net Benefit Range (NPV)	NET BENEFIT (NPV Best estimate)	
			£ 0.0m	

What is the geographic coverage of the policy/option?		England and Wales		
On what date will the policy be implemented?		As soon as practicable		
Which organisation(s) will enforce the policy?		LSC		
What is the total annual cost of enforcement for these organisations?		£ minimal		
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?		Yes/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	£	Decrease	£	Net
				£

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

1. Scope of Impact Assessment

- 1.1 This proposal is intended to change the current payment structures for committals for trial. It is part of a set of policies designed to prioritise what we spend on criminal legal aid, to reform and rationalise some of our payment structures and to remove some of the inefficiencies in payments between the magistrates' court and the Crown Court. These changes will help to sustain the legal aid budget over the next spending review period, ensure that we focus criminal legal aid spending effectively and protect the civil fund as far as possible from any rise in criminal spend in the short to medium term.
- 1.2 The policy proposals would affect the following groups / sectors:
 - **The Legal Services Commission (LSC)** is responsible for managing the legal aid budget on behalf of Government. The proposals would be implemented by the LSC and may impose administration impacts.
 - **Litigators** who are the principle providers of legal services within the context of this impact assessment. Any changes in the fees would have a first round impact on them and other players who depend on them.
 - **Consumers** are the ultimate users of legally aided services. Although the measures are not directly aimed at them, they may be impacted in the long term through behavioural changes of the part of litigators as they accommodate new changes.

2. Rationale for Government Intervention

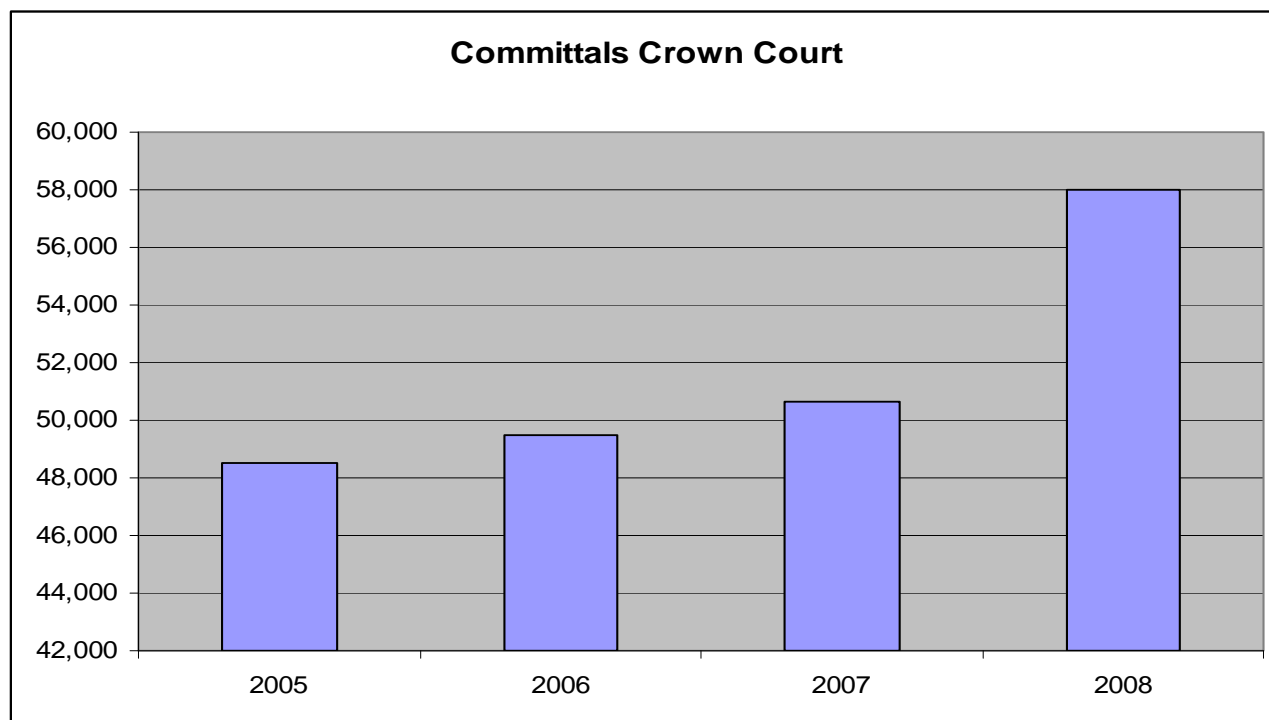
- 2.1 The current fee scheme pays solicitors firms at the magistrates' court for preparation work in committal hearings – this includes consideration of the committal bundle and conferences with the client.
- 2.2 Where a case is committed to the Crown Court, the litigator is then entitled to make a claim under the LGFS. The LGFS scheme remunerates litigators for preparation required in Crown Court cases by means of a Graduated Fee. One of the proxies for the LGFS is Pages of Prosecution Evidence (PPE). In calculating the PPE proxy, the LGFS includes all of the pages that have been served as part of the committal bundle.
- 2.3 We believe that this allows for an element of duplication of funding within the current arrangements and therefore does not lead to an optimal allocation of scarce resources.

3. Cost Benefit Analysis

BASE CASE / OPTION 0 – “Do Nothing”

- 3.1 The total cost of remunerating cases that are committed for Crown Court trial was £33m in 2008/09. The volume of committals has increased by about 17% from 2005 to 2008, as shown in Figure 1 below. Therefore, the level of duplication in payments has been increasing at the same rate. In addition, the number of cases where defendants have elected for Crown Court trial has increased by 29%. If we continue to make payments under the current structure, we may introduce further inefficiencies.

Figure 1: Committals in the Crown Court



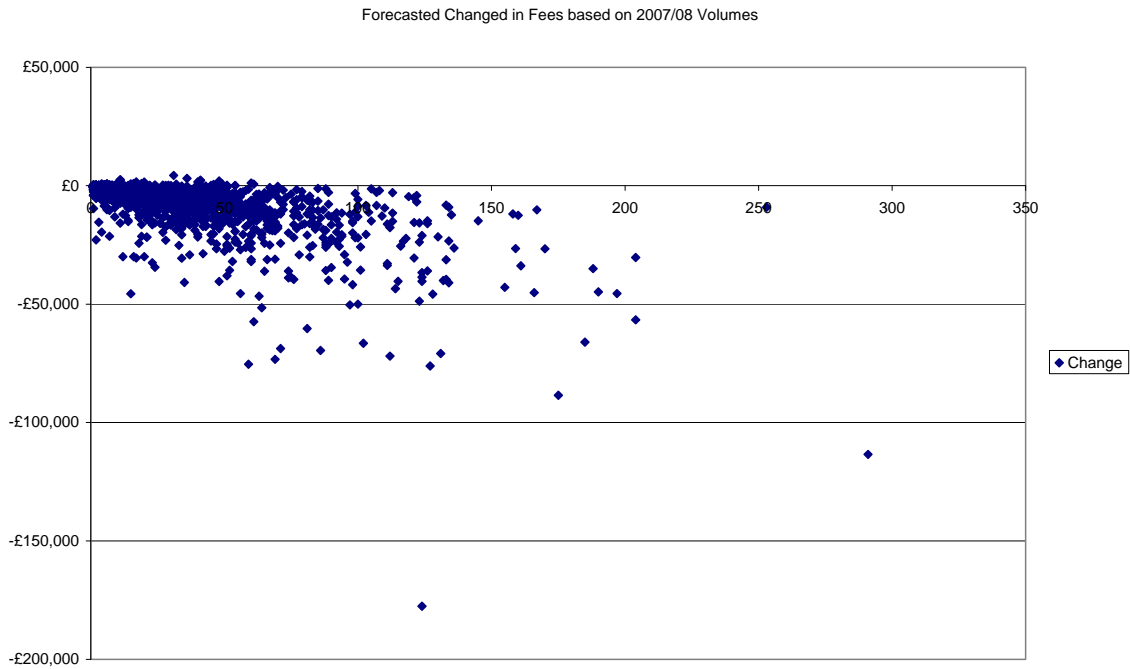
OPTION 1 – Single Fee of £318 (excluding VAT)

3.2 Our preferred option is to replace the existing mechanism for the payment of committals for trial with a single fixed fee of £318 (excluding VAT). We propose to pay the new fee as part of the LGFS. This proposal will eliminate an element of duplication of funding within the current arrangements. The total cost of remunerating cases that are committed for trial was £33m in 2008/09 and we are keen to rebalance the financial incentive which is currently in place to elect to the Crown Court and then pursue a guilty plea.

Costs

- 3.3 It is not possible to produce an exact calculation of the level of duplication. Therefore, this policy will move committal payments in magistrates' courts to the LGFS scheme. This single fee would represent a reduction in payments for committals of £11.8m, equivalent to 5% of the aggregated Crown Court expenditure. We have assessed the costs over 10 years and discounted them accordingly at 3.5%. The total discounted costs are estimated to be £109.7m over the appraisal period.
- 3.4 The impact on solicitors' firms would depend on how much publicly funded work they undertake. Figure 2 below shows the reduction in fees that would result from a new fee of £318 (or £366 including VAT at 15%) against the volumes of committal cases undertaken by firms in 2007/08. The average fee reduction for solicitors from current levels of standard fees would be £5,928. However, the distribution is heavily skewed so the median loss is a much more accurate measure of central tendency. This would be £2559 or 29% of the old committal fees.

Figure 2: Forecast Changes in Fees (2007/2008 Volumes)



3. 5 It is not possible to assess the effect on business sustainability of this proposal. Although the reduction is made from fees in the magistrates' court, it is obvious that the impact would be proportional to the amount of work firms do in the Crown Court. The proposed fee represents only a 5% reduction in aggregate expenditure in the Crown Court.

Benefits

3. 6 The proposal would bring £11.77m savings that could be redirected to priority areas of legal aid expenditure.
3. 7 Replacing the standard fee regime with a fixed fee may also mitigate the trend of increasing guilty pleas in the Crown Court by removing the financial incentive to elect.

Net Impact of Option 1

3. 8 Option 1 would generate a net present value of zero. This is based on the assessment that Government revenue savings will be offset by equal losses to private providers, with no additional administrative costs to the LSC. Nevertheless, Option 1 would result in savings to the legal aid budget which are necessary given the current financial context, the requirement to find efficiency savings and the Government's desire to protect civil legal aid expenditure.
3. 9 There would be *non-monetised costs* from a possible impact on the service provided by advocates, with potential market exit and associated costs of corrective action. *Non-monetised benefits* would include possibility that the proposed fee decrease may result in a more equitable and efficient allocation of resources in the criminal legal aid services market resulting from the correction of institutional inefficiencies.

4. Enforcement and Implementation

4. 1 The proposals would be implemented by means of regulations made by the MoJ. Once these regulations were made, the LSC would need to consult the usual representative bodies about any changes to the legal aid contracts which might be necessary to implement these changes. The LSC would then need to give notice of any contract amendments before they took effect.

5. Impact Tests

5. 1 The Impact Assessment Guidance sets out a number of tests which would need to be assessed.

Competition Assessment

5. 2 The market affected by these proposals is the publicly funded criminal defence services market. The impact on competition is not expected to be significant. No specific impacts on competition were identified responses to consultation.

Small Firms

5. 3 The Impact Assessment Guidance states that *“any new proposal that imposes or reduces the cost on business requires a Small Firms Impact Assessment Test”*. The assessment of the potential impacts has relied on the BERR Small Firms Impact Assessment Guidance (September 2007). Some respondents identified potential impacts on firms, though those appear to be common to all firms, and not particularly impacts on small firms. .

Legal Aid and Justice Impact Test

5. 4 The impact on the Justice System has been assessed as part of the options analysis.

Human Rights

5. 5 The proposals are compliant with the Human Rights Act.

Race / Disability / Gender Equality

5. 6 An Equalities Impact Test was undertaken for all the policy proposals. This is set out separately in the consultation document.

Rural Proofing

5. 7 Rural proofing is a commitment by Government to ensure domestic policies take account of rural circumstances and needs. It is a mandatory part of the policy process, which means as policies are developed, policy makers should consider whether their policy is likely to have different impacts in rural areas, because of particular circumstances and if so adjust the policy where appropriate, with solutions to meet rural needs and circumstances. Our assessment is that there are no specific rural impacts from the proposals. Indeed, the introduction of a national fee may have a slightly greater impact on urban firms.

Health Impact Assessment

- 5.8 The Health Impact Assessment considers the effects policies, plans, programmes and projects have on health and well-being, and in particular, how they can reduce health inequalities. Screening questions for health and well-being are provided by the Department for Health. Our assessment is that there are no impacts on health from the proposals.

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	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes/No	Yes/No
Small Firms Impact Test	Yes/No	Yes/No
Legal Aid	Yes/No	Yes/No
Sustainable Development	Yes/No	Yes/No
Carbon Assessment	Yes/No	Yes/No
Other Environment	Yes/No	Yes/No
Health Impact Assessment	Yes/No	Yes/No
Race Equality	Yes/No	Yes/No
Disability Equality	Yes/No	Yes/No
Gender Equality	Yes/No	Yes/No
Human Rights	Yes/No	Yes/No
Rural Proofing	Yes/No	Yes/No