

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

2007 No. 1174

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs 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 provides for the remuneration of barristers and solicitors in publicly funded criminal cases. It consolidates and replaces the Criminal Defence Service (Funding) Order 2001 (S.I. 2001/855) (the 2001 Order), and introduces changes to the graduated fee scheme that applies to advocates in Crown Court cases.

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

- 3.1 This instrument and the 2001 Order both contain a long table of offences, which categorises criminal offences for the purposes of fee rates. The table in Part 6 of this instrument supplements the table in the 2001 Order by inserting two additional categories; class J and class K. Class J contains serious sexual offences and has been inserted at the end of the Table of Offences in Part 6. Class K contains offences of dishonesty which meet an enhanced financial threshold. It is closely related to offences in class F and G, as the class of offence is determined by the monetary value involved in the offence. As a result, class K offences are listed in the table in the section that deals with class F and class G. This is because the Department considers that the three classes need to be grouped together to make the various financial thresholds clear and to ensure that the upper financial limit imposed by class K is not overlooked. The Department draws this to the attention of the Committee because the result is that the Table of Offences is not set out in strict alphabetical order. However, the Department considers that this drafting means the table is easier to navigate because it is clear which offences fall within which class, and hence which rates apply in particular circumstances.

4. **Legislative Background**

- 4.1 This Order is made by the Lord Chancellor, under section 14(3) of the Access to Justice Act 1999 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 changes to the Crown Court Advocates Graduated Fee Scheme recommended by Lord Carter of Coles in his independent review of legal aid procurement.

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 policy objective of this instrument is to implement changes to the Advocates Graduated Fees Scheme (AGFS) for the Crown Court in line with the recommendations made by Lord Carter. 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 proposed a number of amendments to the Advocates Graduated Fee Scheme (AGFS) for Crown Court work. The key proposals included an increase to base fees, the introduction of two new offence categories, a reduction in the number of ancillary payments and a provision that the case fee should be paid to a single identified advocate (or two identified advocates in cases involving two counsel), who should be identified at the commencement of the case.

7.3 There were 148 responses to Lord Carter's report on the question of advocates graduated fees in Crown Court cases. Many of those who responded to the detail of Lord Carter's proposed revised AGFS were positive, with a number of respondents suggesting that the proposals would introduce significant benefits to the current system. Some respondents felt that the proposed rates remained too low and did not reflect the true value of the work, with others suggesting that the system had been rebalanced too far in favour of the Bar and in particular Junior Barristers. A small number of respondents expressed concern at specific elements of the proposed fee structure – e.g. the proposed capping of ancillary payments (particularly where hearings may be brought about as a result of prosecution

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

behaviour), and the mechanism for allocating payment to the first instructed advocates.

- 7.4 The Government broadly accepted the AGFS proposals made by Lord Carter but concluded that keeping a small number of “bolt-on” ancillary payments outside the base fee for certain ancillary procedures and hearings is necessary at the present time, and meets concerns expressed by respondents in this regard.
- 7.5 These proposals set out in this instrument extend the AGFS under the 2001 Order to capture all remaining non contracted and non standard fees to defence advocates in Crown Court trial proceedings within a fixed fee system. The graduated fee provisions will encourage more efficient practices by subsuming many of the current bolt-on fixed fees within the base fee of the graduated fees. Overall they should help the Department to obtain greater control over future expenditure.
- 7.6 In addition to the wider public consultation undertaken in response to Lord Carter’s report, the Department also undertook statutory consultation on this instrument. In accordance with section 25(2) of the 1999 Act the Department has consulted the General Council of the Bar and Law Society about this instrument. Consultation took place over a period of 3 months. During this statutory consultation the Department set out the detailed arrangements for the identification of the lead advocate and the remuneration arrangement that would apply. Both the General Council of the Bar and Law Society are now broadly content with the proposals.

8. Impact

- 8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies

9. Contact

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