

**EXPLANATORY MEMORANDUM TO**  
**THE CRIMINAL DEFENCE SERVICE (FUNDING) (AMENDMENT No. 2) ORDER**  
**2009**

**2009 No. 2086**

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 provides for increased graduated fees to be payable to advocates in certain confiscation proceedings that are publicly funded. Confiscation proceedings have been stayed in a number of recent complex criminal cases where a defence advocate could not be found to do the work at the previous rates. The Ministry is increasing payments in complex cases to ensure that assets that are the proceeds of crime can be confiscated.

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

3.1 The instrument introduces new fees payable to advocates in complex confiscation proceedings. This will increase expenditure under the Advocates Graduated Fees Scheme by an estimated 0.4% to 0.6%.

4. **Legislative Context**

4.1 This instrument amends the Criminal Defence Service (Funding) Order 2007. The Ministry appreciates that it is undesirable for there to be numerous separate amendments to Statutory Instruments. In this case we regret that it was not possible to include these provisions in a recent amendment (2009 No. 1843), which had to come into force to meet a deadline for provision representation orders. Equally, for reasons outlined at paragraph 7.1 there is a degree of urgency in making this Instrument that means we cannot await the next routine amendment.

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 Confiscation proceedings arise following conviction and sentence in appropriate criminal cases and are aimed at stripping criminals of the proceeds of their crimes. While the current fees for publicly funded advocates to undertake confiscation hearing are sufficient in the majority of cases, there have been difficulties in some complex cases and in cases where the defence advocate has changed between trial and confiscation hearing. The confiscation proceedings in the case of R-v-P (Harrow Crown Court) were stayed in May 2008 following a successful abuse of process argument because the judge accepted that the defendant could not find a sufficiently experienced barrister to represent him. More recently further cases in the Court of Appeal have highlighted similar difficulties. The Ministry established a working group to explore potential solutions to the problem and the provisions in this instrument were drawn up in consultation with key stakeholders. There are a number of cases currently before the Crown Court where confiscation proceedings have been stayed, where prosecutors will be seeking to re-open confiscation proceedings in the light of this change to the Advocates Graduated Fees Scheme. We are aware of at least one substantial case where the statutory time limit to re-open the confiscation proceedings will expire in September 2009.

7.2 The instrument provides for an additional payment in cases where there are more than 50 pages of confiscation evidence on a sliding scale according to the total number of pages.

- ***Consolidation***

7.3 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 The Ministry has consulted the General Council of the Bar and the Law Society on this instrument and both were supportive of the proposals.

## **9. Guidance**

9.1 Guidance will be available to practitioners on the Legal Services Commission and Her Majesty's Courts Service websites.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is negligible. Some advocates will receive increased payments in complex confiscation proceedings

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 Ministry will monitor the impact of increased payments made under this Order and will review the graduated fees payable, with the Bar Council and the Law Society, during the coming year.

## **13. Contact**

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