

**EXPLANATORY MEMORANDUM TO
THE CRIMINAL DEFENCE SERVICE (FUNDING) (AMENDMENT NO. 3) ORDER
2010**

2010 No. 1358

1. 1.1 This explanatory memorandum has been prepared by the Ministry of Justice (MOJ) 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 Criminal Defence Service (Funding) (Amendment No 2) Order 2010 (SI 2010 No. 1181, “the 2010 Order”), which in turn amends the Criminal Defence Service (Funding) Order 2007 (SI 2007 No. 1174, “the 2007 Order”) in order to correct errors in the rates payable to advocates in relation to confiscation proceedings. The 2010 Order included the current rates for confiscation hearings, rather than reduced rates, in Schedule 1. This meant that the further reductions in Schedules 2 and 3 were incorrect as they had been reduced from the wrong starting point. The 2010 Order has been made and laid before Parliament and is due to come into force on 27 April 2010.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 The Ministry of Justice regrets that the fees for advocacy in confiscation proceedings included within the 2010 Order were incorrect. The present Instrument comes into force on 26th April 2010 in order that the correct fees are payable when the 2010 Order comes into force on 27th April 2010. This will mean the SI will be laid for less than the minimum of 21 days normally required.

3.2 The 2010 Order was itself an amending Order; it amended the 2007 Order. The Ministry of Justice therefore wanted to ensure that there was not a period where an incorrect amendment to the 2007 Order was operative. The 2010 Order was made on 5th April 2010 and laid before Parliament on 6th April 2010. The Ministry has acted as quickly as possible to amend the Order after the error was noticed.

3.3 The effect of this amendment is that the reductions in advocates fees’ will take place sooner than they would have done if we had complied with the 21 day rule. However the Government's response to the public consultation, as set out in 'Legal Aid: Reforming Advocates Graduated Fees and Very High Cost (Crime) Cases 2010' clearly stated that the cuts to all relevant tables were intended to be 4.5% in year 1 (i.e. from 27th April 2010), with further cuts of 4.5% in both years 2 and 3. Advocates would therefore have expected the fees in the tables for confiscation hearings to be cut in the same way as the fees in the other tables in the Order from 27th April. This is what the amending Order achieves.

3.4 The Ministry of Justice considered whether it would be preferable to withdraw and relay the 2010 Order, instead of amending it. However, given the nature of the subject matter and the fact that the re-laid Order would need to be made while Parliament is dissolved, we concluded that it was better to amend the Order to make clear that the only amendment was to correct the errors in the relevant tables.

3.5 We also considered whether it was necessary to include a time of making in the italic text above the preamble. We considered that whilst perhaps not strictly necessary, it was appropriate, in this context where the Order is expressed to come into force 'immediately before the 27th April' to give clarity to the reader about the sequence of events.

3.6 As this Instrument is being made due to a defect in the 2010 Order it is being issued free of charge to all known recipients of the 2010 Order.

4. Legislative Context

4.1 Section 12 of the Access to Justice Act 1999 (c. 22) gives the Legal Services Commission responsibility for the Criminal Defence Service. Section 14(3) of that Act allows the Lord Chancellor to make provision about payments by the LSC to advocates. The 2010 Order amends the 2007 Order by reducing the level of the fees set out in Schedule 1 to that Order over a 3-year period. This Instrument amends the 2010 Order so that the correct changes are made to the 2007 Order on 27th April 2010.

4.2 Information in respect of the legislative background was set out in full in the Explanatory Memorandum which accompanied the 2010 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 Because of an error in the 2010 Order, incorrect fees for advocacy in confiscation proceedings were included in the tables in Part 3 of each of Schedules 1, 2 and 3. This error was detected only after the 2010 Order had been made and laid. The 2010 Order, therefore, did not give effect fully to the decision made by Ministers as expressed in the response to consultation (see paragraph 8 below).

7.2 Making this amendment to the 2010 Order before it comes into force (on 27th April 2010) will ensure that there is no period when the incorrect fees apply.

7.3 This Order has no other policy background beyond that for the Criminal Defence Service (Funding) (Amendment No 2) Order 2010.

- ***Consolidation***

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

8. Consultation outcome

8.1 Proposals to reform Advocates Graduated Fees were the subject of two separate MOJ consultation exercises (*Legal Aid: Funding Reforms* in August 2009 and *Legal*

Aid: Reforming Advocates Graduated Fees in December 2009) and the details of these were set out in the Explanatory Memorandum to the 2010 Order.

8.2 Section 25(2) of the Access to Justice Act requires the Lord Chancellor to consult the General Council of the Bar and the Law Society before making a remuneration order. There was a full public consultation, including consultation of the General Council of the Bar and the Law Society, before making the 2010 Order. The Government's response was set out in 'Legal Aid: Reforming Advocates Graduated Fees and Very High Cost (Crime) Cases 2010', as described in the Explanatory Memorandum to that Order. Although the consultation response did not set out the detail of the figures that were to be substituted into the Advocates Graduated Fee Scheme, it did state the intention to make reductions of 4.5% in year 1 (i.e. from 27th April 2010), with further cuts of 4.5% in both years 2 and 3. These reductions should have been reflected in the relevant Tables in the 2010 Order. This Order rectifies that error, and the Ministry considers that its statutory duty to consult has been fulfilled without the need for any further consultation

8.3 Copies of both MOJ consultation papers and responses are on the Ministry of Justice website at www.justice.gov.uk.

9. Guidance

9.1 Guidance will be issued for advocates and staff processing AGFS claims.

10. Impact

10.1 As this Instrument simply corrects an error in the 2010 Order, there is no separate impact on the private or voluntary sectors and an Impact Assessment is not required. A full impact assessment was attached to the Explanatory Memorandum for the 2010 Order.

11. Regulating small business

11.1 This Instrument applies to small business.

11.2 Details on regulating small businesses were included within the Explanatory Memorandum for the 2010 Order

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.

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.