

EXPLANATORY MEMORANDUM TO
THE CRIMINAL DEFENCE SERVICE (FUNDING) (AMENDMENT) ORDER 2008

2008 No. 957

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. **Description**

- 2.1 This instrument is about the payment regime for advocacy in very high cost criminal cases (VHCCs) in the Crown Court. The instrument amends the Criminal Defence Service (Funding) Order 2007 (“the principal Order”), which makes provision for the funding and remuneration of services provided as part of the Criminal Defence Service.

- 2.2 This Order provides that in a VHCC where a litigator instructs an advocate who is not a member of a panel he may apply to the Legal Services Commission for payment in respect of the advocate’s work. This will apply in cases where the instruction is made, and the work done, is in accordance with the Commission’s contract for those cases. It then sets out the maximum payments that the Commission may make.

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

- 3.1 In its Ninth Report of the present session, the Committee drew the attention of both Houses to the Criminal Defence Service (Funding) (Amendment) Order 2007, S.I. 2007/3552 on the grounds that Article 7(c) contained a redundant definition of “Very High Cost Case (Crime) Panel”. The Ministry explained that the phrase had been used in a draft of the Order and had not been removed when other drafting changes were made, and agreed to remove the phrase when the principal Order was next amended. As it has transpired, however, the present Order requires the use of the phrase and article 7(c) has accordingly been left as it is.

4. **Legislative Background**

- 4.1 This Order is made by the Lord Chancellor, under section 14(3) of the Access to Justice Act 1999 (“the 1999 Act”) 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 introduction of a payment scheme for advocacy services where a member of the VHCC panel set up by the Legal Services Commission does not provide those services.
- 4.3 Lord Carter of Coles recommended the introduction of a VHCC panel in his independent review of legal aid procurement.

5. Extent

- 5.1 This instrument extends 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 Very high cost cases have been managed under individual case contracts by the Legal Services Commission since 2001. These arrangements were introduced in response to the rapidly growing expenditure being incurred in long and complex cases.
- 7.2 The introduction of a competitively tendered panel was one of the recommendations made by Lord Carter of Coles recommended the introduction of a VHCC panel in his independent review of legal aid procurement in July 2006. Lord Carter believed that better value for money could be obtained for this work by giving defence teams some probability of increased or more consistent volume in return for some reduction in hourly rates. To do so involves limiting access for the VHCC panel to defence teams who can show a track record of experience in working on VHCCs and meet appropriate quality standards.
- 7.3 In order to facilitate the introduction of the Panel, on a contractual basis, the 2007 amending Order (S.I. 2007/3552) removed all provisions for Very High Cost Cases from the principal Order.
- 7.4 The policy objective of this instrument is to implement a change to the Very High Cost Case (Crime) Panel for the Crown Court, allowing the LSC to pay solicitor panel members in order for them to pay for advocacy services provided by non-panel advocates, and specifies the maximum amounts that may be paid for those services.
- 7.5 This Order is necessary because an insufficient number of advocates, who had bid to be panel members, agreed to sign contracts. In order to ensure that advocates who are not members of the Panel can be instructed the Commission has amended Panel contracts to make clear that, in certain circumstances with the agreement of the Commission, non-Panel advocates may be instructed. As those non-Panel advocates will not have signed a Panel contract, this Order makes provision for payment for non-Panel advocacy services and sets the maximum rates of payment.

7.6 On 4 February 2008 the Lord Chancellor and Secretary of State for Justice consulted the Law Society and the General Council of the Bar about this Order in accordance with Section 25 (2) of the Access to Justice Act 1999. The period for consultation was later extended by the Parliamentary Under Secretary of State until 14 March 2008.

8. Impact

8.1 The Legal Services Commission has prepared an Impact Assessment for the introduction of the Very High Cost Case (Crime) Panel. A copy is available from www.legalservices.gov.uk or from the Ministry of Justice. The effects of this Order are not anticipated to be different from the effects of the introduction of the Panel, therefore an additional Impact Assessment has not been prepared.

9. Contact

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