

**EXPLANATORY MEMORANDUM TO  
THE CRIMINAL DEFENCE SERVICE (FUNDING) (AMENDMENT) ORDER  
2012**

**2012 No. 750**

1. This explanatory memorandum has been prepared by the Ministry of Justice (MoJ) and is laid before Parliament by Command of Her Majesty.
  
2. **Purpose of the instrument**
  - 2.1 This Order amends provisions for payments to solicitors and advocates calculated according to the number of pages of prosecution evidence, to include evidence that has been produced and served electronically. It also clarifies and corrects some of the provisions of the Criminal Defence Service (Funding) Order 2007 (S.I. 2007/1174) (the principal Order), in particular in relation to some amendments made by the Criminal Defence Service (Funding) (Amendment) Order 2011 (S.I. 2011/2065).
  
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 None
  
4. **Legislative Context**
  - 4.1 Section 12 of the Access to Justice Act 1999 (c.22) gives the Legal Services Commission (LSC) 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 litigators and advocates. The principal Order makes such provisions. Schedule 1 to that Order sets out the fees that are payable to advocates and the fees payable to litigators are set out in Schedule 2 to the Order.
    - 4.2 This statutory instrument amends that Order by making changes to both Schedule 1 and Schedule 2 to that 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**

- **What is being done and why**

7.1 The Order:

- provides that electronic evidence may count towards “pages of prosecution evidence” (PPE) for payment purposes in the same way that paper evidence has been counted to date. This amendment supports the recent introduction of electronic service of evidence by the Crown Prosecution Service. Paper bundles are no longer being produced in every case. This amendment is intended to maintain the current position of paying “paper” documents as PPE and “electronic” documents by means of special preparation on a cost neutral basis. As there will no longer be any “paper” documents, the definition in the Order will allow the appropriate officer to count a document as part of the PPE when it would have previously been included in the paper bundle. The assessment of what does, or does not, count towards PPE will be subject to redetermination and appeal to a Costs Judge in the usual way;
- amends the definition of “standard appearance” in paragraph 1 of Schedule 1 by adding “preliminary hearings” in the Crown Court in cases sent for trial under section 51 of the Crime and Disorder Act 1998 and hearings relating to: breach of bail, failure to surrender to bail and execution of bench warrants. This means that such hearings will count as one of the first five “standard appearances” that are included within the basic fee payable to advocates. Any appearance in excess of the five is paid separately;
- clarifies the payment provisions that apply in magistrates’ courts cases by further defining two categories of cases, now known as Category 1A and Category 1B. Category 1A cases are paid at a higher rate than Category 1B. Broadly speaking, Category 1A includes either way offences that result in a guilty plea in the magistrates’ courts and other similar proceedings. Category 1B includes summary only cases that result in a guilty plea in the magistrates’ court and other similar proceedings;
- provides for payment to an advocate following the grant of representation after conviction to cover mitigation only;
- clarifies the proportion of the graduated fee that is payable to a litigator in retrials and on transfer to/from another firm in two additional scenarios;
- makes explicit that in cases committed or sent to the Crown Court that disbursements incurred by litigators at the magistrates’ courts stages of a case are payable under the disbursement provisions of the principal Order; and
- corrects errors in the 2011 amending Order in two of the fees payable in the table following paragraph 25 of Schedule 1 for offences of dishonesty in Offence Category G and removes the original sub-paragraph (5) of paragraph 2 of Schedule 2 of the 2007 Order.

- **Consolidation**

7.2 There are currently no plans to produce a consolidated version of the 2007 Order and the amendments to it. However, it is expected that the 2007 Order will be superseded in the next year or so by legislation made under the Legal Aid, Sentencing and Punishment of Offenders Bill (subject to the Bill receiving Royal Assent).

## **8. Consultation outcome**

8.1 The policy changes introduced through the 2011 amending Order were the subject of a consultation exercise entitled ‘Proposals for the Reform of Legal Aid in England and Wales’ which ran from 15 November 2010 to 14 February 2011.

8.2. Copies of both the consultation paper and the Government responses are on the MoJ website at [www.justice.gov.uk](http://www.justice.gov.uk). Respondents to the consultation included the Law Society, Bar Council, the Criminal Bar Association, and other bodies representing advocates and solicitors. Responses were also received from members of the judiciary and others.

8.3 This Order, as it largely clarifies existing provisions or corrects errors, has not been the subject of separate public consultation. However, it has been the subject of consultation with the Law Society and the Bar Council, in accordance with section 25(2) of the 1999 Act. The changes in relation to PPE have also been the subject of wider consultation with other representative bodies. Both the Law Society and the Bar Council were concerned that the provisions to allow for electronic material to be counted for payment purposes should maintain the status quo. We were happy to give an assurance that that was indeed the case. The Law Society objected to breach of bail hearings being counted as a “standard appearance” for payment purposes. However, breach of bail proceedings have not been treated as a substantive offence since 2007 in line with the intention of the principal Order. A Bail Act offence is not an indictable offence, and can never be tried by a jury, but is simply dealt with summarily by a Judge as part of the substantive proceedings. We concluded, therefore, that we should include breach of bail proceedings within the definition of a “standard appearance”.

## **9. Guidance**

9.1 Guidance will be issued for litigators and advocates as well as to staff processing graduated fee claims and claims under the magistrates’ court scheme.

## **10. Impact**

10.1 There will be no impact on charities, voluntary bodies or businesses.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been conducted.

## **11. Regulating small business**

11.1 The legislation applies to small business, but is not anticipated to have any detrimental effect.

11.2 MoJ 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 impose any additional regulatory burdens on small firms. Instead the Order governs the fee paid to litigators and advocates who provide their services under the terms of the Criminal Defence Service.

## **12. Monitoring & review**

12.1 Expenditure on legal aid is regularly monitored and reviewed by the MoJ and the LSC.

## **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.