EXPLANATORY MEMORANDUM TO

THE CRIMINAL DEFENCE SERVICE (FUNDING) (AMENDMENT) ORDER 2011

2011 No. 2065

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 the fees payable by the Legal Services Commission (LSC) to litigators and advocates for representing individuals in Magistrates' Court and the Crown Court proceedings. These fees are payable as part of the Criminal Defence Service maintained by the LSC which administers the legal aid scheme in England and Wales. This Order reduces the fees payable in some Crown Court cases, and increases the fees payable in most magistrates' courts cases, in order not to discourage early consideration of the question of plea in cases that the magistrates' believe are suitable for summary trial. The Order also makes further adjustments to Crown Court fees, aligns the fees paid in magistrates' courts in London with other urban areas and increases the scope of the Litigators Graduated Fees Scheme. The Order also imposes, for the first time, a set of fixed fees and hourly rates to be paid for expert witness work in criminal cases. The Schedules to this Order set out the fees and rates and detailed rules applicable to the revised schemes.

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 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 Criminal Defence Service (Funding) Order 2007 (S.I.2007/1174) (the principal Order) makes such provisions. Schedule 1 to that Order sets out the fees 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 the level of fees set out in both Schedule 1 and Schedule 2 to that Order. In addition, this instrument also includes some fees payable for magistrates' courts proceedings in Schedule 5 to the Order. Currently all the fees paid under the Magistrates scheme are set out in the LSC Standard Crime Contract. Following a tender exercise the 2010 Standard Crime Contract runs from July

2010 to July 2013. The Contract, between the LSC and providers of criminal legal services, sets out the fees payable in areas where the fees are not set out in the Funding Order.

4.3 This Order also removes redundant references to Very High Cost Cases (VHCC) contract and VHCC panel contract in the Funding Order. New article 13A and a new Schedule 6 provide, for the first time in the 2007 Order, fixed fees and hourly rates to be paid for the types of expert services listed in that schedule.

4.4 Under section 25(2) of the Access to Justice Act 1999, the Lord Chancellor is required to consult the Law Society and the Bar Council when making a remuneration order.

4.5 The instrument is subject to the negative resolution procedure under section 25(10) of the Access to Justice Act 1999.

4.6 A related Order, The Community Legal Service (Funding) (Amendment No.2) Order 2011, implements a number of changes to the remuneration of the civil legal aid scheme.

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 Government believes that reform of the legal aid scheme is needed in order to ease the significant pressures on the legal aid budget. The overall expenditure on legal aid in 2009/10 was around £2.2bn. The purpose of the legal aid system is not to sustain the current legal market, but to ensure that help is targeted on those who need it most, for the most serious cases in which legal advice and representation is justified.

7.2 Under section 25(3) of the Access to Justice Act 1999, the Lord Chancellor is explicitly required to have regard to the cost to public funds and the need to secure value for money when setting remuneration rates. Given the urgent need to address the fiscal deficit, the Government's view is that it is crucial to review every area of expenditure to ensure that this duty is being met and that the amount that it pays for any service represents maximum value for money. In this context the Government considers that it needs to ensure

that it only pays those fees that are absolutely necessary to secure the level of services that are required.

7.3 Currently remuneration rates for criminal legal aid work are set out either in the principal Order (as amended) or in contracts between the LSC and legal aid providers. There are considerable variations in the level of fees for the same types of case depending on whether the case is heard in the magistrates' court or the Crown Court. There is also a considerable difference between the fees paid for an early guilty plea and a late guilty plea (cracked trial) in the Crown Court. These differences do not necessarily reflect the amount of work done on a particular case; rather, fees are determined by the venue or the stage in proceedings at which the guilty plea is entered.

7.4 A simple approach to reducing cost would be to apply a general across the board reduction to the amounts paid under the various fee schemes to achieve a particular level of saving. However, this would not address some of the problems identified with the current schemes. For this reason, the Government developed a series of proposals for the reform of criminal fees designed to promote swift, efficient justice, while ensuring that there remains a sufficient supply of good quality practitioners to undertake criminal legal aid work.

7.5 We are introducing single fixed fees for litigation and advocacy in either way cases[1], which the magistrates' court had deemed suitable for summary trial, but committed to Crown Court at the defendant's election, which subsequently do not proceed to trial. The number of cases going to the Crown Court for trial in recent years has increased significantly and a large proportion of these cases often result in a guilty pleas or 'cracked' trial[2] with a significant cost to the legal aid budget when these cases might more efficiently have been handled in the magistrates' court. In addition, we are also removing the separate fee for a committal hearing under the Litigators Graduated Fees Scheme would be removed.

7.6 We are aligning the fees payable in cases of murder and related offences with the fees payable in cases of serious sexual offences. Additionally, we will remove the distinction in fees payable in cases of dishonesty based on the value of dishonest act(s) below £100,000. The Magistrates' Courts fees paid in London will also be brought in line with those in other urban areas in England and Wales. The Order will also remove separate ancillary payments for sentencing hearings and subsume sentencing hearings within the standard graduated basic fee as one of the standard appearances included within the base fee. Litigators in all cases with an estimated trial length of between 41 and 60 days will be paid under individual contracts and will be remunerated at the rates in the Litigators' Graduated Fee scheme, rather than at Very High Cost Case rates.

[1] Either way cases may be tried either in the magistrates' courts or the Crown Court. Either way cases are committed to the Crown Court either because the magistrates direct Crown Court trial or the defendant elects Crown Court trial.

[2] A 'Cracked Trial' means a case on indictment in the Crown Court which does not proceed to trial after a plea and case management hearing, whether by reason of a guilty plea or for other reasons.

7.7 Given the need to make substantial savings to legal aid, the Government's view is that fees paid to experts should be subject to the same constraints as those paid to lawyers. Legally aided expert witnesses are contracted directly by solicitors and paid for as a disbursement when the solicitor submits their final bill. The LSC therefore currently has no direct control over the commissioning of expert witness services and estimated costs are increasing. There are currently no official rates but the LSC operates benchmark hourly rates which they use as guidance when considering payment claims for expert witnesses at the end of a case. The Government therefore intends to codify the LSC's benchmark hourly rates (reduced by 10%) and continue to develop longer term plans to further tailor payments to expert witnesses in a more detailed and prescriptive scheme in future. The Funding Order will apply the changes to all legally aided expert witness work in October 2011.

- **Consolidation**

7.8 There are no current plans to produce a consolidated version of the 2007 Order and the amendment to it. This is because the Government has introduced the Legal Aid, Sentencing and Punishment of Offenders Bill in the Current Session and this will be producing secondary legislation governing legal aid, subject to that Bill receiving royal assent.

8. Consultation outcome

8.1 Proposals to reform criminal legal aid fees were the subject of a consultation paper 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 response (published 21 June 2011) are on the MoJ website at http://www.justice.gov.uk/consultations/legal-aid-reform.htm. 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, other representative bodies and members of the public. Most respondents, particularly lawyers and their representative bodies, were opposed to proposed fee changes.

8.3 The main objections raised included: that the introduction of a single fixed fee would unfairly penalise defence lawyers for a decision made by the defendant and the proposal would significantly reduce income for either way cases, which the magistrates' court had deemed suitable for summary trial, but committed to Crown Court at the defendant's election, which subsequently do not proceed to trial; the scale of the proposed deductions were disproportionate given the previous 13.5% reduction which was still being implemented; enhancing the magistrates' courts lower standard fee was inadequate; the proposals would have a disproportionate impact on junior barristers and practitioners from minority ethnic groups.

8.4 The Government acknowledged the issues raised by respondents but remained concerned that the current system of fees did not sufficiently support the aim of speedy and efficient justice and might not encourage early consideration of plea by the defence team. The Government believed that it was not appropriate to pay significantly more for cases deemed suitable for disposal by the Magistrates' Court. However, a number of steps have been taken to amend the original proposals in light of the responses to the consultation. For example, we have decided to increase the higher standard fees for guilty pleas in either way cases in the magistrates' court by 8%. In recognition of the concerns raised about the proposed single fee, the Government has decided to introduce separate fixed fees for litigation and advocacy in either way cases, which the magistrates' court had deemed suitable for summary trial, but committed to Crown Court at the defendant's election, which subsequently do not proceed to trial.

8.5 Many respondents raised concerns that the proposed fee reforms threatened the ability of providers to deliver legally aided services. The Government said in the response to consultation that it is satisfied that the proposed reforms to legal aid fees are likely to be sustainable, and that, although individual providers may leave the scheme, there will be sufficient supply of providers of sufficient quality to provide an appropriate level of service. Following the reforms, the LSC will monitor the situation to ensure that they are aware of any market shortfall and the Government will work closely with them so that that they are able to respond promptly, effectively and appropriately to ensure that clients can continue to access legally aided services. The Government is also working with the LSC to develop and put in place a robust client and provider strategy that both reflects the demands and requirements of the new legal aid market, and also obtains the maximum value from the ongoing structural developments in the legal market.

8.6 The Law Society and the Bar Council were consulted on the instrument, in accordance with section 25(2) of the Access to Justice Act 1999. The consultation was held between 13 July and 10 August 2011. The purpose of the consultation was to ensure that the text of the Funding Orders delivered the policy intentions as set out in 'Reform of Legal Aid in England and Wales: the Government response'.

9. Guidance

9.1 Guidance will be revised and re-issued for litigators and advocates as well as to LSC staff processing graduated fee claims and claims under the magistrates' court scheme.

10. Impact

10.1 There will be no impact on charities or voluntary bodies. The impact on businesses will be a reduction in fees paid to litigators and advocates by an estimated £96m per annum, thereby delivering these savings from the public sector legal aid budget when fully implemented.

10.2 An Impact Assessment including an Equality Impact Assessment is available at http://www.justice.gov.uk/consultations/legal-aid-reform.htm.

11. Regulating small business

11.1 The legislation applies to small business.

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.

12. Monitoring & review

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

13. Contact

13.1 Any enquires about the content of this memorandum should be addressed to James Macmillan at the Ministry of Justice, tel: 020 3334 4258 or email: james.macmillan2@justice.gsi.gov.uk.