EXPLANATORY MEMORANDUM TO

THE CRIMINAL DEFENCE SERVICE (GENERAL) (NO. 2) (AMENDMENT) REGULATIONS 2009

2009 No. 1853

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 is one of three relating to the grant of provisional representation orders (legal aid) at the investigative stage of a potential serious or complex fraud. It deals with representation by litigators and advocates, a change of representative and representation in cases involving more than one defendant.

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

3.1 None.

4. Legislative Context

4.1 These Regulations will assist in allowing plea discussions to take place between represented suspects and a prosecutor following the Attorney General's Guidelines on plea discussions in cases of serious or complex fraud.

4.2 The main regulations that introduce provisional orders are the draft Criminal Defence Service (Provisional Representation Orders) Regulations 2009, which have been laid before Parliament for approval by a resolution of each House of Parliament. As a consequence of that Instrument, there will also be amendments, by the negative resolution procedure, to the Criminal Defence Service (Funding) Order 2007.

4.3 The main regulations are due to come into force on Saturday 1 August 2009, the changes to the Criminal Defence Service (Funding) Order come into force on Monday 3 August 2009 and this instrument will come into force on Tuesday 4 August 2009. While differing implementation dates are not desirable, we felt that it was more important to observe the convention that Statutory Instruments are laid before Parliament at least 21 days before they come into force. In practice, only a small number of cases will be granted provisional representation orders and the differing implementation dates will not cause any undue delay or problem.

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 The draft Criminal Defence Service (Provisional Representation Orders) Regulations 2009 allow the provisional grant of a representation order at an earlier point in a criminal investigative process in order that the prosecution and defence may discuss and, in appropriate cases, agree the basis of a guilty plea. A prosecutor in a serious and complex fraud investigation may trigger such discussions. If a plea agreement is reached the case would then proceed to the Crown Court in the usual way and it would be a matter of judicial discretion whether or not the proposed plea agreement was acceptable in each individual case. This instrument specifies by whom representation may be provided under a provisional representation order, it also specifies that the provisions in the 2001 Regulations on a change of representative and on cases involving more than one defendant will also apply to provisional representation orders.

7.2 The Attorney General's Guidelines on plea discussions in cases of serious or complex fraud will encourage discussions about guilty pleas in fraud cases to happen much earlier and more transparently. Avoiding costly and lengthy fraud trials would be beneficial for the criminal justice system as a whole and provide an earlier outcome for victims, witnesses and defendants.

- ***Consolidation***

7.3 This order amends the Criminal Defence Service (General) (No 2) Regulations 2001. We are not proposing to consolidate the relevant legislation at this time.

8. Consultation outcome

8.1 Plea discussions were the subject of a 12 week policy consultation by the Attorney General and a total of 20 responses were received. The proposals were supported by 80% of respondents (though some support was conditional upon implementation of requirements that have now been accommodated within the Attorney General's Guidelines).

8.2 The Law Society and Bar Council were consulted throughout the period of the litigators graduated fees scheme interim review.

8.3 The Ministry has consulted the General Council of the Bar and the Law Society on this instrument and both were broadly supportive of the principles.

9. Guidance

9.1 Guidance will be available to practitioners on the LSC website.

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

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 main instrument, the Criminal Defence Service (Provisional Representation Orders) Regulations 2009 will cease to have effect on 31 December 2011. At that stage we envisage introducing a scheme based on graduated fees, in common with many other areas of legal aid, if plea discussions are producing earlier guilty pleas. Consequential amendments may need to be made to the Criminal Defence Service (General) (No.2) Regulations 2001.

13. Contact

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