EXPLANATORY MEMORANDUM

THE CRIMINAL DEFENCE SERVICE (GENERAL) (No.2) (AMENDMENT No.2) REGULATIONS 2004 No. 2046

1. Title of the instrument

The Criminal Defence Service (General) (No.2) (Amendment No.2) Regulations 2004.

Laying Authority and Purpose

iii). This explanatory memorandum is laid before Parliament by Command of Her Majesty.

Department responsible

iv). Department for Constitutional Affairs.

2. Description

The first instrument amends the Criminal Defence Service (Funding) Order 2001 which made provision for the funding and remuneration of the Criminal Defence Service under Part 1 of the Access to Justice Act 1999. The attached instrument is required in order to make an amendment to Article 9 of the Criminal Defence Service Funding Order 2001 which, together with Schedule 5 of the Funding Order, prescribes maximum rates for services under individual case contracts in very high cost criminal cases which are funded by the Legal Services Commission. The effects of the amendment are to extend the Graduated Fee payment scheme by extending the payment provisions in Schedule 4, for advocacy on behalf of assisted persons in the Crown Court, to all trials that are not individually contacted by the Legal Services Commission as a Very High Cost Criminal Case. The instrument proposes an extension of the current graduated fee scheme to cases beyond 25 days so that cases coming for trial under a representation order made on or after 2nd August, and estimated as likely to last for 40 days or less, would be paid for under graduated fees rather than under the Very High Cost Criminal Contract or Ex Post Facto scheme. For current Very High Cost Cases where the representation order was made on or before 1st July 2004, this instrument proposes that the Legal Services Commission has discretion to apply graduated fees.

The second instrument provides the consequential amendment needed to the definition of a Very High Cost Case.

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

These provisions are being introduced as a matter of urgency to address the immediate problem of barristers showing their dissatisfaction with the current contract rates under Schedule 5 of the Funding order by refusing to accept contracts in Very High Cost Criminal Cases. The Bar Council was concerned

about the level of the rates they were allowed for doing this work, caused by recategorisation of these cases, and the controls set by the Legal Services Commission on the amount of time they could spend. During April Ministers set up a review committee with the Bar, Law Society, CPS and the Legal Services Commission to examine the Very High Cost Criminal cases contracting regime. The review also looked at the relationship between the 11-25 day graduated fee scheme and very high cost cases. The review report was delivered to Ministers on 28 May. The Review agreed to recommend changes to the way in which the contract managers operate the VHCC system. It also agreed that a number of longer term proposed measures should be considered within the Fundamental Legal Aid Review's High Cost Case project. No agreement was reached by the Review on the issue of remuneration or on the statistical basis for the earnings of barristers. Further discussions with the Bar Council led to the Government putting forward a package on 24 June covering legal aid payments to those barristers working on VHCCCs. Under this new package, the current Criminal Graduated Fees Scheme is extended from 25 days to 40 days; the rates are raised for 11-25 day cases to the level expected in 2001 and this these increased rates are carried through to the extended 40 day scheme. This will take around 50% of VHCCC cases out of the contracting system. The provision in article 7, although not related to the scheme changes being introduced under this package, takes the opportunity to amend Schedule 2 of the Order to correct a drafting error in accordance with an undertaking to the JCSI.

4. Legislative Background

This Order is made by the Secretary of State and Lord Chancellor, in exercise of the powers conferred upon him by sections 14(3) to the Access to Justice Act 1999, having had regard to the matters specified in section 25(3) and having consulted the General Council of the Bar and the Law Society.

5. Extent

The Instrument applies only to England and Wales.

6. European Convention on Human Rights

This instrument is subject to negative resolution and does not amend primary legislation. It is considered, however, that the provisions of this instrument are compatible with the European Convention on Human Rights.

7. Policy background

Evidence has shown that the Criminal Graduated Fee Scheme is paying less than was expected in the 11 – 25 day cases and we are making good this shortfall. In addition, the operation of the very high cost criminal case regime for Crown Court trials lasting over 25 days, or likely to cost more than £150,000 from legal aid per defendant, has caused a good deal of disquiet amongst the Bar with some barristers refusing to accept cases. A joint review committee of the Department for Constitutional Affairs with the Bar and the Law Society has examined the Very High Cost Case Contracts regime and reported their finding to Ministers on 28 May.

The instrument facilitates arrangements that will help the Legal Services Commission secure counsel.

It is likely that there will be some public, political and legal interest in this instrument.

8. Impact

It is not considered that the instrument will have any significant impact on business, charities or voluntary bodies.

The deal is a package worth approximately £17m to the profession. £11m will come from the changes to the VHCCC scheme, and a further £6m from the changes made to the 11 to 25 graduated fee scheme.

9. Contact

If the committee require any further information on the proposed legislation, they should address enquiries to:

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Department for Constitutional Affairs

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