EXPLANATORY MEMORANDUM TO

THE CRIMINAL DEFENCE SERVICE (PROVISIONAL REPRESENTATION ORDERS) REGULATIONS 2009

2009 No.

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 allows the Legal Services Commission (LSC) to grant a provisional representation order for publicly funded representation (legal aid) at the investigative stage of a potential serious or complex fraud. This will allow those under investigation to enter into plea discussions with the prosecutor following the Attorney General's Guidelines on plea discussions in cases of serious or complex fraud - see http://www.attorneygeneral.gov.uk/sub_publications_guidelines.htm

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

3.1 None.

4. Legislative Context

4.1 This instrument is the first to be made under paragraph 1A(1) of Schedule 3 to the Access to Justice Act 1999 (c.22), which was inserted by section 56 of the Criminal Justice and Immigration Act 2008 (c.4). It is subject to the affirmative resolution procedure under section 25(9) of the 1999 Act. The use of the regulation-making power for fraud cases was envisaged when the Criminal Justice and Immigration Bill was going through Parliament (House of Commons, Committee Stage, 22 Nov 2007, col 503).

4.2 As a consequence of this Instrument, there will also be amendments, by the negative resolution procedure, to the Criminal Defence Service (General) (No. 2) Regulations 2001 and to the Criminal Defence Service (Funding) Order 2001. Draft instruments will make further changes, beyond those related to plea discussions, and will be laid before Parliament in due course.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

Lord Bach, Parliamentary Under Secretary of State, has made the following statement regarding Human Rights:

In my view the provisions of the Criminal Defence Service (Provisional Representation Orders) Regulations 2009 are compatible with the Convention rights.

7. Policy background

- ***What is being done and why***

7.1 This instrument allows 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.

7.2 The instrument also makes provision for circumstances in which provisional representation orders may or must be withdrawn.

7.3 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***

7.4 This is new legislation that does not amend existing legislation.

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). The full response to consultation is at: http://www.attorneygeneral.gov.uk/attachments/Summary%20of%20Responses%20to%20Two%20Consultation%20Papers%20on%20Criminal%20Proceedings%20for%20Fraud%20doc.pdf

8.2 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. As suggested by the Law Society we have agreed that provision representation orders may be granted in favour of any firm with a LSC criminal contract, rather than restrict cases to those firms that hold a Very High Cost Case (Crime) Panel contract.

9. Guidance

9.1 The LSC will publish guidance for practitioners.

10. Impact

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

10.2 The impact on the public sector is minimal.

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, as the effect of this instrument is that legal aid might be granted earlier in the criminal process for a small number of cases (estimated to be around 20 cases per annum).

12. Monitoring & review

12.1 This instrument 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.

13. Contact

James MacMillan at the Ministry of Justice Tel: 020 3334 4258 or email: james.macmillan2@justice.gsi.gov.uk can answer any queries regarding the instrument.