

EXPLANATORY MEMORANDUM TO
THE CRIMINAL DEFENCE SERVICE (VERY HIGH COST CASES)
REGULATIONS 2008

2008 No. 40

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. **Description**

- 2.1 This instrument is about legal aid in criminal cases. It provides that where an individual has chosen a representative who is not a member of the Very High Cost Case (Crime) Panel and the case then becomes a very high cost case, the Legal Services Commission need not continue to fund representation by that representative and the individual may choose a new representative, from the panel. The Regulations replace the Criminal Defence Service (Choice in Very High Cost Cases) Regulations 2001 (S.I. 2001/1169).

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

- 3.1 None

4. **Legislative Background**

- 4.1 These Regulations are made by the Lord Chancellor, under section 15(5) of the Access to Justice Act 1999 and are subject to the affirmative resolution procedure under section 25(9) of that Act.

- 4.2 This instrument is being made to bring into effect part of the changes to the Very High Cost Case (Crime) Panel recommended by Lord Carter of Coles in his independent review of legal aid procurement.

5. **Territorial Extent and Application**

- 5.1 This instrument applies to England and Wales.

6. **European Convention on Human Rights**

- 6.1 The Parliamentary Under Secretary of State for Justice has made the following statement regarding Human Rights:

In my view the provisions of the Criminal Defence Service (Very High Cost Cases) Regulations 2007 are compatible with the Convention rights.

7. Policy background

- 7.1 Very high cost cases have been managed under individual case contracts by the Legal Services Commission since 2001. These arrangements were introduced in response to the rapidly growing expenditure being incurred in long and complex cases. It was widely recognised that the method of paying lawyers by determining appropriate fees after the event (*ex post facto* determination) did not exercise control over the increasing cost of these cases. The main difference between the old *ex post facto* system and individual case contracts is that work is agreed in advance through three monthly stage plans.
- 7.2 The policy objective of this instrument is to implement changes to the Very High Cost Case (Crime) Panel for the Crown Court in line with the recommendations made by Lord Carter. The Government set out its proposals for legal aid reform in *Legal Aid Reform: the Way Ahead*¹ published on 28 November 2006. This followed Lord Carter's final report "*Legal Aid A market based approach to reform*"² and the accompanying DCA / Legal Services Commission consultation paper "*Legal Aid: a sustainable future*"³, both of which were published on 13 July 2006. These further developed the Government's strategy for legal aid as set out in *A Fairer Deal for Legal Aid*⁴, published in July 2005 which set out the need to rebalance spending between civil and criminal legal aid.
- 7.3 Lord Carter proposed a number of amendments to the system of individual case contracts for very high cost cases (currently defined as those cases expected to last 41 days or more at trial).
- 7.4 Lord Carter believed that better value for money could be obtained for this work. by giving defence teams some probability of increased or more consistent volume in return for some reduction in hourly rates. To do so will involve limiting access for the VHCC panel to defence teams who can show a track record of experience in working on VHCCs and meet appropriate quality standards. This is preferable to allowing unlimited access for firms who may be so numerous that they do not actually get any - or get very little - work. The Legal Services Commission will work with panel members to recognise and incentivise

¹ Department for Constitutional Affairs, *Legal Aid Reform: the way ahead* (November 2006) Cm 6993

² ,*Legal Aid: a market-based approach to reform* (July 2006)
<http://www.legalaidprocurementreview.gov.uk/publications.htm>

³ Department for Constitutional Affairs, *Legal Aid: a sustainable future* (July 2006) CP 13/06

⁴ Department for Constitutional Affairs, *A Fairer Deal for Legal Aid* (July 2005) Cm 6591

efficient, high quality case management, as a means of delivering better value for money.

- 7.5 Following Lord Carter's review the Government and the Legal Services Commission conducted a consultation exercise. Respondents recognised the need to tackle expenditure in this area. A number of respondents expressed concern about the panel's composition, and the stage at which advocates and litigators form to join a defence team. The Legal Services Commission and the Government recognised the importance of flexibility in forming teams to take on individual cases. However, it was decided that for the team approach to work in the way intended by Lord Carter, team members must work together from the earliest possible stage, with any price competition taking place through bids put forward as a team.
- 7.6 The Government broadly accepted the proposals made by Lord Carter.
- 7.7 In addition to the wider public consultation undertaken in response to Lord Carter's report, the Legal Services Commission published a further consultation document "*Best Value Panel for Very High Cost Cases.*"⁵ A response to that consultation "*Best Value Panel for Very High Cost Cases. Final Response to Consultation*"⁶ was published in April 2007, together with a final Regulatory Impact Assessment⁷. Responses from representative bodies did not, generally, support the proposals, though there was some qualified support from other respondents, mainly individual litigator firms. The Legal Services Commission responded to concerns about the experience requirements for the selection process by amending the criteria.
- 7.8 In order to introduce the panel, the Lord Chancellor will need to amend two other Statutory Instruments⁸, by the negative resolution procedure, before the panel can be implemented in October 2007.
- 7.9 Individuals who receive publicly funded legal representation in criminal cases can generally choose their representative. In very high cost cases the choice of representative will be limited to members of a panel set up by the Legal Services Commission. This particular instrument provide

⁵ Legal Services Commission, *Best Value Panel for Very High Cost Cases*, February 2007
http://www.legalservices.gov.uk/docs/criminal_consultations/Best_Value_Panel_for_VHCCs_-_A_Consultation_Paper_-_12_Feb_07.pdf

⁶ Legal Services Commission, *Best Value Panel for Very High Cost Cases. Final Response to Consultation*, April 2007
http://www.legalservices.gov.uk/docs/criminal_consultations/Best_Value_Panel_VHCCs_Final_response_to_Consultation_270407.pdf

⁷ Legal Services Commission, *Best Value Panel for Very High Cost Cases. Regulatory Impact Assessment*, April 2007
http://www.legalservices.gov.uk/docs/criminal_consultations/regulatory_impact_assessment__300407.pdf

⁸ Criminal Defence Service (Funding) Order 2007 (No. 1174) & Criminal Defence Service (General) (No2) Regulations 2001 (No. 1437)

that where an individual has chosen a representative who is not a member of the panel, and the case is classified as a very high cost case, the Commission need not continue to fund representation. The instrument also provides that the individual may choose a new representative, from the panel.

8. Impact

- 8.1 The Legal Services Commission has prepared an Impact Assessment for the reforms of the Very High Cost Cases scheme. A copy is attached at annex A.

9. Contact

James MacMillan at the Ministry of Justice, 3rd Floor (3.23) Selborne House, 54 Victoria Street, London SW1E 6QW Tel: 020 7210 8049 or e-mail: james.macmillan2@justice.gsi.gov.uk can answer any queries regarding the instrument.

**Best Value Panel
For
Very High Cost Cases**

Regulatory Impact Assessment

April 2007

1. INTRODUCTION

1.1 This document is the final regulatory impact assessment of the proposals referred to in:

- The Department of Constitutional Affairs (“the DCA”) and Legal Services Commission (“the LSC”) paper, “Legal Aid Reform: the Way Ahead”, paragraphs 30-36 – Very High Cost Cases in the Crown Court; and
- “Legal Aid – A market-based approach to reform” published in July 2006
- Consultation paper “Best Value Panel for Very High Cost Cases” issued by the LSC on 12 February 2007

1.2 The main changes to the current Very High Cost Case (“VHCC”) contracting system that have been proposed are:

- that there should be a new specialist panel of providers (“the Panel”) to conduct very high cost criminal cases; and
- that the criteria for membership of the Panel and the selection process should be consulted on with the appropriate professional bodies.

1.3 The proposals have now been finalised and the LSCs policy decisions following the Consultation Paper⁹ are set out in “Best Value Panel for VHCCs - Final Response to the Consultation” published by the LSC on 27 April 2007.

2. TITLE OF PROPOSALS

2.1 Best Value Panel for VHCCs: A Consultation Paper.

3. OBJECTIVE OF PROPOSALS

3.1 There are three objectives for the implementation of the proposals:

- the introduction of best value competition based on experience, quality, price and capacity;
- to ensure that all defendants whose defence costs are paid under VHCCs receive high quality advice; and
- to deliver better value for money for the taxpayer.

⁹ Best Value Panel for Very High Cost Cases: A Consultation Paper (February 2007)

4. PURPOSE AND INTENDED EFFECT

4.1 Background

- 4.1.1 A Fairer Deal for Legal Aid (published in July 2005) set out the Government's long-term strategy for legal aid. The paper highlighted the disproportionate amount of the legal aid budget spent on high cost criminal cases, with over 50% of Crown Court legal aid expenditure being consumed by 1% of cases. The paper stated the Government's aim to deal with these cases in the most effective and efficient way for the taxpayer without compromising the fairness of our justice system and that defence costs should be proportionate to the issues at stake.
- 4.1.2 A critical element of the strategy was a detailed examination of the way that Government purchases legal aid services. As a result, Lord Carter of Coles was commissioned to conduct an independent review of legal aid procurement, which would achieve maximum value for money whilst ensuring quality and the fairness of the criminal justice system.
- 4.1.3 In his interim findings published on 9 February 2006, Lord Carter recommended that a specialist panel of providers be set up to deliver better value for money on VHCCs. Defence Teams, consisting of litigators and advocates, would bid for the amount of capacity they wish to deliver and the price they would offer, with Panel membership being determined as those who bid capacity sufficient to meet the LSC's forecast needs at or below the lowest price at which the capacity need was met. He also recommended that Defence Team Members should have to meet defined experience standards and that the Panel should be initially for twelve months.
- 4.1.4 Lord Carter published his final report on 13 July 2006. The DCA and LSC published a joint consultation paper on the proposals, "Legal Aid: a sustainable future". This consultation was to last until 12 October 2006.
- 4.1.5 Lord Carter's final report outlined his recommendations on how a best value panel for VHCCs should be set up but also left much of the detail to be subject to further consultation between the LSC and the appropriate professional bodies.
- 4.1.6 The report also recommended that the LSC work with practitioners to develop a Best Value Protocol ("the Protocol") for the efficient preparation of VHCCs, to be measured by the standards of the most efficient practitioners. An updated draft of the Protocol has now been published on the LSC website but is not assessed individually in this impact assessment.
- 4.1.7 In November 2006, the Government published its plans following analysis of the consultation responses received, in "Legal Aid Reform: the Way Ahead". It stated its intention to create a Panel of VHCC providers based on quality and experience and that best value could be achieved by giving Defence Teams some probability of increased or more consistent volume in return for some reduction in hourly rates. It also stated that there would be further consultation in the New Year with the professions about the detailed changes required to underpin the introduction of the Panel.

4.2 VHCC expenditure and volumes

4.2.1 A detailed description of the VHCC system is given in Chapter 2, paras 43 to 52 of “Legal Aid – A Market Based Approach to Reform” (“the Carter Report”) published in July 2006.

4.2.2 This shows that total spending on cases contracted under the VHCC scheme in the financial year to 31 March 2006 was £103m, of which £46m was spent on fraud cases. 397 new contracts were signed in the year, of which 39% were fraud cases.

4.2.3 The total spend of £103m is divided as follows:

- Litigators - £55 m
- Advocates - £44m
- Disbursements - £4m.

4.2.4 In the first six months of the current financial year (to 30 September 2006) expenditure was £50.7m and 222 new contracts were signed.

4.2.5 Since the current VHCC contracting scheme began in 2000 just over 600 firms of litigators have managed at least one case under a VHCC contract. The split of contracts by litigator firm into different volume bands since 21 May 2004 is as follows:

- One contract - 225 firms
- Two contracts - 91 firms
- Three contracts - 49 firms
- Four contracts - 33 firms
- Five or more contracts - 49 firms.

In the same period, 1070 individual advocates signed individual VHCCs. Of these, 730 worked on two or more VHCCs or did 300 hours of VHCC Work.

4.3 Rationale for Government intervention

4.3.1 At present, a disproportionate amount of the legal aid budget is taken up by VHCCs. This means that there is less available for other legal aid schemes and fuels concerns about whether the taxpayer is getting best value for money on VHCCs.

4.3.2 Under the current VHCC system, fraud VHCCs¹⁰ must be conducted by a member of the LSC Specialist Fraud Panel (“the SFP”), the qualification requirements for which are set out in the Specialist Fraud Panel Arrangements 2002. Any firm that has conduct of a fraud VHCC and is not a member of the SFP must transfer the Representation Order to an SFP member.

¹⁰ A VHCC fraud case is currently defined as any case where:

- a) the defendant is charged with fraud or with serious financial impropriety; and
- b) the trial is likely to last for 41 days or more.

- 4.3.3 In the case of non-fraud VHCCs¹¹, defence teams with no previous VHCC experience can conduct these cases as long as the firm holding the Representation Order has a General Criminal Contract. Even when the instructing litigator has relevant experience, there is no requirement for them to instruct advocates with relevant experience. The client may, therefore, be defended by a team with no previous experience of conducting large complex cases often involving several defendants and prosecuted by the more specialist Prosecution agencies.
- 4.3.4 At present, the defence team are paid according to the amount of work they do based on set hourly or daily rates provided the work is agreed with the LSC in advance. The main method of control over the amount of time paid for is through the need to agree with the LSC in advance what work reasonably needs to be done and who in the defence team should do it.
- 4.3.5 The level of profitability of VHCC Work is, based on the evidence available, higher than any other criminal legal aid scheme. Some firms with experience of VHCCs have told us that they would be willing to conduct VHCCs for lower rates than at present, particularly if they knew that they had exclusive access to this work through a panel which provided them with greater prospects of increased and/or more consistent volume. They have also told us that they have options to offset the reduction in rates by flexible cost structures and working methods.
- 4.3.6 As recommended by Lord Carter, there is an opportunity to secure better value by creating a specialist panel by means of competition on price and capacity. In order to join the Panel, Defence Teams would need to satisfy various quality and experience requirements.
- 4.3.7 The Government also intends to require the LSC to start to work with specialist practitioners to identify ways to incentivise and reward Defence Teams for representing their clients in more efficient ways. This will be more likely to be successful if the LSC is working with a specialist panel of firms for whom VHCC Work represents a long-term investment. At present, firms have insufficient incentive to invest in technology, training and high quality recruitment.

¹¹ Any other VHCC that does not meet the criteria set out in 1 above.

5. CONSULTATION

5.1 On 12 February 2007, the LSC issued the “Best Value Panel for Very High Cost Cases – A Consultation Paper” for consultation with the following representative bodies:

- The Law Society;
- The Bar Council;
- The Criminal Law Solicitors Association;
- The Criminal Bar Association;
- The London Criminal Courts Solicitors Association;
- Solicitors Association of Higher Court Advocates;
- The Serious Fraud Association;
- The Legal Aid Practitioners Group; and
- Association of Major Criminal Law Firms.

5.2 Practitioners were able to view the proposals on the LSC website (www.legalservices.gov.uk/criminal/consultations.asp) and provide comments.

5.3 The consultation closed on 23 March. The LSC held two consultation meetings to which representatives from all of the above professional bodies were invited.

5.4 56 written responses were received. Seven of these were from Representative Bodies; three were from individual chambers and the balance from individual litigator firms.

5.5 Impact of Consultation

The DCA and LSC carefully considered all responses to the consultation paper. As a result, changes have been made in the following main areas:

- removal of the individual firms’ experience requirement from the selection process;
- expansion of cases that qualify as experience (“qualifying cases”);
- we have revised the fee earner experience requirements to either ‘qualifying cases’ or hours;
- we have relaxed entry requirements to the Panel in order to remove any potential barriers that would effect women on maternity or adoption leave, men on paternity leave, carers or people on disability leave by allowing such absences to be taken into account on a pro rata basis; and
- we have made the policy on transfer of cases to Panel Members and travel costs more practical.

These are described in more detail in “Best Value Panel for VHCCs – Final Response to the Consultation” which contains an analysis of the issues raised and our response.

5.6 Regulatory Impact Assessment

The DCA and LSC also received comments on the draft Regulatory Impact Assessment that have been considered when drafting this document. These are referred to in Section 9.6

6. SECTORS AFFECTED

6.1 Sectors and groups that are likely to be affected by the scheme are:

- providers of legal aid services, both those with VHCC experience and those without;
- clients of those providers;
- employees of some or all legal aid providers; and
- the LSC and DCA.

7. ASSESSMENT OF THE PROPOSALS FOR THE VHCC BEST VALUE PANEL

The Carter Report recommended changes in the following areas to deliver better value on VHCCs:

- Best Value Tendering for VHCCs; and
- Quality Assurance;

This section assesses these proposals, including the options considered where appropriate.

7.1 Best Value Tendering for VHCCs

The Government has decided to introduce a Panel of VHCC providers to deliver better value. This section examines the options considered to implement this. In all options there will be fewer firms able to undertake VHCC Work. Some however, will see an increase in work by being a Panel Member.

600 firms have signed at least one VHCC contract since the scheme started. Of the 447 firms who have experience of VHCC Work since 21 May 2004, we believe that approximately 50% would meet the essential criteria. This number may increase as the qualifying time for counting cases is 21 May 2004 to 20 May 2007 and also because of the widening of the definition of qualifying cases.

7.1.1 Option 1 – Single stage application process

This option involves a single stage application process where applicants are invited to submit tenders for a number of VHCCs (i.e. tender capacity) at a range of prices / hourly rates offered by the LSC. This process would use essential and desirable criteria to assess applications and ultimately select the Panel. This is the LSC's proposed model, as set out in the consultation document.

Benefits:

- Provides the best balance between quality, experience, commitment to growth and potential for cost reduction (i.e. best value).
- Provides sufficient growth potential to incentivise teams to bid for access to more volume at a lower price.
- Reduces the risk of low bids, which might result in raising the price.
- Provides best advice for clients.
- Inclusion of Panel B provides risk protection against unexpected growth in volume.
- Panel B provides firms who are not awarded a Panel A contract with the opportunity to gain VHCC experience for any future panel.
- A single stage application process is efficient for applicants and provides applicants with the full information about what they are applying for.
- By providing a range of prices, this avoids the need for several tendering rounds. Applicants would know the lowest price the LSC will offer which should assist in decision-making.

- Provides the potential for working with providers, who have not been awarded a Panel A contract, to develop a strategy for applying for any future panel.

Costs, disbenefits and risks

- May not maximise the savings from competitive tendering.
- Excludes firms with either no experience of VHCCs or experience below the qualifying level. This could affect the firm's profitability.
- Firms with significant experience but higher overhead structures may only bid at the highest price and this could result in them being excluded.
- May reduce client access to local firms.
- May increase travel and accommodation costs. This, however, is possible with all options.
- May incur wasted costs because cases may have to be transferred from a non-Panel firm to a Panel firm.

This option is recommended.

7.1.2 Option 2 – Multi-stage application process

This option involves separate qualification and tender stages, where the LSC would offer one price at a time, invite tenders at that price and, if necessary, re-tender until the desired capacity is met. In this option, there would be no preference for applicants with greater experience and an appetite for growth. This is essentially the process as set out by Lord Carter.

Benefits

- More likely to find the market price which might be lower than the previous option.
- Provides teams with only the basic qualifying experience with access to a full range of Panel work.
- Only applicants who know they have met the qualifying standards would need to invest time in preparing their tender.
- Could improve local access for clients because there may be more teams on the Panel as the incentive to bid for growth is reduced.

Costs, disbenefits and risks

- Increases the risk of the most experienced firms not being on the Panel, as they are not prepared to bid below their economic price. Several firms may have alternative business sectors in which to use their staff more profitably.
- May result in compromises on quality of advice as firms seek to maintain profitability, as there is no floor to limit the price reduction.
- Could result in the price rising to meet LSC needs, as there are no restrictions on teams making minimum bids.
- Teams apply without knowing what the lowest price is.
- The need to allow teams reasonable time to make decisions and submit tenders at each re-tendering stage could delay implementation.

This option is not recommended.

7.1.3 Option 3 – Market-clearing rate process

This option involves applicants bidding on both capacity and the best price they wish to offer. The LSC would then aggregate the capacity bids from the lowest price upwards until the desired capacity is met. The price at which capacity is met becomes the Panel price, known as the market-clearing rate. This is the original proposal as set out in the interim Carter report published in February 2006.

Benefits:

- Allows the market to set the price.
- May produce a lower price than the other options.
- Allows those providers with the lowest costs to benefit because the market clearing rate is likely to be higher than their bid price.

Costs, disbenefits and risks

- High risk for providers as they are unlikely to have any previous experience of tendering on capacity and price.
- Providers have only one chance to get it right and have nothing on which to compare.
- No incentive for providers to offer anything more than the minimum bid, which may mean that the LSC's demand is not met and/or the price needs to rise to meet the desired capacity.
- Could lead to much lower price than expected which may have a direct impact on quality.
- Could destabilise the market in the medium term if the most experienced teams are not members of the first Panel.

This option is not recommended

7.2 Quality Assurance of the VHCC Panel

Options Considered:

7.2.1 Option 1

To use the LSC general crime Peer Review system and to accept firms who achieve PR3 (Threshold Competence) or better.

Benefits

- Makes clear that best value is not about reducing prices alone.
- Uses quality as an essential criterion for the first Panel. At present, there is no quality standard to be allowed to undertake VHCC Work.
- Enables the first Panel to be implemented during 2007.
- Is consistent for all applicants.
- Provides re-assurance to clients.

- Enables firms who achieve PR2 or better to meet the Peer Review standard for the LSC Preferred Supplier scheme.

Costs, disbenefits and risks

- It does not assess the quality of VHCC Work
- Requires a valid sample of general crime files, which some firms are not able to supply as they specialise in higher crime work. It has been necessary to develop a low intensity VHCC file review for those firms.
- Panel firms will need a second Peer Review at some stage if a specific VHCC Peer Review system is developed. This is likely to lead to additional cost of reviewers.

This option is recommended

7.2.2 Option 2

To either define PR2 (Competence Plus) as one of the desirable criteria or to develop a specific Peer Review system for VHCCs.

Benefits

- PR2 would set a higher quality standard; would be in line with the requirements of Preferred Supplier; and would have all the other benefits of 7.2.1 above.
- VHCC Peer Review would give direct assurance of the quality of work that is covered by the Panel.
- This would enable quality to be used more directly in distinguishing applicants and/or to differentiate price according to quality.

Costs, disbenefits and risks

- Not enough firms would qualify at PR2 for the first Panel in order to meet the desired capacity.
- Using PR2 in any way would differentiate applicants based on general crime work rather than VHCC Work.
- Firms with no general crime work would not be able to obtain PR2.
- Both use of PR2 and VHCC Peer Review would delay the start of the Panel.
- Specialist Peer Review for VHCCs has not been developed or evaluated.
- This may disadvantage newer and/or smaller firms.

This option is not recommended

7.3 Summary of decisions

In light of the recommendations set out above, we have decided to implement:

- the single stage application process;
- the use of PR3 as the quality standard for the Panel

The other proposals above are key parts of delivering best value on VHCCs but were not the subject of this consultation.

8. EQUITY AND FAIRNESS

8.1 Our Duties:

Race Equality

Public authorities in Britain have a legal duty to promote race equality. This means that they must have due regard to how they will:

Eliminate unlawful racial discrimination;

Promote equal opportunities between persons of different racial groups; and

Promote good relations between people from different groups.

The DCA and LSC are also under a specific duty to conduct race equality impact assessments of its policies in relation to the public duty to promote race equality and within this, to identify whether there is a differential and adverse impact on particular racial groups.

Disability Equality

The Disability Equality Duty came into force on 4 December 2006. The LSC has already published its Disability Equality Scheme and this is available on the LSC website (www.legalservices.gov.uk). This sets out the actions that we will be taking to promote disability equality for legal service providers and the clients they serve, and our staff.

When carrying out our functions, we must have due regard to the duties placed upon us by the Disability Discrimination Act 2005. These are to:

- promote equality of opportunity between disabled people and other people;
- eliminate discrimination that is unlawful under the Disability Discrimination Act;
- eliminate harassment of disabled people that is related to their disabilities;
- promote positive attitudes towards disabled people;
- encourage participation by disabled people in public life; and
- take steps to take account of disabled people's disabilities, even where that involves treating disabled people more favourably than other people.

From 4 December 2006, the DCA and LSC are also under a specific duty to conduct disability equality impact assessments of our policies to assess the likely impact on equality for disabled people.

Gender Equality

The Equality Act of 2006 places a statutory duty on all public authorities, when carrying out their functions, to have due regard to the need:

- To eliminate unlawful discrimination and harassment; and
- To promote equality of opportunity between men and women.

Since 6 April 2007, the DCA and LSC have also been under a specific duty to conduct gender equality impact assessments of our policies in relation to the public duty to promote gender equality. We have included gender equality impact in our assessment.

Rural proofing

Public authorities also need to take account of rural circumstances and needs (Rural White Paper 2000). Rural proofing states that policy makers should systematically:

- consider whether their policy is likely to have a different impact in rural areas, because of particular rural circumstances or needs;
- make a proper assessment of those impacts, if they are likely to be significant;
- adjust the policy, where appropriate, with solutions to meet rural needs and circumstances.

Where appropriate, the LSC also considers the rural impacts of its policies to identify whether there is a differential and adverse impact on rural areas.

8.2 Current Position

- 8.2.1 Black and minority ethnic (“BME”) groups, the disabled, people of different genders, and people living and/or working in rural communities have a direct interest in any changes to the legal aid scheme, as the owners and/or managers of solicitor firms providing legal aid services, as employees of those organisations, as barristers and experts providing services to contracted organisations and as clients of legal aid services.
- 8.2.2 Research conducted by the Legal Services Research Centre (“LSRC”) in 2006, to be published in a forthcoming report has provided information on the ethnicity, gender, age and disability profile of providers of legal aid services, their employees and their clients based on the results of diversity monitoring forms completed by 44.7% of providers with legal aid contracts, and data from the LSC corporate information system.

9. IMPACT ON CLIENTS, PROVIDERS AND EMPLOYEES

9.1 Impact on Clients

9.1.1 We are unable at present to provide any data on the ethnicity of clients whose defence is funded under a VHCC contract. As part of the Panel application process we intend to require applicants to provide this information. In addition, it is proposed that provision of ethnicity data on clients will be a contract obligation under the Unified Contract. The Unified Contract - Contract Standard Terms will form an Annex to the revised VHCC Panel Contract. We will analyse this equal opportunities information about clients periodically and will report the results at the conclusion of the first Panel (proposed to be 31 March 2009) as part of the renewal process.

9.1.2 A key objective of setting up the Panel is to provide clients with a choice of quality assured expertise and experience in handling the specialist characteristics of VHCCs which, with the exception of fraud cases, they do not have today. However, the present Serious Fraud Panel has no quality assessment and firms can become members without ever having conducted a VHCC.

9.1.3 Remote location

There may be some parts of the country where the client, if not in custody, may need to travel further to meet with his litigator than at present, primarily for the provision of instructions. In such situations, we will pay for the client to travel to the litigator – the criteria for determining when such a situation arises are in the Final Response to Consultation document, section 3.10. We will also take steps to ensure that we do not adversely affect clients with disabilities.

From a study of 80 cases started since March 2005, we were able to identify that 80% of defendants were easily accessible to/by litigator firms who meet the selection criteria in the consultation paper. The remaining 20% were made up of two groups. First, 10% had a local litigator who would not meet the proposed minimum criteria; whereas the remaining 10% were already served by litigators who were remote from them (defined as more than one hour's travel).

9.2 Impact on providers of legal aid services

9.2.1 The LSRC Provider Diversity Survey 2006 produced replies from 192 of approximately 430 litigator firms who have conducted VHCCs in the last 3 years. The following table shows the available data on managerial control in terms of ethnicity, gender and disability of the whole group and also those we estimate are likely to meet the essential criteria.

Majority Managerial Control

ETHNICITY			GENDER			DISABILITY	
	All VHCC firms	Firms with 2 VHCCs		All VHCC firms	Firms with 2 VHCCs	All VHCC firms	Firms with 2 VHCCs
White British	76%	75%	Male	79%	78%	One VHCC firm reported disability within its management	None of the firms likely to qualify reported any disability
BME	17%	20%	Female	9%	5%		
Split	7%	5%	Split	12%	17%		

This is only a proxy for firms who may meet the essential criteria as the need for individual firms' experience has been removed following consultation. No data is available at present to identify the ethnicity, gender or disability of individual team members.

In firms with majority managerial control other than BME, there are often BME individual partners.

These figures, and those under "Selection Criteria" below show that firms with BME majority managerial control may have a slightly higher prospect of meeting the essential criteria than other firms. The above figures indicate that firms with female majority managerial control are slightly less likely to meet the essential criteria. Because of the small number of providers with majority managerial control who have a disability, we do not have sufficient information to assess fully the impact of the introduction of the Panel on disability equality for VHCC providers.

We will carry out equal opportunities monitoring of VHCC providers and analyse the results for any adverse impact periodically.

- 9.2.2 In order not to unlawfully discriminate against a person with a disability, during the application process, applicants will be asked to tell us whether they consider that a member of their team has a disability that makes it difficult for the applicant to meet any of the essential or desirable criteria. They will be asked to provide us with information about their disability. This information will be used to determine whether it is possible to make any reasonable adjustments for that applicant.

9.3 Impact on employees

- 9.3.1 For employees of firms that become Panel Members, the scheme offers the prospect of more challenging work and personal development. The impact on employees of firms who do not achieve membership of the first Panel will depend on many factors, including the relative importance of VHCC Work to that firm.

- 9.3.2 Employee data from the LSRC Provider Diversity Survey referred to above shows:

- 81% of employees of firms who have conducted VHCCs were White British; and
- 19% of employees of firms who have conducted VHCCs were BME.

9.4 Selection Criteria

The selection criteria for the Panel includes the requirement that any litigator firm should have received a Peer Review rating of at least PR3 (Threshold Competence).

Up to the end of February 2007, 265 Peer Reviews had been carried out for which initial ratings had been produced. Ethnicity data is held for 72% of these firms. Of those firms for which we have that data, 92.1% of the BME firms (35 firms) achieved PR3 or better, whereas 7.9% of BME firms (three firms) did not reach this level. In the case of White British firms the ratios were 88.9% (120 firms) and 11.1% (15 firms) respectively, those of “split” firms were 87.5% (14 firms) PR3 or better and 12.5% (2 firms) did not achieve at least PR3.

9.5 Performance Standards

Performance standards will be set for Panel members through an objective set of provider performance standards (these will form an Annex to the Contract). We do not believe there will be any material impact from this on any particular group of providers. We will however, monitor their impact in practice.

9.6 Draft regulatory impact assessment, summary of responses and amendments

9.6.1 Preliminary assessment

The DCA and LSC’s preliminary assessment of the impact of the Panel was that:

- (i) the proposals would provide clients with reassurance about the experience and quality of the chosen litigator firm. Most clients on bail would be within a reasonable distance of a Panel A member. Where this is not the case, provision is made for payment of reasonable expenses or access to a Panel B member;
- (ii) there would be a similar mix of BME owned firms on the Panel compared to the total number of firms who have represented clients under the VHCC scheme since it started. It was not possible to assess the impact on clients of limiting VHCC Work to a reduced number of firms as we did not hold data on the ethnicity of clients whose defence was funded by VHCC;
- (iii) firms who become members of Panel A would have the opportunity to increase their volume of VHCC Work to compensate for any price reduction that may be necessary to become a Panel Member. Those firms who were unsuccessful in seeking join the Panel would still have access to the majority of Crown Court work; and

- (iv) it was appropriate to exclude applicants with no VHCC experience from the first Panel, but that it would be important to make provision in the selection criteria for the second Panel to allow applicants with no previous VHCC experience to apply.

9.6.2 Summary of responses to the RIA and other diversity issues raised

- There were five responses that made any comment about the RIA, of which three were from Representative Bodies. Some other responses made comments about the impact on individual groups.
- The Bar Council were concerned at the lack of information and assessment of the impact of the changes on the independent Bar as opposed to litigator firms. In particular, they felt there had been no assessment of the diversity impact on the members of the Bar.
- Another area of comment was that some aspects of the selection criteria discriminated against applicants who had experience of cases similar to VHCCs. For example, cases over 40 days, which had not been contracted.
- Some respondents felt it was unfair to exclude additions to the Panel or to team members for the whole of the Panel term.
- The desirable criteria were likely to work against smaller and/or newer firms who may include a higher proportion of BME firms.
- By not allowing consortia bids, the proposals would possibly discriminate against smaller and/or BME firms.

9.6.3 Amendments to proposals and further analysis of impact and assessment of equity and fairness for the Panel

Impact on members of the Bar

- There are approximately 1070 barristers who have signed at least one VHCC contract (and undertaken work) since 21 May 2004. Of these, 730 have undertaken two VHCCs or 300 hours. 15% of these are QC's and another 37% are Leaders other than QC's. This number of Leaders and QC's is sufficient to ensure that around 750 defence teams can be formed. Since it is possible for each team to cover more than one VHCC, the cover provided by the potential list will, we believe, provide sufficient capacity cover.
- The LSC does not believe that the experience criteria will limit the number of advocates available within the scheme.
- The LSC has further sought to ensure that the experience criteria are as broad as possible to ensure that limiting the experience requirement to VHCCs only, does not disadvantage applicants. The LSC is allowing applicants to include non-VHCC cases with an actual trial length of over 40 days as part of the experience criteria in their application.

Diversity Impact

- To allow for the possibility that the scheme may discriminate against certain groups, the selection criteria include scope for litigators and advocates with no VHCC experience to be members of applicant teams. For example, there is no

requirement for led advocates to have any previous VHCC experience. The precise number of led juniors on the advocates list is unknown but is likely to be at least as many as the number of VHCCs required to meet the LSC's demand.

- To allow for the possibility that the qualification period of three years from May 2004 may exclude unintentionally litigators or advocates with VHCC experience, we have now provided that team members who have been absent from work during some of this period may increase their actual experience on a pro rata basis to ensure they are treated equally.

No data is presently held by the LSC about the ethnicity, gender or disability of either litigators or advocates who have previously worked on VHCCs to show whether or not this is any different from those who do not work on VHCCs. We do not consider that the selection criteria discriminate against people on any of these grounds and do allow scope for those with no VHCC experience to seek membership of applicant teams.

Although some smaller firms, including BME firms, may have undertaken some VHCC Work, it is possible that the individual fee earners in those firms may not meet the essential criteria for the Panel.

However, the LSC has an obligation to ensure that clients are provided with access to appropriate experience in handling large complex cases. There is also scope for firms to recruit individual fee earners who meet the essential and/or desirable criteria or for individuals to bring their VHCC experience together into a new firm and form a viable applicant body.

Scope for firms to join the Panel after it is formed

- It has been suggested that firms, who for example, have formed after the start of the Panel, are disadvantaged by not being allowed to join during the life of the Panel. We do not intend to allow for this as membership of the Panel is through participation in the best value tender. We consider that it would be unfair to Panel Members to allow new members to join once the Panel price has been set by the tender. However, the length of the Panel – at 18 months - has been set to ensure that such firms are not excluded for an unreasonably long period.

9.6.4 Revised assessment of equity and fairness

The DCA and LSC's final assessment of the impact of the VHCC Best Value Panel is that:

- the scheme will provide clients with access to providers who have met our quality standard and have experience of handling the most complex crime cases. Whilst a minority of clients will need to travel further than they would at present, there is provision for payment of reasonable expenses. Panel B will also assist geographical coverage as will the likely increase in Panel A size arising from the change to the capacity at which the LSC's demand will be met;
- there is unlikely to be any reduction in the proportion of firms doing VHCC Work who have BME control, assuming they apply and are successful;
- Panel litigator firms will have the opportunity to offset any reduction in hourly rates by increasing their volume of VHCC Work. Those who do not become Panel Members will have access to all other Crown Court work, of which VHCCs account for 20%. Advocates may be less able to increase the volume of work but the impact depends on the range of non VHCC Work they undertake;
- of the other changes in criminal legal aid being implemented or proposed by the LSC, the revised standard fees for Magistrate's Courts are unlikely to affect many of the potential VHCC applicants. It is not feasible to assess the impact of the Panel on firms affected by the LSC's proposed Police Station Reforms as yet, as consultation responses are being considered. However, it is possible that some firms who experience a reduction in income from the VHCC changes will also be affected by the Police Station Reforms. Many Panel Members will also be undertaking other Crown Court work. The combined impact of the VHCC changes and the proposed Litigator Graduated Fee Scheme cannot be assessed yet as the latter scheme will be subject to consultation in May 2007.

10. SMALL FIRMS IMPACT TEST

Whilst we have identified approximately 30 of the largest VHCC firms having turnover above the Small Firms limit, many providers of legal advice, which is paid for under VHCC terms, are small businesses. The various professional bodies that are party to this consultation were able to represent their views and these have been taken into account.

As independent advocates are self-employed, they are all small businesses. They will be competing against each other and we do not consider that there is therefore any discrimination within the Panel assessment and selection process related to the size of business.

11. COMPETITION ASSESSMENT

- 11.1 The objective of tendering for membership of the VHCC Panel is to introduce price and volume competition among teams who meet our quality and experience requirements. To incentivise teams to compete in this way they need to have the prospect of undertaking more VHCC Work to offset the impact of price reduction. We estimate that the amount of work done in the last year by firms who may not meet the proposed selection criteria represents about 10% by value and 30% by number of contracts out of the total work done in the period.
- 11.2 The effect of the scheme will be to limit the access to VHCC Work only to those practitioners on the Panel and will result in other practitioners not being able to undertake such work.
- 11.3 We have included specific provision for a Panel B, if our capacity needs are met from Panel A, to give at least those teams with less experience the opportunity to undertake some VHCC Work and to use this to qualify for the next Panel, depending on the qualification requirements at that time.
- 11.4 In addition, teams who do not meet the essential criteria for either Panel will be able to undertake VHCCs started up to the date of Panel implementation and to use these to help them meet experience requirements in future tendering exercises.
- 11.5 There will also be discretion for the LSC to enter into a VHCC Individual Case Contract with non-Panel firms in exceptional circumstances.
- 11.6 Firms who have done less than the essential level of VHCC Work may suffer a loss of income. However, a sample of 20 contracts handled by firms who have done only one VHCC showed the average fee income to be £67,000 per contract. This is unlikely to be sufficient to change the longer-term viability of their business, as it would average approximately £13,000 of gross fee income per year over the five years since the VHCC scheme started.
- 11.7 Non-Panel firms will still be able to undertake the vast majority of Crown Court work under the proposed Litigator Graduated Fee Scheme including the majority of 25-40 day cases.
- 11.8 In preparing for the second Panel we will consider whether it may be possible to allow firms with no previous VHCC experience to qualify to do this work in future (for example by including work on larger Graduated Fee cases).
- 11.9 The effect of the scheme on the Bar will be to limit the number of leading advocates to twice the number of those applying who meet the essential experience level of either two qualifying cases or 300 hours on qualifying cases. As shown in section 9.6.3 there is scope for approximately 375 leading advocates who do not meet the essential experience to be part of applicant teams.
- 11.10 The selection of led junior advocates is not affected by the assessment and selection process, which only sets a minimum number for advocates in relation to the number of VHCCs that a team bids.

As they are self-employed, advocates do not have the same flexibility that many litigator firms possess to offset any price reduction by changing their cost structure or expanding the number of VHCCs they are managing at any one time. The effect would therefore be a reduction in income on their VHCC Work. The annual impact would depend on the range of advocacy work they undertake in addition to VHCCs which in aggregate account for only 15% of advocacy Crown Court spend.

12. LEGAL AID IMPACT TEST

- 12.1 We anticipate that a successful best value tender will reduce the amount of the Legal Aid budget spent on VHCCs. Until the tender has taken place it is impossible to quantify the outcome with any confidence. However, we estimate that a Base Price of £155 for Level As/QCs together with the changes to proportionality as set out in the Final Response to Consultation would reduce the amount paid to defence teams by 5.4%, of which approximately 2.4% comes from the changes in proportionality. If the Base Price at which the LSC's demand is met were lower than this, the saving would increase to 8.3% at £150 and 11.4% at £145.
- 12.2 We estimate that the changes to category definition in the Consultation Paper could reduce Legal Aid spend on VHCCs by approximately £1m to £1.5m on current volumes and case types in addition to the potential reductions in 12.1 above. This assumes that half the terrorism cases are paid at Category 2 rather than Category 1, and that all fraud cases, where there was a successful category appeal, are paid at the pre-appeal category rate.
- 12.3 Because it will be necessary for non-Panel firms who hold the initial Representation Order to notify the LSC and, if the case is contracted, transfer this to a Panel Member, the Legal Aid fund will need to meet the costs of the non-Panel firm up to the point of transfer under the appropriate scheme. In most cases this would be the relevant Graduated Fee Scheme. The likelihood of this being later than the Plea and Case Management Hearing is low. From a small sample of cases we estimate that costs to this stage would typically be up to £5,000 per VHCC for litigators and advocates together. We estimate that this could apply to approximately 100 additional VHCCs per annum.

This will be mitigated by:

- prompt notification and contracting where a Panel Member holds a Representation Order in the same case;
 - the intention to identify potential VHCCs at the Police Station stage where possible;
 - the development of the Prosecution Register of Potential VHCCs recommended by Lord Carter;
 - improvements to the trial length estimating process recommended by Lord Carter;
 - proposals, which we will bring forward, to limit the amount that can be paid to a non-Panel firm when a potential VHCC is notified late;
 - the instructed advocate being a Panel Member.
- 12.4 As mentioned in Section 8.2.5 above and in Section 7.0 of the Consultation Paper, we propose to ensure that clients and/or litigators are not disadvantaged in those situations where the Panel results in the need for significantly longer journeys than at present. We anticipate that this could arise in up to 10% of cases in a few geographical areas. We estimate that the additional cost to the Legal Aid fund could be up to £200,000 per annum. However, using Panel B can reduce this, as described in the Consultation Paper, but we are unable to quantify the saving this could achieve.
- 12.5 There will be costs for applicants in preparing applications including dialogue between litigators and advocates about team membership and bidding strategy. We are not able to

quantify this. The LSC will incur cost in the planning and implementation of the Panel, including assessment of applications.

13. ENFORCEMENT, SANCTIONS AND MONITORING

- 13.1 The LSC will monitor the performance of Panel Members through the Contract management process, by the introduction of the performance monitoring standards referred to in the draft Contract and compliance with the proposed Best Value Protocol. Possible sanctions might include termination of a Panel Member's Contract and referral to the proposed VHCC Audit Board, the terms for which are contained in the draft Contract.

14. IMPLEMENTATION AND DELIVERY PLANS

This is set out in the main body of the Consultation Paper at page 29, which sets out the proposed implementation timetable.

15. POST IMPLEMENTATION REVIEW

We will monitor and evaluate the impact of the proposals post Panel implementation and report on findings in accordance with our statutory duties and the LSC Equalities Scheme.

16. COMPENSATION SIMPLIFICATION MEASURES

- 16.1 The Cabinet Office has produced interim guidance on compensatory simplification, to be applied when producing regulatory impact assessments. The interim guidance requires government bodies to actively look for opportunities to simplify or remove existing requirements when they want to introduce new regulation, and to assess both the extent to which the simplification proposal(s) will offset the cost of the new regulatory measures and the impact of removing the existing provision.
- 16.2 These proposals will involve applicants in preparing and planning their tenders, but we have sought to reduce the need to repeat this again for the second Panel by proposing that the first Panel is for 18 months rather than 12 months. We intend to explore the extent to which the specialism and best value delivered by the Panel can help to reduce the administrative burden of the VHCC system without reducing effective control over spending.

17. SUMMARY AND RECOMMENDATION

- 17.1 After full consideration the DCA and LSC recommend implementation of the VHCC Best Value Panel including Option 1 in section 7.1 and Option 1 in section 7.2 of this document.