

EXPLANATORY MEMORANDUM TO

THE CRIMINAL DEFENCE SERVICE (FUNDING) (AMENDMENT NO. 2) ORDER 2008

2008 No. 2930

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 Order is about the payment for publicly funded advocacy services in complex criminal cases, known as Very High Cost Criminal Cases (VHCCs).
- 2.2 The Order, which amends the Criminal Defence Service (Funding) Order 2007 (S.I. 2007/1174) (the “Principal Order”), increases the maximum fees that may be allowed for advocacy services in VHCCs, which are provided by an advocate who is not a member of the Very High Cost Cases (Crime) Panel established by the Legal Services Commission.

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

- 3.1 The Ministry regrets that it has been necessary to breach the rule that an instrument should be laid before Parliament for not less than 21 days before coming into force. The implementation of this policy required urgent action to avoid criminal trials fixed from January 2009 onwards being delayed, or possibly even stayed, as a result of a lack of defence representation.
- 3.2 Negotiations to resolve the dispute with the Bar have been ongoing since the Summer. It was on the 24 October 2008 that the Lord Chancellor and Justice Secretary announced that agreement had been reached on a way forward, in principle, on VHCCs. Since then this Order has been drafted and been the subject of a short formal consultation with the General Council of the Bar and the Law Society until 6 November 2008.
- 3.3 In order to avoid problems in complex trials listed to commence in January 2009 the Ministry need to ensure that the Order comes into force on 13 November 2008. On 30 October 2008 there was an interim hearing in a conspiracy to supply class A drugs case at Oxford Crown Court. The trial judge expressed his concern that the new rates ought to be brought into force as quickly as possible, and certainly by mid-November, if the trial was to proceed as planned in January 2009. Many of the 10 defendants in this trial have been remanded in custody since March 2008. There are several other trials listed from January 2009 onwards that would also be affected if the increase in rates was to be delayed.

4. Legislative Context

- 4.1 This Order is made by the Lord Chancellor, under section 14(3) of the Access to Justice Act 1999 (“the 1999 Act”) and is subject to the negative resolution procedure under section 25(10) of that Act.
- 4.2 This instrument is being made to bring into effect increased fees for advocacy services where a member of the VHCC panel set up by the Legal Services Commission does not provide those services.

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 Section 12 (1) of the 1999 Act sets out that the “the Commission shall establish, maintain and develop a service known as the Criminal Defence Service for the purpose of securing that individuals involved in criminal investigations or criminal proceedings have access to such advice, assistance and representation as the interests of justice require”.

7.2 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.

7.3 On 2 April 2008 the Legal Services Commission introduced a competitively tendered panel for VHCC work, for both litigators and advocates, on a contractual basis.

7.4 As an insufficient number of advocates agreed to sign contracts the principal Order was amended by the Criminal Defence Service (Funding) (Amendment) Order 2008 (S.I. 2008/957) to make provision for payment for non-Panel advocacy services and set the maximum rates of payment from 24 April 2008. Non-panel advocates continued, over the following six months, to refuse to accept instructions in VHCCs. As a result the fees and associated expenses, for advocacy and litigation, in these cases are being increased for both panel advocates and non-panel advocates, the former by changes to their contract with the Commission, the latter by this Order. The increases are considered to be a necessary measure pending the development of a new scheme for VHCCs.

7.5 There are approximately 100 cases each year that are contracted under the VHCC scheme. If appropriately qualified advocates cannot be identified the most complex cases in the criminal justice system could be delayed, or even stayed, if appropriate representation could not be found within a reasonable time.

8. Consultation outcome

8.1 The Lord Chancellor and Secretary of State for Justice consulted the Law Society and the General Council of the Bar about this Order in accordance with section 25 (2) of the Access to Justice Act 1999, both formally and informally. Both the professional bodies were content with the terms of the draft Order.

8.2 The Lord Chancellor and Secretary of State for Justice sought the views of the professional bodies' before deciding to breach the 21 day rule. The General Council of the Bar supported breaching the 21 day rule and the Law Society did not object to breaching the rule.

9. Guidance

9.1 The Ministry does not believe guidance is necessary to explain the new rates for advocacy in VHCCs, as the new rates are self-explanatory and well understood by advocates.

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 is attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 There is not expected to be a disproportionate impact on small businesses.

12. Monitoring & review

12.1 This Order is an interim arrangement until the current VHCC Panel ends in July 2009.

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.

Summary: Intervention & Options

Department /Agency: Ministry of Justice	Title: Impact Assessment of the proposed Criminal Defence Service (Funding) (Amendment No 2) Order 2008	
Stage: Consultation	Version: 2.0	Date: 10 November 2008
Related Publications:		

Available to view or download at:

Contact for enquiries: James MacMillan

Telephone: 020 3334 4258

What is the problem under consideration? Why is government intervention necessary?

The Legal Services Commission has been unable to secure sufficient advocates to act in Very High Cost Criminal Cases (VHCCs) at the current rates. Following discussions with the Bar Council the Ministry of Justice proposes to raise the rates payable for advocacy in VHCCs as an interim measure, pending the introduction of a new legal aid scheme for VHCCs next year.

What are the policy objectives and the intended effects?

To ensure that sufficient appropriately qualified advocates are willing to act in VHCCs.

What policy options have been considered? Please justify any preferred option.

Two policy options have been considered: Option 1 – no change and Option 2 – increase rates. In the short-term there is an urgent need to secure advocates for complex trials that are due to commence from January 2009 onwards, therefore Option 2 is our preferred option in the short term. Option 1 has not attracted sufficient advocates over the last six months.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The policy is intended to be temporary, pending the introduction of a new scheme next year.

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Bach

.....Date: 11th November 2008

Summary: Analysis & Evidence

Policy Option: 1	Description: No change to the current system
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition) Yrs	
	£ 0 1	
	Average Annual Cost (excluding one-off)	
	£ 0	Total Cost (PV) £ 0
Other key non-monetised costs by 'main affected groups' None identified.		

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups'
	One-off Yrs	
	£ 0 1	
	Average Annual Benefit (excluding one-off)	
	£ 0	Total Benefit (PV) £ 0
Other key non-monetised benefits by 'main affected groups' None identified.		

Key Assumptions/Sensitivities/Risks It is assumed that as the current system has not attracted sufficient numbers of advocates over the past six months that change is required.

Price Base Year 2008	Time Period Years	Net Benefit Range (NPV) £ 0	NET BENEFIT (NPV Best estimate) £ 0
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What is the geographic coverage of the policy/option?	England and Wales
On what date will the policy be implemented?	
Which organisation(s) will enforce the policy?	N/A
What is the total annual cost of enforcement for these organisations?	£ 0
Does enforcement comply with Hampton principles?	Yes/No
Will implementation go beyond minimum EU requirements?	N/A
What is the value of the proposed offsetting measure per year?	£ 0
What is the value of changes in greenhouse gas emissions?	£ 0
Will the proposal have a significant impact on competition?	No
Annual cost (£-£) per organisation (excluding one-off)	Micro Small Medium Large
Are any of these organisations exempt?	No No N/A N/A

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase	£ 0	Decrease	£ 0	Net £ 0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Summary: Analysis & Evidence

Policy Option: 2	Description: Restrict access to central funds to certain classes of acquitted defendants
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COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' There will be no change to the current level of spending on criminal legal aid as the Ministry of Justice expects that the additional costs will be funded, on a cost neutral basis, by a reduction in the use of two counsel.
	One-off (Transition)	Yrs	
	£ 0	1	
	Average Annual Cost (excluding one-off)		
	£ 6m		Total Cost (PV) £
Other key non-monetised costs by 'main affected groups' None identified.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off	Yrs	
	£ 0	1	
	Average Annual Benefit (excluding one-off)		
	£ 6m		Total Benefit (PV) £
Other key non-monetised benefits by 'main affected groups' This will avoid disruption to individual cases and the overall criminal justice system			

Key Assumptions/Sensitivities/Risks It is assumed that the increase in rates will attract sufficient suitably qualified advocates.

Price Base Year 2008	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?		England and Wales		
On what date will the policy be implemented?		tbc		
Which organisation(s) will enforce the policy?		N/A		
What is the total annual cost of enforcement for these organisations?		£ 0		
Does enforcement comply with Hampton principles?		Yes/No		
Will implementation go beyond minimum EU requirements?		Yes/No		
What is the value of the proposed offsetting measure per year?		£ 6		
What is the value of changes in greenhouse gas emissions?		£ 0		
Will the proposal have a significant impact on competition?		No		
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase	£ 0	Decrease	£ 0	Net £ 0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Summary: Analysis & Evidence

Policy Option:	Description:
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition) Yrs	
	£ 1	
	Average Annual Cost (excluding one-off)	
£ 	Total Cost (PV)	£
Other key non-monetised costs by 'main affected groups'		

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' 8
	One-off Yrs	
	£ 1	
	Average Annual Benefit (excluding one-off)	
£ 	Total Benefit (PV)	£
Other key non-monetised benefits by 'main affected groups'		

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	Net Benefit Range (NPV) £ 	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	England and Wales								
On what date will the policy be implemented?									
Which organisation(s) will enforce the policy?	N/A								
What is the total annual cost of enforcement for these organisations?	£ 0								
Does enforcement comply with Hampton principles?	Yes/No								
Will implementation go beyond minimum EU requirements?	Yes/No								
What is the value of the proposed offsetting measure per year?	£ 0								
What is the value of changes in greenhouse gas emissions?	£ 0								
Will the proposal have a significant impact on competition?	No								
Annual cost (£-£) per organisation (excluding one-off)	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">Micro</td> <td style="width: 25%; text-align: center;">Small</td> <td style="width: 25%; text-align: center;">Medium</td> <td style="width: 25%; text-align: center;">Large</td> </tr> <tr> <td style="background-color: yellow;"></td> <td style="background-color: yellow;"></td> <td style="background-color: yellow;"></td> <td style="background-color: yellow;"></td> </tr> </table>	Micro	Small	Medium	Large				
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No	No	N/A	N/A						

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase	£ 0	Decrease	£ 0	Net
				£ 0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Introduction and rationale

This impact assessment is concerned with proposals to increase payments for litigation and advocacy services in Very High Cost Cases (VHCCs).

The Government considers that action is necessary to ensure that sufficient advocates can be secured to act in VHCCs.

Option 1 – no change to the current system – has been excluded on the basis that the current system has not attracted sufficient advocates to undertake VHCC work since it was introduced six months ago. Option 2 would increase rates for VHCC work as an interim measure, until a new scheme is introduced next year. The increase in VHCC rates will cost £6m, but will be cost neutral as we anticipate making balancing savings in cases where two counsel are granted.

Background

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.

The introduction of a competitively tendered panel was one of the recommendations made by Lord Carter of Coles recommended the introduction of a VHCC panel in his independent review of legal aid procurement in July 2006. 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 involves 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.

In order to facilitate the introduction of the Panel, on a contractual basis, the 2007 amending Order (S.I. 2007/3552) removed all provisions for Very High Cost Cases from the Criminal Defence Service (Funding) Order 2007 (the principal order).

As an insufficient number of advocates signed Panel contracts the 2008 amending Order (S.I. 2008/957) implemented a change to the VHCC (Crime) Panel for the Crown Court, allowing the LSC to pay solicitor panel members in order for them to pay for advocacy services provided by non-panel advocates, and specified the maximum amounts that may be paid for those services.

In order to ensure that advocates who were not members of the Panel could be instructed the Commission amended Panel contracts to make clear that, in certain circumstances with the agreement of the Commission, non-Panel advocates may be instructed. As those non-Panel advocates will not have signed a Panel contract, this Order makes provision for payment for non-Panel advocacy services and sets the maximum rates of payment.

Current position

The provisions allowing solicitor panel members to instruct non-panel advocates was introduced on 24 April 2008, but that has also failed to attract sufficient numbers of advocates to act in VHCCs.

Assessment of the options

Option 1 – No change to the current system

The non-panel advocate provisions have been in force for over six months now and have failed to attract barristers to this work. Following discussions with the professional bodies, the Lord Chancellor and Justice Secretary has concluded that a cost neutral increase in VHCC rates is necessary. No change is, therefore, not a viable option.

Option 2 – Increase Rates

Under this option the rates for non-panel advocacy in VHCC cases will rise by just over 5%. The rates for solicitors and panel advocates will rise in exactly the same way as part of the VHCC contract.

In the current economic climate the LSC's budget has to be both fixed and finite. Expenditure on both VHCC and graduated fees schemes is constantly reviewed. Recent analysis of the grant of certificates for two advocates has shown that this may be an area in which savings could be made and the senior judiciary, who believe that there are only very limited circumstances in which judges can properly grant two junior certificates, are currently in discussion with the wider judiciary about ways to reduce the current number. It is anticipated that a substantial reduction may be possible and that savings could be used to fund the increases in the interim VHCC scheme. The effectiveness of this scheme will be closely monitored and if necessary further measures will be taken to secure the savings. This means that the effect will be cost neutral.

Impact on offenders

We do not believe the proposals will have any negative impact on offenders and their rehabilitation.

Impact on solicitors and barristers

Option 2 may have an impact on some barristers and solicitors' firms, although the overall change will be cost neutral. Some individual advocates may see some decline in income from two counsel cases and these may not be the same individuals who benefit from increased VHCC rates. There is, however, likely to be considerable overlap as VHCCs tend to have more two counsel cases in comparison to shorter trials. The impact is not quantifiable because it will depend on individual judicial decisions made by on a case by case basis.

Competition Assessment

The Department applied the Competition Filter test, which showed that the proposals are likely to have little or no effect on competition for solicitors' firms. No one firm has more than 10 % of the market, and existing firms will not be at an advantage over new or potential firms. The proposals will not affect set up costs. The scheme will not restrict the ability of firms to offer a range of services.

Impact on small firms

We do not believe that there will be an adverse impact on small firms. Indeed, small firms who are members of the VHCC panel will see an increase in income from this work.

Impact on HMCS

There is no anticipated impact on HMCS, though we expect that over time there will be a reduction in applications for two advocates and, therefore, small administrative savings for HMCS. If the proposed amendment is not made there is a risk of disruption to criminal cases and the wider criminal justice system.

Impact on Legal Aid

As stated above the changes are expected to be cost neutral.

Equality impact assessment

This is the equality impact screening exercise for the proposed Criminal Defence Service (Funding) (Amendment No 2) Order 2008

Statutory duties

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 and promote good relations between people from different groups. The MoJ is 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.

The Disability Equality Duty came into force on 4 December 2006. The MoJ has published a Disability Equality Scheme, which is available at our website at: <http://www.justice.gov.uk/publications/equality-schemes-2008.htm>.

This sets out the actions that the MoJ will be taking to promote disability equality. When carrying out our functions, the MoJ must have due regard to the duties placed upon us by the Disability Discrimination Act 2005. From 4 December 2006, the MoJ is also under a specific duty to conduct disability equality impact assessments of its policies in relation to the public duty to promote disability equality and within this, to identify whether there is a differential and adverse impact on disabled people and other people.

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. The MoJ also has a specific duty to conduct gender equality impact assessments of its policies in relation to the public duty to promote gender equality and within this, to identify whether there is a differential and adverse impact on people of different genders.

What is the aim, objective or purpose of the policy, legislation or service and who will benefit from it?

The proposed scheme aims to deliver:

- a VHCC scheme that attracts sufficient numbers of appropriately qualified advocates; and
- more effective use of public resources through reducing two counsel cases

to ensure that the criminal justice system operates efficiently and effectively.

What are the intended outcomes?

Successful outcomes will include VHCCs proceeding as planned and no detrimental impact on court performance or the wider CJS.

Do you share responsibility for this legislation, policy or service with another Government Department or organisation (eg criminal justice partners). If so, who defines it and implements it.

MoJ (Criminal Legal Aid Strategy Division) own the policy, and are responsible for administering the scheme.

Who are the key stakeholders in relation to the legislation, policy or service? What outcomes do they want? Does the list of stakeholders include representatives from all relevant/interested groups of people? If not, why not?

Key stakeholders include the legal profession, the judiciary, defendants and those working in the wider CJS, including equality bodies and those who act on behalf of defendants. Stakeholders will want to ensure that the scheme is fair to defendants, fair to those operating the scheme, and to the taxpayer.

Assessment of impact on defendants and legal aid practitioners

The Legal Services Commission produced an Impact Assessment in April 2007 on the impact of the VHCC Panel – see https://consult.legalservices.gov.uk/inovem/gf2.ti/f/57922/1344933.1/pdf/-regulatory_impact_assessment_300407.pdf.pdf

The change proposed now increases rates for VHCC work and, although the impact will not be exactly the same as the original panel, we have no reason to believe there will be any adverse impact for anyone based on age, gender, ethnicity, disability, religious belief or sexual orientation.

Age

There is no evidence that the policy will have any adverse impact based on age.

Gender

There is no evidence that the policy will have any adverse impact based on gender.

Ethnicity

There is no evidence that the policy will have any adverse impact based on ethnicity.

Disability

There is no evidence that the policy will have any adverse impact based on disability.

Religious belief

There is no evidence that the policy will have any adverse impact based on religious belief.

Sexual orientation

There is no evidence that the policy will have any adverse impact based on sexual orientation.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	No
Rural Proofing	No	No

Annexes

