

EXPLANATORY MEMORANDUM TO
THE CRIMINAL DEFENCE SERVICE (FUNDING) (AMENDMENT) (NO. 2) ORDER
2010

2010 No. 1181

1. 1.1 This explanatory memorandum has been prepared by the Ministry of Justice (MOJ) and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This Order amends the fees payable by the Legal Services Commission (LSC) to advocates for representing individuals in the Crown Court. These fees are payable as part of the Criminal Defence Service maintained by the LSC which runs the legal aid scheme in England and Wales. The order also amends the definition of Very High Cost Cases (VHCCs), which means that more advocacy payments will be governed by the graduated fees scheme set out in the Criminal Defence Service (Funding) Order 2007.

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

3.1 None.

4. Legislative Context

4.1 Section 12 of the Access to Justice Act 1999 (c. 22) gives the LSC responsibility for the Criminal Defence Service. Section 14(3) of that Act allows the Lord Chancellor to make provision about payments by the LSC to advocates. The Criminal Defence Service (Funding) Order (S.I. 2007/1174) makes such provision; Schedule 1 to that Order sets out the fees that are payable to advocates. This instrument amends that Order by reducing the level of the fees set out in that Schedule over a 3-year period.

4.2 These regulations are made by the Parliamentary Under Secretary of State, by authority of the Lord Chancellor, in exercise of powers conferred upon him by sections 14(3) and 25(8A) of the Access to Justice Act 1999.

4.3 Section 25(2) of the Act requires the Lord Chancellor to consult with the Law Society and General Council of the Bar when making a remuneration order.

4.4 The Lord Chancellor has had regard to the factors set out in Section 25(3) of the Act, ie (a) the need to secure the provision of relevant services by a sufficient number of competent persons, (b) the cost to public funds and (3) the need to secure value for money.

4.5 The MOJ appreciates that it is undesirable for there to be numerous separate amendments to Statutory Instruments. In this case we regret that it was not possible to include these provisions in a recent amendment (2010 No. 679). Equally, for reasons outlined at paragraph 7.2 there is a degree of urgency in making this Instrument that means we cannot await the next routine amendment.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The Access to Justice Act 1999 provides for the provision of publicly funded representation for individuals appearing in criminal cases before the magistrates' court and the Crown Court.

7.2 The legal aid budget is under significant pressure and the MOJ therefore believed it was necessary to bring in measures to reduce the costs of criminal legal aid as early as possible during 2010/11. We believe that a reduction in criminal legal aid expenditure is also necessary to enable us to achieve our wider aims and to address the current economic situation. Those aims are to ensure that legal aid is prioritised effectively, and that we enable more people to resolve their civil legal problems, at an early stage. This policy will help to sustain the whole legal aid budget further over the next spending review period and ensure that we focus criminal legal aid spending effectively. We want to rebalance the legal aid budget as far as possible in favour of civil help as the current balance in legal aid spend is tilted too far towards criminal legal aid.

7.3 The Government has decided that it is appropriate to reduce the fees payable to advocates in Crown Court proceedings through the Advocates Graduated Fees Scheme (AGFS). This is because the Crown Prosecution Service (CPS) has not reported any difficulty in obtaining advocates of sufficient quality over the last two and a half years. This is despite the fact that overall the CPS pays 17.9% less on fees to self-employed advocates. It is therefore difficult to justify spending more on defence advocates when the CPS is able to secure the services of appropriate advocates at lower rates.

- ***Consolidation***

7.4 The MOJ has no plans to produce a consolidated version of the 2007 Order and the amendments to it.

8. Consultation outcome

8.1 Proposals to reform AGFS were the subject of two separate MOJ consultation exercises (*Legal Aid: Funding Reforms* in August 2009 and *Legal Aid: Reforming Advocates Graduated Fees* in December 2009). Those consultations included the Law Society and Bar Council, as required by the Access to Justice Act. The first was a full three month consultation between August and November 2009. That consultation paper asked if, in principle, it was right to pay more for advocacy than the rates paid by the CPS.

8.2 The second consultation focused on how, if funding for defence advocates were to move towards parity with CPS, the necessary cuts should be made. It proposed two options to reduce fees; a cut of 17.9% across the board or a staged cut over three years

of 13.5% coupled with an increase in the scope of the AGFS to deal with cases due to last up to 60 days at trial.

8.3 The specific proposal to extend the scope of the AGFS in this way had been set out in a separate LSC consultation exercise; *Very High Cost (Crime) Cases 2010*, published in December 2009. The arrangements for dealing with VHCCs, the most expensive criminal cases, on a case-by-case basis, currently apply to cases due to last over 40 days at trial.

8.4 Copies of both MOJ consultation papers and the Government responses are on the Ministry of Justice website at www.justice.gov.uk. Respondents to the consultation included the Law Society, the Bar Council and Criminal Bar Association, other bodies representing advocates and solicitors, as well as individual barristers. Most of the respondents were opposed to both the proposed fee changes.

8.5 The main objections raised by the proposals include: the inadequacy of the consultation process and the Equality Impact Assessment; the comparison between AGFS fees and CPS fees was said to be flawed; the scale of the proposed reductions were felt to be disproportionate; the impact of a single fee and tendering proposals made it difficult to assess the impact of these proposals; lack of market knowledge and the impact on quality and ability to attract diverse candidates in future.

8.6 In response, the MOJ stated that we would proceed with the option of a staged reduction in AGFS fees of 13.5% over three years, coupled with extending AGFS to cases due to last up to 60 days. We believe this is the fairest way to achieve the level of savings we wished to make. By focusing more of the savings on the transfer of some of the current Very High Cost Cases to AGFS we believed this would reduce the impact on more junior advocates, who are less likely to be undertaking work on the more complex cases. This approach also allowed us to make a lesser reduction in AGFS and to phase that reduction over three years. While we could have made the same broad level of savings by reducing all AGFS fees by 17.9%, we concluded that that option would have a greater impact on the more junior advocates, more quickly, and that a staged approach was preferable as this gives advocates more time to adjust to the changes.

8.7 We believe that it is right to compare payments for advocacy made by the CPS to those made to defence advocates via legal aid. We do not accept that the roles of prosecuting and defending advocate are not, broadly speaking, comparable. We noted consultees' concerns about the lack of clarity about our intention to consult on proposals to pilot a single graduated fee. During the course of consultation we clarified our intention, ie that a consultation exercise on proposals to pilot a single fee was likely to be undertaken in any event, irrespective of the decisions we make in relation to AGFS and VHCCs and published a revised Equality Impact Assessment. We re-opened consultation until 1 April 2010 to allow for revised or additional representations to be made. We do not accept that proposals that were the subject of consultation lacked clarity. The proposals that were consulted upon were designed to achieve significant cost savings at a time of severe pressure on public finances. They form part of a developing programme of reforms to all aspects of the legal aid system. The Government has chosen to formulate the individual proposals which make up this programme in a step by step manner, working up each proposed reform and consulting upon it, before moving to the next. There are considerable advantages in developing a complex programme of reform in this way. In particular, the practical impact of individual elements of the programme can be assessed and the assessment can then be fed into the decision-making process at a later stage. In the current economic climate

we do not accept that the proposals were disproportionate, or that further market knowledge was necessary to make a decision. We do not believe that the proposals will impact on quality, as the CPS is able to secure the services of appropriate advocates at lower rates. We do not accept that the proposals will cause a reduction in diverse candidates joining the legal professions.

9. Guidance

9.1 Guidance will be issued for advocates and staff processing AGFS claims.

10. Impact

10.1 There is no impact on charities or voluntary bodies. The impact on businesses is to reduce the fees paid to advocates by an estimated £49 m per annum in steady state, once all three staged reductions have taken effect.

10.2 The impact on the public sector is legal aid savings of approximately £49 million per annum in steady state.

10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 The Ministry has not taken any specific steps to minimise the impact of the requirements on firms employing up to 20 people.

11.3 The Order does not place additional regulatory burdens on small firms, but rather governs the fee paid to advocates where they choose to offer their services under the terms of the Criminal Defence Service. Advocates are either self-employed barristers or employees of solicitors' firms, which will include small firms. It would not be possible to exempt small firms from the fee reductions as it would have an unfair impact on larger firms who would receive a lower fee for providing exactly the same services.

12. Monitoring & review

12.1 Legal aid expenditure is reviewed regularly by the Ministry and by the LSC and the impact of the fee reductions on expenditure will be monitored as part of this ongoing process.

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.

Legal Aid: Reforming Advocates Graduated Fees and Very High Cost (Crime) Cases 2010

Impact Assessment

Part One: Final Impact Assessment on Advocates

**Part Two: Revised Initial Impact Assessment
on Litigators**

Part One: Final Impact Assessment on Advocates

Summary: Intervention & Options

Department /Agency:
Ministry of Justice/
Legal Services Commission

Title:
Reforming Advocates Graduated Fees and
Very High Cost (Crime) Cases 2010
Part One - Impacts on Advocates

Stage: Final Decision

Version: 2

Date: 5 April 2010

Related Publications:

Legal Aid: Reforming Advocates Graduated Fees (published by MoJ) Very High Cost (Crime) Cases 2010 (published by LSC)

Available to view or download at: www.justice.gov.uk

Contact for enquiries: Annette Cowell

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

Legal aid resources are finite and under significant pressure. The Ministry of Justice (MoJ) is required to contribute to savings announced in CSR 2007, the 2008 & 2009 PBRs and the 2010 Budget, and this includes savings from legal aid. As part of a broader suite of proposals, MoJ would like to bring fees paid to advocates by the Legal Services Commission (LSC) under the Advocates Graduated Fee Scheme (AGFS) more closely into line with those paid to advocates by the Crown Prosecution service (CPS). Moreover, the current VHCC scheme is due to expire on 13 July 2010. We must therefore have a replacement scheme ready for implementation in time for 14 July 2010.

What are the policy objectives and the intended effects?

Our consultation Legal Aid: Funding Reforms (published on 20 August 2009) set out proposals to reduce AGFS fees in line with those paid by the Crown Prosecution Service (CPS). The objective is to protect the civil fund as far as possible from any rise in criminal legal aid spend in the short to medium term. This is intended to support the Government's broader objective of helping as many people as possible with their civil law problems.

While maintaining the broader objectives of the VHCC scheme, the new proposals will have to meet a savings target of 5%. These savings are crucial in the current economic downturn and they would allow the MoJ to live within its financial envelope and to protect other parts of the Legal Aid budget.

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

The following options have been assessed against the base case of "no change" in the existing fee levels for advocates in the AGFS.

Option 1 – Reduce all rates under the AGFS by 17.9%

Option 2 – A staged reduction over three years of 13.5% plus extending the scope of the AGFS to include cases due to last up to 60 days. (Preferred Option).

We have considered three VHCC options for advocates:

- (i) maintain the current scheme but revert to the 2007/08 Panel rates; (Preferred Option)
- (ii) to introduce a new benchmarking scheme; and
- (iii) to extend the Advocates' Graduated Fee Scheme.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

If this policy was to be taken forward, the impact of any preferred option would be evaluated for their effectiveness within five years of policy implementation.

Ministerial Sign-off For final decision:

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:

A handwritten signature in black ink that reads "Lord Bach". The signature is written in a cursive style and is positioned above a horizontal line.

Lord Bach, Parliamentary Under Secretary Of State

5 April 2010

Summary: Analysis & Evidence

Policy Option: 2

A staged reduction over three years of 13.5% plus extending scope of advocates graduated fees only.

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' The total cost in the appraisal period of 10 years will be £438.3m. There would also be a one off implementation cost to LSC estimated at between £0.4m and £0.8m. Although it is standard practice to show costs over a ten year period it should not be assumed that policy in this area will remain static over 10 years.	
	One-off (Transition)	Yrs		
	£0.4m – 0.8m	1		
	Average Annual Cost (excluding one-off)			
	Variable rising to £47.0m	10	Total Cost (PV)	£438.3m
Other key non-monetised costs by 'main affected groups' There will be potential indirect costs on society in the form of possible compensatory adjustments on the part of advocates, and potential market exit. If corrective action is undertaken in the long term, this may also impose substantial costs on tax payers.				

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' The financial benefit to government in terms of cost savings for the legal aid budget brought about from reduced fees is estimated to be £47.0m p.a. in steady state and £438.3m in total	
	One-off	Yrs		
	£0.0m	1		
	Average Annual Benefit (excluding one-off)			
	Variable rising to £47.0m	10	Total Benefit (PV)	£438.3m
Other key non-monetised benefits by 'main affected groups' There will be indirect benefits in the form of a more efficient allocation of resources in the criminal law services market resulting from the correction of existing institutional inefficiencies. The freeing up of financial resources will allow government to spend it on other priority areas.				

Key Assumptions/Sensitivities/Risks Savings could be affected by behavioural changes. In particular, firms could transfer cases from graduated fees to the VHCC scheme.

Price Base Year 2010	Time Period Years 10	Net Benefit Range (NPV) (£-0.4m) – (-£0.8m)	NET BENEFIT (NPV Best estimate) (£-0.4m) – (-£0.8m)
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What is the geographic coverage of the policy/option?	England and Wales
On what date will the policy be implemented?	2010
Which organisation(s) will enforce the policy?	LSC
What is the total annual cost of enforcement for these organisations?	£
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?	£
What is the value of changes in greenhouse gas emissions?	£
Will the proposal have a significant impact on competition?	Yes/No

Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	Yes/No	Yes/No	N/A	N/A
Impact on Admin Burdens Baseline (2005 Prices)				(Increase -
Increase of	£	Decrease of	£	Net Impact £

Evidence Base for IA of advocate proposals

1. Scope of Impact Assessment

- 1.1 As set out in the MoJ consultation paper, the Ministry has to make £1 billion of efficiency savings by March 2011. In addition, in the December 2009 Pre-Budget Report, the Chancellor announced that an additional £360 million of efficiency savings would be realised in the Criminal Justice System, in part through reforming legal aid.
- 1.2 The MOJ consultation document proposed two options in relation to advocates graduated fees in order to contribute towards the savings the Ministry needs to achieve.

2. Rationale for Government Intervention

- 2.1 The conventional economic approach to Government intervention is based on efficiency or equity arguments. Government intervenes if there is a perceived failure in the way markets operate (“market failures”) or it would like to correct existing institutional distortions (“government failures”) e.g. existing laws or legislation. Government also intervenes for equity or fairness reasons. In this context the ‘market’ is the market for advocacy services in the context of criminal proceedings.
- 2.2 The government rationale for intervention in this market is principally based on the view that the current graduated fees are beyond the optimum level. This may be partly due to historic development. Historically the CPS and LSC had broadly paid similar fees for advocacy services from the self-employed bar. As a result of the Government’s acceptance of Lord Carter’s recommendations following his 2006 Review of Legal Aid Procurement, fees in the Crown Court under the AGFS were increased by 16% in 2007. The CPS did not mirror the Carter fee increases. As a result of the 2007 changes the CPS expenditure on advocacy is approximately 82% of the legal aid expenditure. Whilst it is recognised that the legal aid AGFS does not need to be a precise copy of the CPS scheme, as the prosecution and defence operate in different ways, it is in the public interest for there to be broad ‘equality of arms’ between prosecuting and defending counsel. Existing government intervention may therefore have distorted the ideal allocation of legal aid resource.
- 2.3 Crown Court advocacy is remunerated under three separate schemes: the advocates graduated fees scheme (AGFS), the Very High Cost Cases scheme (VHCCs) and some legacy work originating from 2005 or earlier is paid following determination after the event (ex post facto). Expenditure under each heading from 2006/07 to 2009/10 (estimated) is shown below.

Table 1: Crown Court Advocacy Expenditure (£m - cash)

	2006/07	2007/08	2008/09	2009/10 (estimated)
AGFS	171	209	246	282
VHCC	47	56	51	47
EPF	61	18	7	5
Total	279	283	304	334

3. Consultation Options

- 3.1 The Ministry of Justice consultation document set out two options for reforming advocates graduated fees:
- Option 1: A one-off reduction of 17.9% in all advocates graduated fees, which would bring remuneration for defence advocates in line with rates payable to prosecution advocates by the Crown Prosecution Service (CPS); or
 - Option 2: A staged reduction over three years of 4.5% each year (a total reduction of 13.5%). This option would only achieve the required level of saving if the AGFS were extended to cover cases due to last up to 60 days at trial as set out in the Legal Services Commission's consultation paper "Very High Cost (Crime) Cases 2010" published on 2 December 2009.

- 3.2 The Legal Services Commission consultation document set out three options for reforming VHCC arrangements for advocates:
- Option (i): Maintain current Panel scheme. This option does not introduce any changes to the current Panel scheme but it involves reverting to the rates of pay achieved through the 2007/8 Panel tendering exercise. This would achieve 5% savings against the base case scenario or 'do nothing' option.
 - Option (ii): Benchmarking scheme. Under this option advocates would not operate under a Panel but under an individual case contract arrangement. Despite the contractual relationship, this scheme would not be fundamentally different in operation to the current VHCC scheme but it attempts to arrive at some middle ground between a graduated fee scheme and an hourly rate scheme.
 - Option (iii): Advocates' Graduated Fee Scheme (AGFS) extension. The third option for a replacement scheme for advocates on VHCC work would be to extend the range of cases that are captured by the Advocates' Graduated Fee Scheme (AGFS). Under this option, we would propose to amend the VHCC definition. This approach will not replace the requirement for a separate VHCC scheme and all cases that would fall outside the AGFS will be treated as VHCCs to be managed under an hourly rate scheme as now.

4. Decision

- 4.1 The views of consultees are summarised in **the joint MoJ and LSC** response to consultation: *Legal Aid: Reforming Advocates Graduated Fees and Very High Cost (Crime) Cases 2010*. This paper also sets out the chosen course of action.
- 4.2. The Government has decided to implement Option 2: a staged reduction in AGFS fees of 13.5% over three years, coupled with extending AGFS to cases due to last up to 60 days. Cases due to last more than 60 days will continue to be contracted under the VHCC arrangements, with the 4.92% reduction in fees proposed in the LSC's option (i). We believe this is the fairest way to achieve the level of savings we wish to make.
- 4.3 In deciding how best to proceed, the Government has concluded that:-
- The existing arrangements (the "base case") are not affordable within the financial constraints that the Ministry faces.
 - Option 1 would have a greater impact on the more junior advocates and is, therefore, less desirable. Although the level of savings is broadly in line with Option 1, the Government's view is that a staged reduction – that can achieve a similar level of saving – is preferable as this will give advocates more time to adjust to the changes. However, in view of the level of savings committed to the Ministry

of Justice in Budget 2010, further policy options will continue to be examined across the range of the Ministry's responsibilities including for legal aid.

- 4.4 In coming to a decision, the Government also believes it legitimate to compare payments for advocacy made by the CPS to those made to defence advocates via legal aid. The merger of CPS and the Revenue and Customs Prosecution Office (RCPO) has provided an opportunity to provide greater consistency in prosecution fees. The Government's view is that broad parity between RCPO and CPS fees provides a strong case for aligning defence fees more closely. The CPS continues to source good quality advocates at these rates.

5. Cost Benefit Analysis

Description

- 5.1 Option 2 is a staged reduction of 13.5% (by year three – April 2012). This option will only achieve the required level of saving (£47-48 million savings in a steady state) if graduated fees for advocates are extended to cover cases due to last up to 60 days at trial as set out in the Legal Services Commission's consultation paper "Very High Cost (Crime) Cases 2010" published on 2 December 2009, while fees for the remaining VHCC cases, due to last 61 or more days, are reduced by 4.92%. Currently cases due to last 40 to 60 days are taken under VHCC contract by the LSC. Moving those cases into the graduated fees schemes will, we estimate, save around 30%.

Costs of Option 2

First Round Costs

- 5.2 Option 2 will impose direct costs which are more certain to identify. These are:

- **LSC:** There will be some basic administration costs in rewriting the AGFS to incorporate the proposed new fee rates. Writing new guidance, project time and training will all contribute to this cost but are expected to be minimal. The major implementation cost involved will be the IT costs required to change the IT systems which handle AGFS payments. This will constitute a one off fixed cost.
- **Providers:** The aggregate cost to providers of the service will be a £47 m decrease on fees paid under the base case/'do nothing' option in a steady state. This combines £36.3m from AGFS cuts plus £10.8m from the VHCC scheme (the combination of savings from cases that transfer into AGFS plus reduced fees on the cases remaining as VHCCs). Given the profile of cases in the system, we have estimated that it will take up to 7 years to get to a steady state where all cases will be paid on the same basis. The profile of payments under this option is shown in Table 2 below.¹

Table 2: Scheme and Year Profiles Option 2

	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17
Option 2 13.5%	£m	£m	£m	£m	£m	£m	£m
AGF cuts	7.17	19.19	31.29	36.22	36.29	36.29	36.29
VHCC	1.55	6.39	8.75	10.33	10.65	10.75	10.75
RAB	8.72	25.58	40.04	46.55	46.94	47.05	47.05

¹ The commentary on Option 2 in the Impact Assessment published with the MoJ Consultation Paper in December 2009 erroneously stated that the savings shown in the second line of the table arose solely from the transfer of 41-60 day cases into AGFS.

CASH	0.45	12.02	22.68	36.96	42.36	47.54	47.05
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Second Round Costs

5.3 Option 2 may lead to the following indirect costs which are more uncertain than the direct costs as these will depend on behavioural changes:

- Compensatory adjustments on the part of advocates:** It is possible that as a result of the reduction in the fees paid to advocates, there may be an incentive to make negative compensatory adjustments to the way that they deliver services. In theory, advocates may be incentivised to spend less time on cases where their fees will be reduced and they will be earning less profit. In addition, there may also be a perverse incentive to take on fewer cases. Another important quality consideration might be the *impact on different grades of lawyers to take on extra work*. It is possible that the effects of a decrease in fees may have a proportionately larger impact on QCs because the fall in fees could potentially represent a bigger disincentive to them than juniors. At the margin, a QC might have less of an incentive to take on an extra case than a junior because he/she is likely have a different *marginal rate of substitution* between labour and leisure. However, the CPS has not reported any problems in attracting good quality advocates as a consequence of the differential in fees paid compared with defence work.
- Incentives to transfer cases to the VHCC:** It is possible that as a result of fee changes, there could be an incentive for firms to try to move cases from the Graduated Fee to the VHCC scheme. This would impact on final expenditure but it is difficult to assess the size of the impact. It would also affect other part of the wider justice system because resources would have to be allocated to cases that would take less time than initially predicted.
- Market Exit:** The fee decrease might be so great that the new fee level no longer represents a situation where the fees collected meet the cost to advocates of providing the service. This would result in advocates leaving the market. This is thought to be unlikely however, as the CPS has reported no problems with paying fees which will continue to be broadly lower than the proposed new AGFS rates.

Benefits of Option 2

First Round Benefits

5.4 Option 2 will lead to direct benefits to government that are identical to the costs on providers..

Second Round Benefits

- Predictability:** There are benefits for advocates in moving more cases into AGFS, particularly for the most efficient who will do well under a system that pays for outputs rather than on an hourly rates basis (i.e. inputs). Such a scheme also provided certainty about fees for both the advocate and the LSC.
- LSC:** In the long term, the administrative benefits for the LSC will increase. With the removal of 90% of advocacy work from VHCCs and thereby from CCU case load, the CCU will, over time, see a gradual decrease in their resource needs. Whilst it is difficult at this stage to be certain about the level of savings, it is estimated that implementation of this option would see a reduction of between five and seven full time equivalent posts by the end of a three year period (July 2010 – July 2013).

Net Impact of Option 2

- 5.5 Option 2 will generate a **negative net present value** ranging between –£0.4m and -£0.8m. This is based on the assessment that Government revenue savings will be offset by equal loss to private provider, with the administration costs leading to an overall negative outcome.
- 5.6 There will be *non-monetised costs* from possible compensatory adjustments to the service provided by advocates, with potential market exit and associated costs of corrective action. *Non-monetised benefits* include the more efficient allocation of resources in the criminal law services market resulting from the correction of institutional inefficiencies described under the rationale for government intervention section (Section 2).

6. Enforcement and Implementation

- 6.1 Option 2 will be implemented by means of amendments to the Criminal Defence Service Funding Order made on behalf of the Lord Chancellor. We envisage that the earliest these changes could be fully implemented would be late April 2010 (on AGFS) and in mid-July 2010 (on VHCCs).

7. Specific Impact Tests

- 7.1 The Impact Assessment Guidance sets out a number of tests which need to be assessed.

Competition Assessment

- 7.2 The market affected by these proposals is the advocacy fees market. Although, the impact on competition is difficult to fully assess at this stage, our initial assessment is that there are unlikely to be negative impacts on competition.

Small Firms

- 7.3 The Impact Assessment Guidance states that “*any new proposal that imposes or reduces the cost on business requires a Small Firms Impact Assessment Test*”. The assessment of the potential impacts has relied on the BERR Small Firms Impact Assessment Guidance (September 2007). Some respondents identified potential impacts on firms, though those appear to be common to all firms, and not particularly impacts on small firms.

Legal Aid and Justice Impact Test

- 7.4 The impact on the Justice System has been assessed as part of the cost benefit analysis (Section 5).

Human Rights

- 7.5 The proposals are compliant with the Human Rights Act.

Race / Disability / Gender Equality

- 7.6 An Equalities Impact Assessment has been completed. This is set out separately alongside the consultation response.
- 7.7 The MOJ and LSC have considered whether these proposals give rise to indirect sex and/or race discrimination under the Sex Discrimination Act 1975 and/or under the Race Relations Act 1976. It is not accepted that the proposals

to reduce AGFS by 17.9% or by 13.5% over three years give rise to indirect discrimination under those Acts. The proposals are for across-the-board reductions applicable to all advocates. They do not impose restrictions on which advocates can qualify to do legally aided criminal work or set prerequisites for doing such work. Nor do they oblige advocates who do criminal work to perform services in a certain way. The proposals do not, therefore, impose a requirement or condition on advocates, or impose or constitute a provision, criterion or practice, within the meaning of the relevant legislation.

- 7.8 Even if the proposals fall within the provisions of the legislation on discrimination and would have the effect of putting women or persons of the same race or ethnic or national origin at a particular disadvantage, in our view the effect is justified because the proposals are a proportionate means to achieve legitimate aims. as set out in our response to consultation.

Rural Proofing

- 7.7 Rural proofing is a commitment by Government to ensure domestic policies take account of rural circumstances and needs. It is a mandatory part of the policy process, which means as policies are developed, policy makers should consider whether their policy is likely to have different impacts in rural areas, because of particular circumstances and if so adjust the policy where appropriate, with solutions to meet rural needs and circumstances. Our assessment is that there are no specific rural impacts from the proposals.

Health Impact Assessment

- 7.8 The Health Impact Assessment considers the effects policies, plans, programmes and projects have on health and well-being, and in particular, how they can reduce health inequalities. Screening questions for health and well-being are provided by the Department for Health. Our assessment is that there are no impacts on health from the proposals.

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	Yes/No
Small Firms Impact Test	Yes/No	Yes/No
Legal Aid	Yes/No	Yes/No
Sustainable Development	Yes/No	Yes/No
Carbon Assessment	Yes/No	Yes/No
Other Environment	Yes/No	Yes/No
Health Impact Assessment	Yes/No	Yes/No
Race Equality	Yes/No	Yes/No
Disability Equality	Yes/No	Yes/No
Gender Equality	Yes/No	Yes/No
Human Rights	Yes/No	Yes/No
Rural Proofing	Yes/No	Yes/No

Part Two: Revised Initial Impact Assessment on Litigators

Summary: Intervention & Options

Department /Agency:

Ministry of Justice/
Legal Services Commission

Title:

Reforming Advocates Graduated Fees and Very High Cost (Crime) Cases 2010 Part Two - Impacts on Litigators

Stage: Consultation

Version: 2.0

Date: 5 April 2010

Related Publications: Very High Cost (Crime) Cases 2010 – A Consultation Paper

Available to view or download at: <http://www.legalservices.gov.uk>

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Why is government intervention necessary? The current VHCC scheme for both litigators and advocates is due to expire on 13 July 2010. We must therefore have a replacement scheme ready for implementation in time for 14 July 2010.

What are the policy objectives and the intended effects? While maintaining the broader objectives of the VHCC scheme, the new proposals will have to meet a savings target of 4.92%. These savings are crucial in the current economic downturn and they would help the MoJ to live within its financial envelope and to protect other parts of the Legal Aid budget.

What policy options have been considered?

In the consultation paper we set out our consideration of two options:

Option 1: to maintain the current litigator Panel scheme but revert to the 2007/08 Panel tender rates; and

Option 2: to extend the Litigators' Graduated Fee Scheme.

We are now considering a variant of option 1: individual case contracts for litigators.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

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

Ministerial Sign-off For Final Decision:

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:



Lord Bach, Parliamentary Under Secretary Of State

5 April 2010

Summary: Analysis & Evidence

Policy Option: 1 (revised)	Description: Individual case contracts for litigators		
COSTS	ANNUAL COSTS		<p>Description and scale of key monetised costs by 'main affected groups'</p> <p>A reduction in the rates as proposed would see a 4.92% decrease in the headline rate. All other rates would be decreased to maintain the same proportionality as with the current rates. The cost of such a change would impact, primarily, on VHCC litigators who would see a reduction of around £3 million per annum across the VHCC population.</p> <p>Over a three-year scheme period (July 2010 – July 2013), the estimated total cost to VHCC litigators would amount to £6.4 million (RAB).</p>
	One-off (Transition)	Yrs	
	£ 0.5m in FY10/11	3	
	£ 2.2m in FY11/12		
	£ 2.7m in FY12/13		
	£ 1m Apr 13 – Jul 13		
Average Annual Cost (excluding one-off)			
£ 3m	Total Cost (PV)		£6.4 million (RAB)
Other key non-monetised costs by 'main affected groups'			
BENEFITS	ANNUAL BENEFITS		<p>Description and scale of key monetised benefits by 'main affected groups'</p> <p>Such a reduction in the rates would see a potential cost reduction for the fund of £0.5 million in FY 2010/11, £2.2 million 2011/12 and £3 million per annum there after.</p> <p>Over a three year scheme period (July 2010 – July 2013), the estimated total cost reduction for the legal aid fund would amount to £6.4 million (RAB).</p>
	One-off	Yrs	
	£ 0.5m in FY10/11	3	
	£ 2.2m in FY11/12		
	£ 2.7m in FY12/13		
	£ 1m Apr 13 – Jul 13		
Average Annual Benefit (excluding one-off)			
£ 3m	Total Benefit (PV)		£6.4 million (RAB)
Other key non-monetised benefits by 'main affected groups'			
<p>The primary indirect benefit of this option is that we would continue with a scheme that is currently in operation and is familiar to both the profession and LSC. Litigators have already requested that we make no operational changes to the litigator scheme. The indirect benefits of this option are therefore likely to be quite significant.</p>			
Key Assumptions/Sensitivities/Risks			
<p>The risk with this option is likely to surround the litigator's acceptance of a scheme which includes a cost reduction. The cost of a rejection of this scheme will be the potential for defendants on high profile cases to have difficulties in gaining representation.</p>			
Price Base Year 2009	Time Period Years 3	Net Benefit Range (NPV)	NET BENEFIT (NPV Best estimate) £ 0.0m
What is the geographic coverage of the policy/option?		England and Wales	
On what date will the policy be implemented?		14 July 2010	
Which organisation(s) will enforce the policy?		LSC and MoJ	
What is the total annual cost of enforcement for these organisations?		£ minimal	

Does enforcement comply with Hampton principles?		Yes		
Will implementation go beyond minimum EU		N/A		
What is the value of the proposed offsetting measure		£ N/A		
What is the value of changes in greenhouse gas		£ N/A		
Will the proposal have a significant impact on		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	£	Decreases	£	Net £

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

Evidence Base for IA of Litigator proposals

1. Scope of Impact Assessment

- 1.1 As we set out in the consultation paper, the Ministry has to make £1 billion of efficiency savings by March 2011. In addition, in his recent Pre-Budget Report, the Chancellor announced that an additional £360 million of efficiency savings would be realised in the Criminal Justice System, in part through reforming legal aid.
- 1.3 The LSC consultation document proposed two options in relation to litigator fees in VHCCs in order to contribute towards the savings the Ministry needs to make.

2. Rationale for Government Intervention

- 2.1. The current VHCC scheme for both litigators and advocates is due to expire on 13 July 2010. We must therefore have a replacement scheme ready for implementation in time for 14 July 2010.
- 2.2. While maintaining the broader objectives of the VHCC scheme, the new proposals will have to meet a savings target of 4.92%. These savings are crucial in the current economic downturn and they would help the MoJ to live within its financial envelope and to protect other parts of the Legal Aid budget.
- 2.3. Therefore, a key part of all the proposals set out in the consultation paper is the need to reduce expenditure on VHCCs. In particular, the replacement scheme needs to deliver savings of the same magnitude as the 2007 Panel tendering exercise.

3. Consultation options

- 3.1. The two options we consulted on were:

Option 1: Maintain current Panel scheme

- 3.2. The first option would be to continue with the current Panel scheme. The LSC would offer Litigator Panel Contracts to all applicant organisations (litigator firms) that meet the requisite experience criteria.
- 3.3 This option would incorporate a rate reversion whereby the hourly rates for VHCC work under this option would be £145 per hour for a level A litigator / QC on a category 1 VHCC. Therefore, this option would impose a direct cut in remuneration for litigators working on all new VHCCs with Representation Orders granted on or after 14 July 2010.

Option 2: Extended Litigators' Graduated Fee Scheme

- 3.4 Under this option we proposed an extension to the current Litigators' Graduated Fee Scheme (LGFS). This option involved an amendment to the VHCC definition whereby we would extend the current VHCC threshold of days at trial under the first limb from 40 to 60 and to remove the second limb of the definition.
- 3.5 This approach would not replace the requirement for a separate VHCC scheme and all cases that would have fallen outside the LGFS would have been treated as VHCCs to be managed under an hourly rate scheme as now.

4. Next steps

- 4.1 The views expressed by respondents are summarised in *Legal Aid: Reforming Advocates Graduated Fees and Very High Cost (Crime) Cases 2010 – Response to Consultation*. This paper also sets out our chosen course of action.
- 4.2. The Government and LSC have decided to not implement Option 2. We note that the majority of respondents would prefer to maintain the current Panel scheme rather than extend the Litigators' Graduated Fee scheme. We acknowledge the views expressed about extending the current LGFS. We too agree that in light of the review on the current LGFS it is not appropriate to extend the LGFS to cover cases with trial estimates up to 60 days at this stage. The LSC will continue to collect further data on recently concluded VHCCs to help inform the LGFS review on these matters.
- 4.3. The Government and LSC have decided that in many respects Option 1 is the right way forward. However, a significant number of respondents have asked the LSC to reconsider its position on having a Panel contracting arrangement, which is an important feature of Option 1.. They suggest that instead, the LSC should consider further the possibility of individual case contracting (ICC) arrangements for litigators. We are also mindful that the Government has published high level proposals on restructuring criminal contracting which would not continue the panel.
- 4.4 We have considered all responses to the consultation and taken note of the comments made in relation to this specific point. We are persuaded on the basis of these views to revisit our policy decision on pursuing a Panel contracting arrangement. Therefore, at this stage, the Government wishes to explore a change to Option 1 before making any final decision about the replacement scheme for litigators. This drops the idea of a panel and changes Option 1 to the extent necessary to achieve that.
- 4.5 We are therefore today writing to all existing VHCC Panel Members and Consultative Bodies asking them to consider the proposal for the LSC to contract with litigators on an individual case-by-case basis for VHCCs from 2010 onwards. This letter is included at Annex [2] of this paper and is also available on the LSC website. We invite anyone with an interest in this matter to respond with views and comments.
- 4.6. This informal consultation on a longer term ICC scheme for litigators will run for six weeks from today and close on 18 May 2010. Following the close of this consultation, we will carefully analyse all of the responses received before making any decision on the future of a VHCC Litigator Panel. We will then publish our decision later in May 2010.

5. Impact of an ICC scheme for litigators

- 5.1 It is important to note the following points when considering this new third option:
 - Individual case contracts would only be available to Approved VHCC Litigators (ie. those firms that are able to satisfy the eligibility criteria.)
 - There would be no change in the operation of the scheme.
 - Each individual case contract would apply the 2008 Panel rates.
 - The terms and conditions of the contract (including the eligibility criteria) would be the subject of a separate contract consultation with the representative bodies in May / June 2010.
- 5.2. The financial impact of this revised Option 1 would therefore be the same as the original. An ICC scheme would also incorporate a rate reversion whereby the hourly rates for VHCC work under this option would be £145 per hour for a level A litigator /

QC on a category 1 VHCC. Therefore, this revised Option 1 would impose a direct cut in remuneration for litigators working on all new VHCCs with Representation Orders granted on or after 14 July 2010.

- 5.3 The cost of such a change would impact, primarily, on the VHCC defence litigators, who would see a reduction of around £3 million per annum across the VHCC population. This would translate into a saving to the legal aid fund of approximately £6.4 million (RAB) over a three year period.
- 5.4. This revised Option 1 does however appear to have some significant support from practitioners (as evidenced by responses to the LSC consultation). Therefore, we predict that the non-monetary benefits are likely to outweigh those for maintaining a Panel scheme.

Impact on current Panel Members vs non-panel members

- 5.5 It is important to note at the outset that whichever scheme is implemented as the long term replacement scheme for litigators (ie. Panel or ICCs), there will always be eligibility criteria. The details of such criteria will be the subject of a separate consultation with representative bodies in May 2010. However, it is our current view that the criteria would be the same irrespective of the contracting method applied.
- 5.6 We appreciate that this variation to Option 1, if implemented, would remove the closed Panel arrangements, which at present restricts VHCC work to those that were successful in the 2007 tendering exercise. The accreditation process envisaged under ICC arrangements would enable not only existing Panel Members to become accredited but would also allow new firms and those firms that have developed the necessary experience over the last three years to also become accredited.

6. Cost Benefit Analysis

Description

- 6.1 Option 1 (both in its original form and as revised) involves a rate reversion whereby the hourly rates for VHCC work under this option would be £145 per hour for a level A litigator / QC on a category 1 VHCC. Therefore, this option would impose a direct cut in remuneration for litigators working on all new VHCCs with Representation Orders granted on or after 14 July 2010.

Costs of Option 1 (original and revised)

First Round Costs

- 6.2 The cost of such a change in rates would impact, primarily, on the VHCC defence litigators, who would see a reduction of around £3 million per annum across the VHCC population. Table 3 below sets out the forecast litigator preparation spend per VHCC contract under the 2008 Panel rates compared with the base case (all figures exclude VAT). The average hours used to calculate the spend are set out in Table 4 below. The figures in Table 4 are based on a sample of 1459 concluded VHCC contracts over a seven year period (2000-2007).

Table 3: Forecast litigator preparation spend per VHCC contract under reduced rate (excluding VAT) compared with current rate

£000	Category 1	Category 2	Category 3	Category 4
Average spend per VHCC contract at	359	199	57	43

base case				
Forecast spend per VHCC contract at 2008 Panel rates	341	189	54	41
Difference between base case and forecast spend	-4.83%	-4.90%	-5.13%	-5.16%

Table 4: Average litigator preparation hours per concluded VHCC contract by category

	Category 1	Category 2	Category 3	Category 4
Level A	679	538	246	175
Level B	978	829	300	225
Level C	1413	698	153	140

6.3 With regard to LSC administration costs there would be no direct impact. The LSC would still be required to run an accreditation process in place of a panel tender.

Second Round Costs

6.4 The indirect costs of both options are less certain and are likely to surround the litigators acceptance of a scheme which includes a cost reduction. The cost of a rejection of this scheme will be the potential for defendants on high profile cases to have difficulties in gaining representation.

6.5 If however, the litigators accept to work under such a scheme then behaviours may change in terms of requests for more time to undertake tasks in order to offset the cut in rates. This could however be mitigated through close contract management and clear guidance available to both litigators and CCU staff.

Benefits of Option 1 (original and revised)

First Round Benefits

6.6 Over a three year period (July 2010 – July 2013), there would be a financial saving of approximately £6.4 million (RAB). On the assumption that defence teams claim for work done three months in arrears and a month delay between claiming and payment, if we apply the proposed reduction in rates to new VHCCs from 14 July 2010, we estimate the overall cost benefit to be as detailed in Table 5 below. The calculations are based on a linear model of work done over the course of the financial year.

Table 5: Estimated overall cost benefit to legal aid fund on litigator spend under option 1 (both in its original form and as amended).

Financial year	08/09	09/10	10/11	11/12	12/13	Apr 13 - Jul 13
Historic RAB	£61m					
Estimated spend on current rates		£61m	£61m	£61m	£61m	£18m
Estimated spend on reduced rates (4.92% cut) over period			£58m	£58m	£58m	£17m
RAB saving in period			£0.5m	£2.2m	£2.7m	£1m

Second Round Benefits

- 6.7 The primary indirect benefit of option 1 is that we would continue with a scheme that is currently in operation and is familiar to both the profession and LSC. Litigators have already requested that we make no changes to the operation of the litigator scheme. The indirect benefits of option 1 are therefore likely to be quite significant.
- 6.8 The variation to Option 1 would share the same indirect benefit of the original option 1. However, in addition, litigators appear to prefer a scheme that is based on an individual case by case contracting relationship rather than having to join a panel.

Net Impact of Option 1 (original and revised)

- 6.8 Option 1 (original and revised) would generate a zero net present value. This is based on the assessment that the financial benefits to Government would be directly offset by the cost incurred by litigators.
- 6.9 This option has to be considered within the context of the non-monetised impacts which are more uncertain. Whilst the litigators could reject the proposed rates, the benefits of having a scheme that they are familiar with and understand the financial intricacies of may outweigh the cost.

7. Enforcement and implementation

- 7.1 The LSC would need to consult with representative bodies about the terms and conditions of the new VHCC Litigator Contract (whether that is a Panel Contract or an Individual Case Contract). The new contract will be enforced by the LSC pursuant to revised Regulations laid by MoJ.

8. Other specific impact tests

- 8.1. The Impact Assessment Guidance sets out a number of specific impact tests which would need to be assessed.

Competition assessment

- 8.2. Based on responses from the December 2008 VHCC consultation, the LSC's view is that each of the options is likely to have an effect on competition for litigator firms compared with the current rates of pay. This impact is likely to occur in the next tendering/accreditation exercise for any replacement scheme we have for July 2010 in that some firms may decide not to continue working on VHCCs due to the financial viability of providing their service. The rate reduction under these options may also restrict the ability of firms to offer a range of services.

Small Firms Impact Test

- 8.3. Historically, small firms are more likely to undertake category 3 and 4 VHCCs as opposed to category 1 and 2 VHCCs. Based on the cost impact assessment of the proposal to revert to the 2008 Panel rates across each of the four VHCC categories we believe that there may be an adverse impact on small firms. Whilst it is a marginal difference, category 3 and 4 rates would see a slightly greater cut in rates compared with category 1 and 2 rates. However, as the position is returning firms to the position of January 2008 where firms tendered on the basis of and were operating under the proposed rates we do not consider this to be a significant impact.

Legal Aid Impact Test

8.4 At a headline level these options are costed so that it would maintain the savings that were generated by the last tender before the interim rise in payment levels. In effect this means that it would make an additional 4.92% saving over the current interim scheme on work that is conducted on or after the effective date.

Race / Disability / Gender Equality

8.5 An Equalities Impact Assessment has been completed. This is set out separately alongside the consultation response.

8.6 The MOJ and LSC have considered whether these proposals give rise to indirect sex and/or race discrimination under the Sex Discrimination Act 1975 and/or under the Race Relations Act 1976. It is not accepted that the proposals to reduce AGFS by 17.9% or by 13.5% over three years give rise to indirect discrimination under those Acts. The proposals are for across-the-board reductions applicable to all advocates. They do not impose restrictions on which advocates can qualify to do legally aided criminal work or set prerequisites for doing such work. Nor do they oblige advocates who do criminal work to perform services in a certain way. The proposals do not, therefore, impose a requirement or condition on advocates, or impose or constitute a provision, criterion or practice, within the meaning of the relevant legislation.

8.7 Even if the proposals fall within the provisions of the legislation on discrimination and would have the effect of putting women or persons of the same race or ethnic or national origin at a particular disadvantage, in our view the effect is justified because the proposals are a proportionate means to achieve legitimate aims as set out in our response to consultation.

Sustainable development

8.5. Based on behaviour following the first VHCC tendering assessment, the LSC considers the reduced rates under these options carry a significant risk of delay and withdrawal from engagement in the scheme in the short term; and a refusal to take part in the development of any replacement VHCC scheme and working under such a scheme in the long term. In effect, by reducing the VHCC rates we are reverting to the position where withdrawal from VHCC work occurred between January 2008 and November 2008.

Rural proofing

8.6. 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.

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

8.8. Whilst we appreciate the differing financial constraints on providers and clients in rural areas, we do not believe the proposals will have a significant disproportionate adverse impact on these providers or clients.

9. Compensatory simplification

9.1. The Better Regulation Executive asks departments to state the value of the proposed offsetting measure on an annual basis. Departments must look actively for opportunities to simplify or remove existing requirements when they want to introduce

new regulation. The aim is to achieve a better balance between the creation of new measures and reducing existing requirements.

- 9.2. As yet reporting and data collection arrangements have not been determined, though it is anticipated that they will not change significantly from existing arrangements.

10. **Post-implementation review**

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