

**EXPLANATORY MEMORANDUM TO
THE LEGAL AID FOR CROWN COURT PROCEEDINGS (COSTS)
(AMENDMENT) RULES (NORTHERN IRELAND) 2009**

S.R. 2009 No. 267

1. This Explanatory Memorandum has been prepared by the Northern Ireland Court Service and is laid before Parliament by Command of Her Majesty.

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

2. **Purpose of the instrument**

- 2.1 This instrument amends the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (“the 2005 Rules”) in the following respects:

- (a) to refine the provision regarding applications for certification of a case as a very high cost case (“VHCC”), and to provide that, where the Northern Ireland Legal Services Commission certifies a case as a VHCC, they shall require the representative(s) to maintain contemporaneous records of the work done;
- (b) to introduce new maximum rates of payment for these cases; and
- (c) to introduce a new arrangement for the review by the taxing master of his initial determination of the costs payable in such a case, with an appeal to the High Court against this review decision.

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

- 3.1 The Rules will apply to cases certified by the Commission as VHCCs from 28th September 2009, save for the new review / appeal arrangements referred to at paragraph 2.1(c) above. Those arrangements will apply to all cases, except those in which determinations have been made before 20th July 2009.

- 3.2 However, with the legal profession being informed when the Rules are made (as referred to at paragraph 9.2 below), there is no discernable prospect that any individual solicitor or counsel is at risk of losing out financially as a result of any past behaviour that they would have altered had they known the rule would change. That is, any individual case in which the fees payable have been determined before 20th July

2009 will continue to be governed by the original four-stage assessment / appeal process.

4. Legislative Context

4.1 The instrument currently in operation is the 2005 Rules. They prescribe the remuneration for solicitors and counsel assigned under Articles 29 or 36(2) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.

4.2 Rules 16 and 17 of, together with Schedule 2 to, the 2005 Rules provide for special hourly rates of payment in VHCCs, in respect of which determinations are made by the taxing master. As currently defined, a VHCC is a case which, if it proceeds to trial, that trial would be likely to exceed 25 days. Those provisions will be amended from 28th September 2009.

5. Territorial Extent and Application

5.1 This instrument applies to Northern Ireland only. The new remuneration rates will replicate those which are paid in England and Wales, where VHCC cases are remunerated under a system of contracts.

6. European Convention on Human Rights

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

7. Policy background

- *What is being done and why*

7.1 Currently, the rates of remuneration being paid for VHCC cases in Northern Ireland are generally higher than the rates in England and Wales. The Court Service can see no justification for this, given that the work is broadly similar in both jurisdictions.

7.2 When the 2005 Rules were made, it was anticipated that relatively few cases would receive certification as a VHCC. However, since the Rules came into operation in April 2005, greater numbers have been certified than expected. Furthermore, the intended controls with the prescribed hourly rates of remuneration have been compromised because, in many instances, the representatives involved have failed to maintain contemporaneous records of preparation work done.

7.3 Regarding claims for payment, as made, the 2005 Rules provided a total of four stages for assessment and appeal by the taxing master and, ultimately, the High Court. However, with experience, the Court Service considered that this four stage process is unnecessarily

bureaucratic; and that one of those stages should be removed. Our view is that this amendment would provide benefits to all concerned, and would not be detrimental to the overall process.

- **Consolidation**

7.4 The Court Service has no plans to make a consolidating instrument. In effect, the current provisions contained in rules 16 and 17 of, together with Schedule 2 to, the 2005 Rules are being superseded by the new instrument.

8. Consultation outcome

8.1 Formal consultation took place on the proposed changes over a 14 week period between June and October 2008. That consultation covered two main issues. Firstly, the introduction of a system of contracts to remunerate solicitors and counsel in VHCC cases, similar to that which has been operating in England and Wales. Secondly, by way of transitional arrangements pending the introduction of contracts, the implementation of the England and Wales rates of remuneration, together with refining the procedure for certifying cases as a VHCC case.

8.2 In its response, the Law Society of Northern Ireland argued that higher rates of payment are justified in Northern Ireland because of the continuing security threat and because of (alleged) different prosecution / police practices that create additional work for solicitors in this jurisdiction. However, on the basis that the VHCC scheme remunerates the lawyers by way of hourly rates for preparation work, any additional hours required due to differing practices will be covered as an inherent feature of the scheme. The Court Service has no information to suggest that the rates in Northern Ireland should be higher (or, indeed, lower) than those in England and Wales.

8.3 Initially, the General Council of the Bar of Northern Ireland declined to enter into any consultation process in regard to the proposed system of contracts for VHCC cases. More recently, they argued that the transitional arrangements and the reduced rates of remuneration were unacceptable. However, as noted above in relation to the Law Society, the Court Service view is that no cogent reason has been advanced for continuing to pay higher rates for these cases in this jurisdiction.

8.4 In February 2009, the Court Service published a report on the outcome of the consultation. The report is available on the Court Service website at:

http://www.courtsni.gov.uk/en-GB/Publications/Public_Consultation/p_pc_responses_vhcc.htm

That Consultation Report invited comments on the conclusions and proposals (including the associated draft rules) contained in the report.

Since that time, further consultation has taken place with the legal profession and other stakeholders (including the judiciary and taxing master) regarding the proposed transitional arrangements. The discussions at this time have centred on the necessary practical steps to support the operation of the new arrangements, as referred to in paragraph 9.1 below.

9. Guidance

- 9.1 No specific guidance will be issued by the Court Service. However, as part of the preparatory work for the introduction of the new statutory requirement to maintain contemporaneous records of work done, the Court Service has been liaising with the taxing master in relation to developing guidance materials and claim forms which will issue to the legal profession. A series of information seminars are also planned.
- 9.2 Furthermore, when the Rules are made, under a standing protocol, the Court Service will be writing to relevant stakeholders – including the Law Society and the Bar Council – to provide them with copies of this instrument and to explain the changes it will make.

10. Impact

- 10.1 An Impact Assessment has been prepared; and a copy, as signed by the Minister responsible, is attached.
- 10.2 There will be costs to solicitors and counsel involved with the introduction of reduced rates of payment. Based on the estimated average reduction in fee rates for preparation work (the main area of cost), this cost will be in the region of £278k annually. However, it is considered that this is necessary to secure value for money in the discharge of public funds.

11. Regulating small business

- 11.1 The instrument does not apply to small business.

12. Monitoring & review

- 12.1 The operation of the new arrangements for certifying cases, together with the application of the new remuneration rates, will be monitored. This will take place alongside the programme to introduce a system of contracts similar to that operating in England and Wales.

13. Contact

Padraig Cullen at the Northern Ireland Court Service, Tel: 028 9041 2235 or e-mail: padraigcullen@courtsni.gov.uk can answer any queries regarding this instrument.

IMPACT ASSESSMENT

IMPACT ASSESSMENT SUMMARY: INTERVENTION & OPTIONS

Department/Agency: Northern Ireland Court Service	Title: Impact assessment of introducing a system of contracts for very high cost cases at the Crown Court in Northern Ireland and introducing new rates of remuneration.	
Stage: Implementation	Version: 1	Date: 25 November 2008

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

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

It is proposed to introduce a system of contracting between the NI Legal Services Commission (NILSC) and solicitors and advocates representing legally aided defendants in very high cost cases (VHCC) at the Crown Court. It is also proposed that new rates of remuneration would also be introduced. Whilst the NILSC is responsible for administering legal aid, this is done through a statutory scheme prescribed by the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (the 2005 Rules). To introduce the new system and rates, it would be necessary for the Court Service to amend the 2005 Rules. Introducing the system of contracts will assist the NILSC to forecast expenditure more accurately and produce some savings in the legal aid budget for VHCCs. This will be achieved through the lower rates of remuneration (to levels being applied in England & Wales) and through the eradication of duplicated work, the prevention of unnecessary work and by helping to ensure that work is carried out by fee earners of an appropriate level.

What are the policy objectives and the intended effects?

The introduction of contracting will facilitate the NILSC in better forecasting expenditure and exerting an enhanced level of control over costs to obtain better value for money from funds allocated to legal aid.

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

1. No intervention.
2. Implement changes to the 2005 Rules.

The preferred option is to implement changes to the 2005 Rules to introduce a system of contracting for VHCCs and the new rates of remuneration, now that consultation with the legal profession and other interested parties in Northern Ireland has concluded.

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

Provisions in the 2005 Rules require their operation to be reviewed every two years. The system of contracting would, therefore, be reviewed as part of the wider review process biennially. However, as there is a degree of uncertainty as to some of the future costs of the proposal, a policy review will be conducted one year after implementation.

Ministerial Sign-off for implementation stage impact assessment.

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

Bridget Keeney Date *11 December 2008*

Summary: Analysis & Evidence

Policy option: 1-2	Description: Implementation summary of options
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Annual costs	<p>Description and scale of key monetised costs by 'main affected groups'</p> <p>Solicitors and barristers working on very high cost cases at the Crown Court.</p> <p>Considered to be nil in relation to the contracting process, given that any additional work required by contracts will be paid for by NILSC. In terms of the new rates of remuneration, it is anticipated that there will be a reduction in the fees paid for VHCCs and effectively this is a cost to solicitors and advocates. The rationale behind the estimate is set out in the Evidence Base (for summary sheets) section of this assessment. This will be reviewed one year after implementation and then biennially thereafter as part of the wider review of the operation of the 2005 Rules.</p> <p>An estimate of the additional costs to be met by NILSC is set out in the Evidence Base (for summary sheets) section of this assessment.</p>
<p>One-off (Transition) Yrs £0</p> <p>Average annual cost (excluding one-off) £278,000</p>	
Total Cost (PV) £264,000	
<p>Other key non-monetised costs by 'main affected groups' None.</p>	

Annual benefits	Description and scale of key monetised benefits by 'main affected groups' Solicitors and barristers working on very high cost cases at the Crown Court. The rationale behind the estimate of the additional benefits to be obtained by solicitors and barristers is set out in the Evidence Base (for summary sheets) section of this assessment.
One-off (Transition) Yrs £0 Average annual benefit (excluding one-off) £74,080	
Total Benefit (PV) £70,380	

Other **key non-monetised benefits** by 'main affected groups'

Early and regular payment of legal aid fees to solicitors and barristers working on very high cost cases at the Crown Court.

Key assumptions/sensitivities/risks

None identified.

Price Base Year N/A	Time Period Years N/A	Net Benefit Range (NPV) £ N/A	Net Benefit (NPV Best estimate) £ N/A
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What is the geographic coverage of the policy/option?	Northern Ireland			
On what date will the policy be implemented?	New rates - January 2009 Contracts – September 2009			
Which organisation will enforce the policy?	NILSC			
What is the total annual cost of enforcement?	£120k			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	N/A			
What is the value of the proposed offsetting measure per year?	N/A			
What is the value of changes in greenhouse gas emissions?	N/A			
Will the proposal have a significant impact on competition?	No			
Annual cost per organisation (excluding one-off)	Micro N/A	Small N/A	Medium N/A	Large N/A

Are any of these organisations exempt?	No	No	No	No
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Impact on Admin Burdens Baseline		(Increase – Decrease)
Increase of £ N/A	Decrease of £ N/A	Net impact £ N/A

Evidence Base (for summary sheets)

Proposal - the introduction of a system of contracts for VHCCs at the Crown Court in Northern Ireland, with lower rates of remuneration.

Purpose and intended effect of measure

Objective

To introduce a system of contracts, including lower rates of remuneration, that facilitates the effective management of VHCCs at the Crown Court by the NILSC enabling it to forecast expenditure, deliver better value for money and bring an enhanced level of control over these types of case.

Option appraisal

Options

Option 1 - No intervention.

Option 2 - Implement changes to the 2005 Rules to facilitate contracting and introduce the new rates of remuneration.

Option 1 would mean that the NILSC would continue to face greater difficulties in the management and control of expenditure in VHCCs and the (short-term) forecasting of future expenditure commitments. It would also negate the opportunity to deliver better value for money in the spending of public funds.

Option 2 is the recommended option and should enable the objective set out above to be met by the NILSC.

Costs and benefits

Costs associated with the reduced rates of remuneration

To make an assessment of additional annual costs incurred by solicitors and advocates in VHCCs at the Crown Court arising from the new rates of remuneration, it would be possible to calculate the fees being paid currently in this type of case and apply a reduction based on the (average) percentage decrease in the new fee rates. Whilst this will provide an estimate of additional costs, it assumes that the number of cases being managed annually, the amount of work involved in the cases, the categories of cases and, therefore, the rate of remuneration, the fee earners involved etc will all remain unchanged year on year. Whilst this is unlikely to be the case, this is still considered to be the most appropriate means of arriving at an estimate of the costs involved.

From a data source of 18 completed VHCCs, the average duration of cases and the average fees paid were calculated at 16.5 months and £177k respectively. This indicates total annual expenditure of £2,317k on VHCCs. Where this figure is reduced by 12%, that is, the estimated average reduction in fee rates for case preparation work (the main area of cost), total annual expenditure reduces to £2,039k indicating that the cost to solicitors and advocates will be in the region of £278k annually.

Costs to be met by NILSC in servicing system of contracts

In arriving at a total figure for these additional costs, which will ultimately be met by the NILSC, the following assumptions have been applied.

- There will be 20 cases annually in Northern Ireland
- Each case will have 1 initial case/stage plan meeting plus 3 further stage plan meetings annually
- These meetings will last 1 hour and be attended by a Senior Solicitor, a Solicitor, Queens Counsel and a Led Junior Counsel
- The Senior Solicitor acting as Case Manager will attend 4 meetings with the NILSC Contract Manager annually to negotiate the task list with these meetings lasting for 2 hours
- Cases will fall within Category 1 or 2 and the hourly rate to be applied is the average of the two rates, namely £136 for Senior Solicitors and Queens Counsel, £119 for solicitors and £86 for Led Junior Counsel
- Appeals against decisions made by the Contract Manager will be 20% (16) of all task lists negotiated
- The Appeals Authority will incur equivalent costs to 3 lawyers drawn from a panel of solicitors and counsel who will be paid a daily fee of £320 or a half daily fee of £160
- Of the 16 appeals annually, half will attract a full day fee whilst the other half will attract a half day fee

These assumptions have mainly been based on information on the contracting process from the LSC in England and Wales who have been operating the system for a number of years.

Cost calculation

Activity	Type	Hours/days	Rate £	Total £
Case/stage plan meetings	Senior Solicitor	80h	136	10,880
	Queens Counsel	80h	136	10,880
	Solicitor	80h	119	9,520
	Led Junior Counsel	80h	86	6,880
Task list meeting	Senior Solicitor	160h	136	21,760
Appeal hearings	Appeal Authority	12d	960	11,520
			Total	71,440

Benefits to solicitors and advocates from the early payment of fees

As part of the process of operating under contracts, solicitors and advocates will receive staged payments of their fees following the sign off of completed stage plans (roughly every three months). This is different to the present situation where solicitors and counsel acting in VHCCs have to wait until the completion of the case before submitting their claims for assessment and payment. This means that payment for some of the work undertaken is often paid years in arrears. The earlier payment of fees will provide benefits to solicitors and advocates in that they would be able to clear debts or avail themselves of investment opportunities.

Again, from the data source of 18 completed 'very high cost' cases it was derived that there would be 5 staged payments during the lifecycle of an average case. The average fee was divided by 5 to arrive at the first and subsequent stage payments of £35,320. This was then reduced by 12%, that is, the estimated average reduction in fee rates for case preparation, to give a figure of £31,100. Compound interest at the rate of 5% per annum was applied to that figure and the other staged payments up to the completion of the case. This indicated that benefits in the average case would be £5,093, whilst over 20 cases, that is, the anticipated annual caseload, benefits to solicitors and advocates would be £101,860. This figure reduces to £74,080 in relation to the benefits to be obtained in a calendar year.

Equity and fairness

Contracts and the new rates will apply equally to all solicitors and advocates working on VHCCs in Northern Ireland.

Consultation with small business: the Small Firms Impact Test

It is considered that the introduction of contracting with new lower rates of remuneration will have a minimal effect on small solicitors' practices or individual barristers. This is because the lower rates remuneration will be offset by the regular and early payment of fees through the staged payment element of the new scheme. It should be noted that none of the respondents in the consultation exercise raised issues in this respect. This matter will, however, be considered again at the initial annual review.

Competition assessment

The introduction of contracting will have no effect on the granting of legal aid by the court and will, therefore, not impact on competition.

Enforcement and sanctions

Contracts will be managed by staff in a Very High Cost Case Unit within NILSC who will be responsible for ensuring that the 2005 Rules and the terms of the contracts are complied with. Both the 2005 Rules and the contract contain a range of sanctions to ensure compliance.

Consultation within government

The relevant interested body, that is, the Public Prosecution Service of Northern Ireland, has been involved in the development of this proposal and will be consulted further as part of the proposed consultation.

Public consultation

Copies of the consultation papers, the equality impact screening form and this assessment have been made available to the public in hard copy on request or electronically via websites maintained by the NILSC and the Court Service. The consultation period ran from 29 June 2008 to 31 October 2008.

Summary and recommendation

The recommended option will facilitate the effective management of VHCCs at the Crown Court by the NILSC enabling it to forecast expenditure, deliver better value for money and bring an enhanced level of control over these types of case. This will be achieved by amending the 2005 Rules.

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.

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