EXPLANATORY MEMORANDUM TO

THE CRIMINAL DEFENCE SERVICE (GENERAL) (No.2) (AMENDMENT No. 3) REGULATIONS 2007

2007 No. 3550

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

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

2. Description

2.1 This instrument is about legal aid in criminal cases. These Regulations amend the Criminal Defence Service (General) (No. 2) Regulations 2001 (S.I. 2001/1437) to provide that the right to choose a representative in a publicly funded cases is a right, in a Very High Cost Case, to choose only a representative who is a member of a Very High Cost Case (Crime) Panel set up by the Legal Services Commission

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

3.1 None

4. Legislative Background

4.1 These Regulations are made by the Lord Chancellor in exercise of the powers conferred by section 15(2)(d) of the Access to Justice Act 1999. They are subject to the negative resolution procedure (section 25(10) of the 1999 Act).

4.2 In accordance with Article 6(3)((c) of the European Convention on Human Rights, section 15(1) of the Access to Justice Act provides that individuals who receive publicly funded legal representation in criminal cases may choose their representative. However, as recognised by the case law of the European Court of Human Rights, this is not an absolute right. Section 15(2) gives a regulation-making power to say in what circumstances the right may be limited, paragraph (d) permitting regulations to provide that the right is to select only a representative of a prescribed description.

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

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

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

7. Policy background

7.1 Very high cost cases have been managed under individual case contracts by the Legal Services Commission since 2001. These arrangements were introduced in response to the rapidly growing expenditure being incurred in long and complex cases. It was widely recognised that the method of paying lawyers by determining appropriate fees after the event (*ex post facto* determination) did not exercise control over the increasing cost of these cases. The main difference between the old *ex post facto* system and individual case contracts is that work is agreed in advance through three monthly stage plans.

7.2 The policy objective of this instrument is to implement changes to the Very High Cost Case (Crime) Panel for the Crown Court in line with the recommendations made by Lord Carter. The Government set out its proposals for legal aid reform in *Legal Aid Reform: the Way Ahead* [1] published on 28 November 2006. This followed Lord Carter's final report "*Legal Aid A market based approach to reform"*[2] and the accompanying DCA / Legal Services Commission consultation paper "*Legal Aid: a sustainable future"*[3], both of which were published on 13 July 2006. These further developed the Government's strategy for legal aid as set out in *A Fairer Deal for Legal Aid*[4], published in July 2005 which set out the need to rebalance spending between civil and criminal legal aid.

7.3 Lord Carter proposed a number of amendments to the system of individual case contracts for very high cost cases (currently defined as those cases expected to last 41 days or more at trial).

7.4 Lord Carter believed that better value for money could be obtained for this work. by giving defence teams some probability of increased or

[1] Department for Constitutional Affairs, Legal Aid Reform: the way ahead (November 2006) Cm 6993
[2] ,Legal Aid: a market-based approach to reform (July 2006)
http://www.legalaidprocurementreview.gov.uk/publications.htm
[3] Department for Constitutional Affairs, Legal Aid: a sustainable future (July 2006) CP 13/06
[4] Department for Constitutional Affairs, *A Fairer Deal for Legal Aid* (July 2005) Cm 6591

more consistent volume in return for some reduction in hourly rates. To do so will involve limiting access for the VHCC panel to defence teams who can show a track record of experience in working on VHCCs and meet appropriate quality standards. This is preferable to allowing unlimited access for firms who may be so numerous that they do not actually get any - or get very little - work. The Legal Services Commission will work with panel members to recognise and incentivise efficient, high quality case management, as a means of delivering better value for money.

7.5 Following Lord Carter's review the Government and the Legal Services Commission conducted a consultation exercise. There were 2,372 responses to that consultation exercise, though only 126 responses commented on the VHCC proposals. Respondents recognised the need to tackle expenditure in this area. One respondent commented that "high costs cases are an area where efficiencies can be made without necessarily reducing the quality of service. Any tightening of restrictions is not necessarily a bad thing if it is sensible and proportionate". The majority of respondent argued that there was no need to create a panel, but most of those were a simple endorsement of the submission from one large criminal solicitors association. Many others, however, supported the creation of a panel.

7.6 The Government broadly accepted the proposals made by Lord Carter.

7.7 In addition to the wider public consultation undertaken in response to Lord Carter's report, the Legal Services Commission published a further consultation document "*Best Value Panel for Very High Cost Cases.*"[5] A response to that consultation "*Best Value Panel for Very High Cost Cases. Final Response to Consultation*[6]*"* was published in April 2007, together with a final Regulatory Impact Assessment[7]. A total of 56 responses were received, including seven from representative bodies. Responses from representative bodies did not, generally, support the proposals, though there was some qualified support from other respondents, mainly individual litigator firms. The Legal Services Commission responded to concerns about the experience requirements for the selection process by amending the criteria.

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

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

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

7.8 In order to introduce the panel, the Lord Chancellor will need to amend two other Statutory Instruments[8] before the panel can be implemented in January 2008.

7.9 Individuals who receive publicly funded legal representation in criminal cases can generally choose their representative. The instrument provides that in very high cost cases the choice of representative will be limited to members of a panel set up by the Legal Services Commission.

8. Impact

8.1 The Legal Services Commission has prepared an Impact Assessment for the reforms of the Very High Cost Cases scheme. A copy is available from www.legalservices.gov.uk or from the Ministry of Justice.

9. Contact

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

[8] Criminal Defence Service (Funding) Order 2007 (No. 1174) & Criminal Defence Service (Choice in Very High Cost Cases) Regulations 2001 (S.I. 2001/1169)