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Very High Cost Criminal Cases (VHCC) - Consultation

The Legal Services Commission is pleased to be invited to comment on the Northern Ireland Legal Services Commission (NILSC) consultation on Very High Cost Criminal Cases. We agree with the vast majority of the proposals and set out our detailed comments below.

Background

Who we are

The Legal Services Commission (LSC) commissions £2b of legal aid in England and Wales. We also make sure that about 2m people a year get the information, advice, legal help and representation they need to deal with a wide range of problems.

We work in partnership with solicitors and not-for-profit organisations to provide services to help people in need. Our vision is to make sure clients can access the help they need to address their problems.

How we work with the government

We are a non-departmental public body sponsored by the Ministry of Justice (MoJ). We play a big part in helping the MoJ achieve its aims of:

- promoting justice
- protecting the public
- increasing confidence in justice
- providing access to justice for all
- upholding rights
- safeguarding and modernising our constitution.

The Lord Chancellor and Secretary of State for Justice is accountable to Parliament for our activities and performance. The MoJ agrees its overarching

Public Service Agreement targets with the Treasury. We in turn set our objectives in discussion with the MoJ.

Consultation Response

Please find below our comments on specific elements of the proposals:

Consultation Paper:

- 3.11 – The consultation suggests that the introduction of this new scheme will remove the uncertain nature of the current ex post facto scheme. We agree that it will reduce the uncertainty but from our experience there will always be uncertainty due to the very nature of VHCCs.
- 4.4 – The consultation suggests a scheme whereby solicitor and advocates would make separate applications for certification. In our view, this would increase the admin burden for NILSC compared with a system whereby the defence team makes one application and the decision to certify applies to both solicitors and advocates.
- 4.5 – This paragraph suggests that revocation of a certificate and ultimately the termination of a contract would have no effect on the grant of legal aid and that the legal team will be remunerated under an alternative scheme. We would comment that this would weaken the strength of the contracting scheme, and should only be used in exceptional circumstances.
- 5.1 – This paragraph discusses the appeals authority. A point of clarification here is that all appeals on VHCCs in England and Wales are now dealt with in London. It may be the committee members are chosen from outside the area to avoid conflict but they are not heard elsewhere.

Contractual Terms:

We recognise that the contractual terms mirror closely those used by us. The comments we make reflect the operation of our contract in practice and discussions with the professional bodies about future contractual terms.

The contract is quite lengthy to operate as an individual case contract. We would recommend that you issue the full terms and conditions for the first contract and then issue schedules to the contract as further cases come their way. This way you will not need to set up panels and panel contracts and still reduce the admin burdens for both the provider(s) and NILSC.

The other comments on the contract derive from reconsiderations of some clauses in our contract, specifically:

- 7.1 – Conflicts of interest. We question whether the contract need require fulfillment of a professional obligation. This is a professional obligation for both solicitors and barristers and therefore we should consider whether there is a need contractually to have it in a contract.
- 8.1 – Relationship. Elements of this clause are quite vague and we question whether the contract requires this. Specifically, "...you and we agree to work together and with the other solicitors in mutual trust and cooperation..." We would suggest removing this entirely and rely on paragraph 8.2 to convey the same message.
- 9.2 – Replacing members of the defence team. The contract does not set out who determines the individuals' suitable experience. We assume this is the NILSC, with a right of appeal.
- 10.1 – Compliance with legislation. We question whether the contract need require compliance with legislation.
- 11 – Provision of information. The LSC revised its requirements for information to clarify the information required and the purposes.
- 21 – Amendments to the Contract. The LSC was the subject to a challenge brought under EU procurement legislation on the lawfulness of an amendment clause, which attempted to allow for the unilateral amendment of a contract in certain circumstances.

The NILSC may wish to consider the decision in the Court of Appeal in the Queen on the application of the Law Society and Legal Services Commission [2007] EWCA Civ1264 which found that "reserving a unilateral power to insert new technical specifications and to amend any existing technical specification, without any restriction is incompatible with the requirement in regulation 9(7) to specify any such requirements sufficiently precisely to allow a potential service providers to determine the subject matter of the contract".

As a result of this decision the LSC was forced to terminate contracts and re tender new contracts redrafted to limit the circumstances for amendments only to be allowed as a result of a change in legislation (as your term 22.3), or by agreement with the parties and the representation bodies.

- 22 – Ongoing changes. This is too wide and arguably unreasonable - see current VHCC Panel Contract - term 22.3.
- 24 – Breaches of contract – We consider this a simple and appropriate contractual solution.

If you have any queries about the contents of this response please do not hesitate to contact my office.

Yours sincerely

Carolyn Regan
Chief Executive
Legal Services Commission