

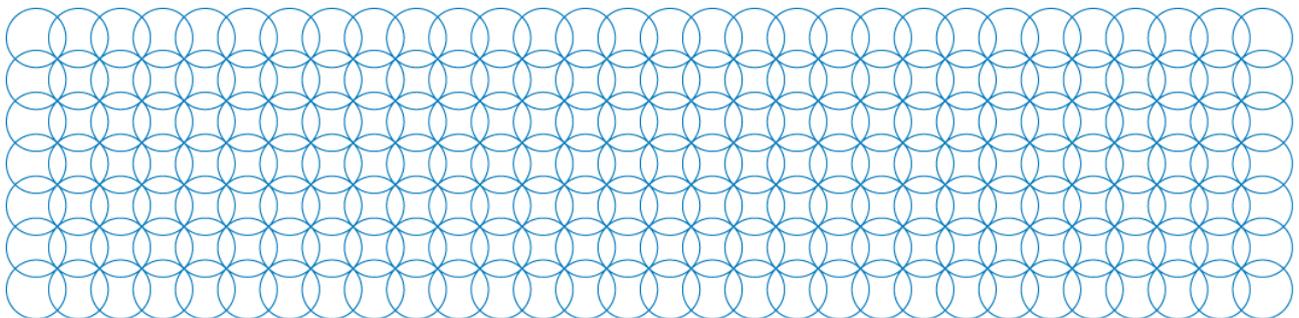


Ministry  
of Justice

# **Anti-Social Behaviour Crime & Policing Act 2014:**

## **Changes to remuneration for legal aid services**

Response to Consultation  
Published: January 2015







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of Justice

# **Anti-Social Behaviour Crime & Policing Act 2014:**

## **Changes to remuneration for legal aid services**

A consultation produced by the Ministry of Justice. It is also available on the Ministry of Justice website at [www.justice.gov.uk](http://www.justice.gov.uk)



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## Chapter 1: Executive Summary

### Introduction and case for reform

- 1.1 The Anti-Social Behaviour Crime and Policing Act 2014 (ASBCPA) received Royal Assent on 13 March 2014. The Act introduces a number of new injunctions and orders, including a series of orders to prevent sexual harm, criminal behaviour orders and the new injunctions under Part 1 dealing with anti-social behaviour (Part 1 injunctions). The new Part 1 injunction, which aims to prohibit a certain activity or requires some positive activity from the offender where they have caused nuisance or annoyance within a household context or harassment, alarm or distress elsewhere, will be a purely civil order and will be available against individuals aged 10 years or over. The new Part 1 injunction will replace Anti-Social Behaviour Injunctions (ASBIs) and Anti-Social Behaviour Orders (ASBOs) and several other tools designed to deal with anti-social individuals including:
  - Drinking Banning Orders (DBO);
  - Intervention Orders; and
  - Individual Support Orders.
- 1.2 Part 1 injunctions will be available in the county court or High Court for adults and in the youth court (sitting in its civil capacity) for under-18s. Appeals against an injunction will be made either to the county court (dependant on the level of judge that conducted the earlier proceedings to which the appeal relates), the High Court or the Crown Court (for appeals against decisions made by the youth court). Breach of an injunction will be punishable as civil contempt of court and for over-18s will be dealt with in the county court or High Court. For under-18s, proceedings will be heard in the youth court.
- 1.3 The new injunction will fall within the scope of the civil legal aid scheme as a result of amendments made by ASBCPA to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) (except on breach, whereupon contempt proceedings are prescribed as criminal for the purposes of legal aid). Given this, the Government has tried to develop proposals which enable legal services to be provided on anti-social behaviour matters by appropriate legal aid providers that minimise any impact on the current legal aid provider market dynamics and which enables appropriate remuneration to be made. The Government's overall aim has been to minimise any impact on legal aid providers and the legal aid fund.
- 1.4 In November last year, the Government outlined its proposals on how it intended to remunerate legal aid providers for Part 1 injunctions and related parenting orders. The Government sought views from legal professionals who would be directly affected by the changes. This document reflects the responses received to those proposals and describes how the Government intends to proceed.

## The consultation process and outcome

- 1.5 The Government received 18 responses to the consultation, the majority of which were from representative bodies of the legal profession or those providing legal aid services. On the levels of remuneration proposed for applications for injunctions, applications to vary or discharge and appeals of Part 1 injunctions, the majority of respondents agreed with the Government's proposal to remunerate such matters at the proposed civil legal aid rates. Respondents did, however, state their objection to the Government's proposal for remunerating breach of Part 1 injunctions. Their opposition centred on:
- (a) remuneration not being payable at civil rates. Respondents were of the view that as the majority of breach proceedings would take place in the county court, then remuneration should be payable at civil rates; and
  - (b) there should be no limitation on who undertakes breach proceedings. Civil as well as crime providers should be able to undertake breach proceedings on the basis that they do so now. Some respondents also took the view that civil rather than crime providers should undertake breach proceedings on the basis that these were civil proceedings.

Respondents' views on breach have been considered carefully by the Government. However, as breach of a Part 1 injunction will be punishable as contempt of court with the potential to attract a penal sanction and is subject to the criminal standard of proof, these proceedings will be in scope of the criminal legal aid scheme (by virtue of regulation 9(v) of the Criminal Legal Aid (General) Regulations 2013 (as amended)). Accordingly the Government remains of the view that breach of Part 1 injunctions should be treated as criminal proceedings for the purposes of legal aid.

- 1.6 The Government does not intend to exclude civil providers from undertaking breach proceedings if they elect to do so. Civil providers can apply for an Individual Case Contract (ICC). If justified and agreed by the Legal Aid Agency (LAA), a civil provider could represent an individual in breach proceedings under an ICC where the provider has had substantial involvement in the original proceedings, where continuing to act for the individual represents value for money, and where it is in the interests of justice for an ICC to be granted. This could be of benefit to clients with incapacity issues or learning difficulties, who might suffer from loss of continuity of representation. However, the Government retains the view that as the focus of breach proceedings will, of necessity, be on proving beyond reasonable doubt whether breach has occurred, then these proceedings should be simpler in terms of process than those for applications, variations, discharges or appeals. This being the case, and as breach matters are prescribed as criminal for the purposes of legal aid, then remuneration should be made based on the rates currently payable under the criminal legal aid scheme for representation in the magistrates' courts (being those which currently apply to similar proceedings, such as breach of an ASBO). These rates would apply to both criminal and civil providers undertaking this work. These rates would not apply to appeals.
- 1.7 Respondents also favoured the payment of travel and waiting for breach proceedings. However, most respondents argued that payment should be made at the relevant civil rate on the basis that the majority of these proceedings would take place in the county court. The Government, initially proposed that travel and waiting should be paid on top of the fixed fee (and in escape cases) to compensate crime providers for the change in venue for

proceedings relating to over-18s. The appropriate rate applicable would be £24 per hour, the rate which applies to breach of an ASBO currently. The Government, however, has reconsidered its earlier position in order to minimise the impact on legal providers and has concluded that travel and waiting should be paid to all legal aid providers where they are involved in breach proceedings in all courts. Travel and waiting will therefore be remunerated at £24<sup>1</sup> per hour and will be in addition to the fixed fee payable for representation, including cases where the escape threshold has been reached.

- 1.8 The Government therefore intends to amend the legal aid remuneration schemes on this basis. These changes will come into force on implementation of Part 1 of the ASBCPA, which is currently anticipated to occur in March 2015.

## Overall impact

- 1.9 Having carefully considered all the consultation responses, we consider that the original Impact Assessment published alongside the consultation continues to represent a fair assessment of the policy. Many of the impacts suggested by respondents are not necessarily or readily quantifiable, and we stand by our initial assessment that as the reforms proposed are intended to work within the current framework of the legal aid remuneration schemes, there should be no or minimal impact on provider income.
- 1.10 An Equalities Statement also accompanied the initial consultation document. This set out the Government's initial consideration of the equalities impacts on solicitors and advocates providing legal aid services from the reforms proposed. Following the consultation, we have reviewed our responsibilities under the Equality Act 2010<sup>2</sup>, and a revised Equalities Statement is published alongside this response. The Government's position remains that we do not anticipate any direct or indirect discrimination as a result of the proposals. Some providers have argued that in breach proceedings the applicable rates of remuneration should be the civil legal aid rates on the basis that breach proceedings will be heard mainly in the county court. However, given that the burden of proof required will remain the same (i.e. beyond reasonable doubt), it is therefore not expected that this will result in additional work compared to that undertaken by a legal aid provider on an ASBO breach case, albeit that there may be a change of venue. Remunerating legal aid providers at the rates applicable in what are currently ASBO proceedings is not expected to present any disadvantage to legal aid providers.
- 1.11 Respondents also focussed on the potential negative impact of the proposals in relation to vulnerable clients. These have been mitigated against by allowing civil providers to apply for an ICC as set out in paragraph 1.6 above.

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<sup>1</sup> It should be noted, however, that this rate may change later this year as a result of the Legal Aid Transformation criminal litigation reforms set out in Transforming Legal Aid – Next Steps: Government Response (available at: <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/transforming-legal-aid-next-steps-respons.pdf>).

<sup>2</sup> See section 149 of the Equality Act 2010

## Chapter 2: Introduction

- 2.1 This Chapter sets out the Government's response to the consultation paper "*Anti-Social Behaviour Crime & Policing Act 2014: Consequential changes to remuneration for legal aid services*".
- 2.2 A summary of the key issues raised by respondents to the consultation and the Government's response to those issues are set out below.

### Consequential changes to remuneration for legal aid services

#### *Applications for an Injunction*

- 2.3 Currently anti-social behaviour matters that involve sub-criminal matters (ASBOs) are subject to a heightened civil evidential test which equates to the criminal standard of proof. These cases are heard mainly in the magistrates' court with legal services provided by those who hold a criminal contract. Anti-social behaviour matters involving social housing (ASBIs) are heard in the county court with services provided by civil legal aid providers and are subject to the lower civil burden of proof. On implementation of Part 1 of the ASBCPA, the new civil injunctions will be subject to the civil standard of proof (i.e. on the balance of probabilities) irrespective of the type of anti-social behaviour being addressed.
- 2.4 All applications for a Part 1 injunction (and applications to vary or discharge) will be heard in the youth court (for under-18s) and the county court for over-18s and be subject to the same process regardless of the venue or the type of anti-social behaviour being addressed. An application for a Part 1 injunction will be subject to the civil (as opposed to criminal) standard of proof which is likely to result in a similar range of issues that currently apply in ASBI (and other civil) proceedings being considered by the court in all applications for a Part 1 injunction. This will widen the scope of arguments the court is likely to be legitimately required to hear in most cases and is therefore likely to result in most hearings involving similar considerations. It was on this basis that the Government proposed that it would be appropriate in such circumstances to remunerate all applications for a Part 1 injunction (and applications to vary or discharge) on the same basis, at the standard civil rates.
- 2.5 Having carefully considered the responses to the consultation, the Government has decided to proceed on the basis set out in the earlier consultation. This means that all applications of a Part 1 injunction (and applications to vary or discharge) will be remunerated at the rates set out in Table 1 at Annex B. These rates will apply to both civil and criminal legal aid providers for proceedings in the youth court, county court, Crown Court and High Court in these proceedings. Barristers in independent practice involved in Part 1 injunction proceedings in the youth court or Crown Court will also be remunerated at the civil rates applicable to the county court or High Court respectively.

### ***Appeals against an Injunction***

- 2.6 The routes of appeal for a Part 1 injunction will differ depending on whether the injunction is made in the youth court, county court or High Court. Currently appeals against an ASBI are heard in either the county court or High Court, whilst for ASBOs appeals are to the Crown Court. Representation in appeals against decisions made in these courts is mainly paid at hourly rates, although remuneration for appeals heard in the Crown Court is lower than that payable for appeals heard in the county court or High Court under the civil legal aid scheme.
- 2.7 The consultation document proposed that all legal aid providers involved in appeals against a Part 1 injunction should be remunerated at the standard civil legal aid rates set out in Table 1 of Annex B. Following careful consideration of the responses to consultation, the Government will be proceeding on the basis that appeals against applications of a Part 1 injunction will be remunerated at the standard civil legal aid rates, no matter the venue or the type of anti-social behaviour being addressed. Barristers in independent practice, involved in appeals against a Part 1 injunction in the Crown Court or High Court, will be remunerated at the standard civil rates applicable to the county court or High Court, respectively.

### ***Breach of an Injunction***

- 2.8 Breach of a Part 1 injunction will be punishable as contempt of court (with the potential to attract a penal sanction) and will be subject to the criminal standard of proof (i.e. beyond reasonable doubt) which, given the potential implications for the individual affected, would be treated as criminal proceedings for the purposes of legal aid. The criminal standard of proof is a higher test than that required for applications and appeals of a Part 1 injunction. As a result in the majority of breach proceedings the matters considered by the court should generally be less complex than those considered at the application or appeal stage. Where breach of an injunction has occurred the court will be considering whether the terms of the injunction have been breached or not. This process is therefore similar to proceedings in relation to breach of an ASBO (or other similar matters subject to the criminal standard of proof). The consultation paper therefore proposed that remuneration should be based on the fixed rates payable for representation in breach proceedings heard in the magistrates' court (i.e., the rates applicable in Category 1B and 2 in paragraph 5(2) of Schedule 4 to the Criminal Legal Aid (Remuneration) Regulations (as amended)), regardless of venue. There will be an escape fee to ensure appropriate remuneration for the small proportion of complex breach cases.
- 2.9 Having carefully considered the responses to the consultation, the Government has decided to proceed on the basis that all breach proceedings should be remunerated at the fixed rates payable under the criminal legal aid scheme for representation in the magistrates' courts. It does not share the view of respondents that remuneration should be made on the basis of the standard civil legal aid rates due to breach proceedings being heard mainly in the county court. Given that the burden of proof required will be the criminal standard (i.e. beyond reasonable doubt), the Government does not expect that this will result in additional work compared to that undertaken by a legal aid provider on an ASBO breach matter (or other similar case), albeit that there is a change of venue. The Government therefore intends to

remunerate breach proceedings on the basis of the rates set out at Table 2, Annex B<sup>3</sup>. Appeals against breach proceedings in the county courts will be remunerated at the rates applicable for similar proceedings in the Crown Court (as set out in para 10 of Schedule 4). Appeals in breach proceedings from the county courts to the High Court, and from the Crown Court to the High Court, will both be remunerated at the criminal rates applicable to work in the High Court (as set out in para 7(2) of Schedule 4).

- 2.10 We recognise that prior to LASPO, some contempt proceedings were within scope of the civil legal aid scheme and that bringing it within scope of the criminal legal aid scheme under LASPO resulted in a change in practice. The Government does not intend to exclude civil providers from undertaking breach proceedings in Part 1 injunction matters. Where they also hold a crime contract they can undertake this work or they can apply for an ICC which, if justified and agreed by the LAA, will enable a civil provider to continue to represent a legal aid client in breach proceedings in appropriate circumstances.

### ***Travel and waiting***

- 2.11 The consultation proposed that in breach proceedings, travel and waiting time should be paid to crime providers on top of the fixed fee; this would be at £24 per hour (the current rate in relation to representation at magistrates' courts in undesignated areas, being that which applies in criminal proceedings such as ASBO breaches). This proposal was made on the basis that only crime providers would do this work as they currently carry out the majority of their business at magistrates' courts and there was a case that they should be compensated for the additional time spent travelling and waiting as a result of attending breach proceedings in the county court. This payment would be made in addition to the standard fee applicable in the magistrates' court for breach proceedings. It would not just be included as part of the escape fee calculation (as for representation in the magistrates' courts in ASBO proceedings currently).
- 2.12 Having carefully considered the responses, the Government does not agree that travel and waiting time should be paid at the standard civil rates. The applicable rate for travel and waiting in most criminal proceedings is £24 per hour. However, the Government has concluded that in order to try and minimise the impact on legal aid providers, travel and waiting time should be paid to all legal aid providers undertaking breach proceedings in all courts. Travel and waiting would therefore be remunerated at £24<sup>4</sup> per hour. This rate would be paid in addition to the fixed fee payable for representation, and those cases where the escape threshold has been reached on the fixed fee scheme. Where civil providers undertake breach proceedings on the basis of an ICC, then the applicable rate for travel and waiting would be the same as that applicable to crime providers.

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<sup>3</sup> It should be noted, however, that these rates may change later this year as a result of the Legal Aid Transformation criminal litigation reforms set out in Transforming Legal Aid – Next Steps: Government Response (available at: <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/transforming-legal-aid-next-steps-respons.pdf>).

<sup>4</sup> It should be noted, however, that this rate may change later this year as a result of the Legal Aid Transformation criminal litigation reforms set out in Transforming Legal Aid – Next Steps: Government Response (available at: <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/transforming-legal-aid-next-steps-respons.pdf>).

## Annex A: Summary of responses to consultation

1. This Annex sets out a summary of the key points made by respondents to the Government's consultation paper "*Anti-Social Behaviour Crime & Policing Act 2014: Consequential changes to remuneration for legal aid services*".
2. The Government sought views on proposed changes to the legal aid remuneration schemes which are necessary as a consequence of the introduction of Part 1 of the ASBCPA. The changes required to the legal aid remuneration schemes are necessary if civil and criminal legal aid providers are to receive appropriate remuneration for legal aid help and representation in proceedings relating to applications, appeals and breach of Part 1 injunctions.

### Changes to the legal aid remuneration schemes

3. The consultation asked:
  - Q1. Do you agree that all applications for and appeals against Part 1 injunctions should be available under both the civil and criminal contracts and be remunerated at the applicable civil (non-family) hourly rates (current rates shown in Annex A)? If not, please give reasons.**
  - Q2. Do you agree that all breaches of a Part 1 injunction should be available under the criminal contract only and remunerated under the criminal legal aid scheme at applicable magistrates' court criminal rates (current rates shown in Annex B)? If not, please give reasons.**
  - Q3. In relation to travel and waiting time incurred as a result of attendance at the county court for the breach of a Part 1 injunction, do you agree that remuneration should be automatically payable to criminal legal aid providers at the criminal rates applicable in the magistrates' court? If not, please give reasons.**

#### Applications and appeals

##### *Key issues raised:*

4. The majority of respondents, including the representative bodies from the legal profession, agreed with the Government's proposed solution to remunerate legal aid providers at standard civil rates for legal help and representation for applications and appeals of a Part 1 injunction. The Law Society welcomed the proposal to pay the civil hourly rates for all of these cases. The LCCSA also agreed that criminal providers, along with those with civil contracts, should be permitted to undertake this work. Although they had no objection that applications and appeals of Part 1 injunctions should be made at the civil hourly rates, they also had some concerns that the application of the lower civil test to the evidence may shorten hearings which could impact on whether or not the matter escapes what they see as the very low current Housing fixed rate.

5. The Bar Council also welcomed the equality of opportunity provided by the proposed solution for both civil and criminal contract holders and supported parity of remuneration. However, the Bar Council were concerned that the application of the civil means and merits criteria to these proceedings could result in individuals who are currently eligible for criminal legal aid for ASBO proceedings not being eligible for full legal aid representation under the civil legal aid means and merits criteria. They were specifically concerned as to whether this could result in criminal providers securing more of this work which could risk losing experienced civil practitioners from the market who currently deal with applications for housing-related ASBOs and gang injunctions ('GANGBO's) under Part 4 of the Police and Crime Act 2009 and ASBIs in the county court.
6. Those individual respondents who disagreed with the Government's proposed solution for remuneration on applications and appeals of Part 1 injunctions were generally concerned whether it was appropriate, in a civil procedure, for both civil and criminal providers to undertake this work. One respondent suggested that criminal practitioners would not have sufficient knowledge or experience to deal with Part 1 injunctions, particularly where these concerned housing-related anti-social behaviour or where the injunction was made in relation to a person's occupation of a residential property. The respondent was specifically concerned that as Part 5 of the ASBCPA could provide mandatory grounds to possession (in some circumstances) if an injunction was breached, it was unlikely that criminal providers would understand the significance of this when representing a client on a Part 1 injunction. Similarly, another respondent felt it would be inappropriate for "housing-related" injunctions to be dealt with by criminal practitioners as they lacked the experience of civil housing law work and representation in housing injunction proceedings in the county court. This lack of knowledge, experience and expertise could result in legal aid clients receiving less than an adequate level of service and put them at a significant disadvantage.

#### *Government response*

7. As set out in the consultation paper, the proposed changes to the legal aid remuneration schemes are as a result of the new civil procedure being established by Part 1 of the ASBCPA and the policy intention to minimise any impact on the current legal aid provider market dynamics and enable appropriate remuneration to be made. Currently, anti-social behaviour issues that involve sub-criminal matters (ASBOs) are subject to a heightened civil evidential test which equates to the criminal standard of proof. These cases are mainly heard in the magistrates' court with legal aid services provided by those who hold a criminal legal aid contract. Anti-social behaviour matters involving social housing (ASBIs) are heard in the county court and are subject to the lower civil standard of proof. Part 1 of the ASBCPA, however, will replace ASBIs, ASBOs and several other tools designed to deal with anti-social behaviour matters (see above). When Part 1 of the ASBCPA comes into force, the new injunctions will be subject to the lower civil standard of proof (on the balance of probabilities). Applications for a Part 1 injunction (including applications to vary or discharge an injunction) will be heard in the youth court for under-18s and the county court for over-18s.
8. Applying the lower civil standard of proof will mean that in considering an application for a Part 1 injunction the court is likely to consider a similar range of issues that it does currently in ASBI (and other civil) proceedings. This could mean that the scope of arguments the court is likely to be legitimately required to hear in all cases will be wider. The Government therefore considers that all Part 1 injunction hearings involving applications (including

applications to vary, discharge or appeal) are therefore likely to involve similar considerations to those undertaken in current ASBI (and other civil) proceedings. The Government does not therefore anticipate a significant reduction in the length of hearings. As the same process will need to be followed for all applications, we consider it is appropriate to remunerate those providing legal aid services at the standard civil rates.

9. The ASBCPA brings all Part 1 injunctions within scope of the civil legal aid scheme. This in effect means that in determining eligibility for legal aid, all applications (including to vary and to discharge) and appeals for full representation will be assessed on the basis of the civil means and merits test for that form of service, regardless of the contract under which services are provided. The Government recognises that defendants in ASBOs are likely to pass the criminal merits (interests of justice) test but due to the application of the civil merits test a number of individuals may not be granted legal aid. However, the number of cases where this will occur is difficult to estimate due to the case-by-case variance in merits. The means and merits tests are fundamental principles of the legal aid scheme, focussing limited resource on the most financially vulnerable and strongest cases only and their application is consistent with bringing these proceedings within scope of the civil legal aid scheme.
10. Part 1 injunctions will encompass matters currently dealt with under provisions related to ASBOs and ASBIs. This being the case the Government considers it is appropriate, in order to ensure the necessary services are provided by those with appropriate skills and experience, to enable both civil and criminal legal aid providers to undertake Part 1 injunction application proceedings (including to vary and to discharge) and appeals. The Government's expectation is that civil providers, currently undertaking ASBI proceedings, are likely to continue to undertake Part 1 injunction proceedings, particularly if there is a need to provide specialist housing advice. Similarly, the expectation is that non-housing related anti-social behaviour (i.e. current ASBO) matters will continue to be carried out by crime providers.

### *Conclusion*

11. The Government therefore intends to proceed with the proposal to remunerate both civil and criminal legal aid providers at the standard civil rates for all applications and appeals of Part 1 injunctions as shown in Table 1 of Annex A.

### *Breach*

#### *Key issues raised:*

12. The majority of respondents to the consultation, including the representative bodies of the legal profession, disagreed with the Government's proposal to remunerate breach of Part 1 injunctions at the criminal legal aid scheme fixed rates applicable for representation in breach proceedings in the magistrates' courts. The main areas of concern raised related specifically to whether breach proceedings should only be undertaken by crime providers, particularly where the breach could result in a social landlord being granted mandatory grounds for possession. Respondents also argued that as the majority of breach cases would take place in the county court, then remuneration should be at the standard civil legal aid rates.
13. The Law Society stated that this proposal was of considerable concern to them on the basis that housing practitioners currently defend breach applications and it was their view that this

work was carried out under civil legal aid certificates. They therefore believed it made sense for housing practitioners to continue to be able to defend housing-related breach applications, as it would avoid duplication of work on the basis that a housing practitioner would normally be involved at the initial application stage. The Law Society also advised that as a result of a survey of crime providers, it was their view that crime providers were unlikely to be willing to take on this work.

14. The Bar Council shared similar concerns. Specifically, they stated that it was irrational for someone allegedly in breach of an injunction, and who wished to be represented, to have to find a new legal aid provider with a criminal contract. The new provider would be unfamiliar with their case and the original circumstances which led to the injunction being granted. The Bar Council also argued that contrary to the Government's view, breach matters were not generally more straightforward and would be even less so if the provider of legal services at the breach stage had very little or no knowledge of the initial application or the civil procedure by which it was obtained. They were also concerned that the Government's proposed arrangements did not appear to have considered what happens in the case of interim injunctions which are available pursuant to s.7 of the Act or where the findings of a proven breach are to be appealed.

#### *Government response*

15. Breach of a Part 1 injunction will be punishable as contempt of court and subject to the criminal standard of proof (i.e. beyond all reasonable doubt) which, given the potential implications for the individual affected, would be treated as criminal proceedings for the purposes of legal aid. Part 1 of the ASBCPA also provides that a decision by a court on a housing-related anti-social behaviour matter, which shows that an individual has breached a Part 1 injunction, will constitute a mandatory ground for possession. Alternatively, an applicant can continue to use the standard discretionary grounds applicable now, pursuing the breach of an injunction as part of possession proceedings.
16. Where breach of an injunction has occurred the court will be considering whether the terms of the injunction have been breached or not. This process is therefore similar to proceedings in relation to breach of an ASBO (or other similar matters subject to the criminal standard of proof). On this basis the Government remains of the view that these proceedings should be less complex than the proceedings relating to the initial application (or to vary or to discharge) or any appeal. If the applicant pursues possession proceedings on either the mandatory or discretionary grounds, then services would likely continue to be provided by civil providers with expertise in housing matters who would be remunerated at standard civil rates as now. Where, however, the claimant pursues contempt proceedings for breach of the injunction, these are criminal proceedings (under regulation 9(v) of the Criminal Legal Aid (General) Regulations 2013 (as amended)). This would mean that the criminal merits (interests of justice) and means tests would apply and the proceedings would be remunerated at the rates set out in Table 2 in Annex B, based on the remuneration rates for representation in the magistrates' courts (for example those in relation to ASBOs). These rates would not apply to appeals. The Government acknowledges that although contempt of court is dealt with as criminal proceedings for the purposes of legal aid and therefore falls to crime providers, it is aware that on introduction of LASPO some cases may have continued to have been granted civil legal aid rather than criminal, with services provided by civil providers at civil legal aid rates.

17. The Government, however, accepts that civil providers should not be excluded from undertaking breach proceedings if they elect to do so. If justified and agreed by the Legal Aid Agency (LAA), a civil provider could represent an individual in breach proceedings under an ICC where the provider has had substantial involvement in the original proceedings and where continuing to act for the individual represents value for money and it is in the interests of justice for an ICC to be granted. This could be of benefit to clients with incapacity issues or learning difficulties, who might suffer from loss of continuity of representation. In terms of remuneration, where a civil provider represents an individual in breach proceedings the same rates would apply as those to all other breach of Part 1 injunction matters, i.e. remuneration would be at the rates set out in Table 2 in Annex B, based on representation in magistrates' courts.

#### *Conclusion*

18. The Government therefore intends to proceed with the proposal to remunerate breach proceedings at the fixed rates listed at Table 2 of Annex B, based on rates for representation in the magistrates' court. The Government, however, acknowledges that civil legal aid providers should not necessarily be excluded from undertaking breach proceedings as there may be cases where it may be appropriate for them to do so. Civil providers electing to undertake breach proceedings can therefore apply for an ICC.

## **Travel and waiting time**

#### *Key issues raised*

19. The majority of respondents who responded to the question on the payment of travel and waiting time to criminal providers in breach proceedings at the county court agreed that it was appropriate that such a payment should be made. However, some respondents questioned whether the criminal travel and waiting rate was appropriate, some suggesting that the civil rate was more appropriate as the majority of proceedings would take place in the county court. The Law Society supported the payment of travel and waiting to crime providers given that in many cases they would be required to travel some distance from their office to the county court, and may have to wait a considerable time for only one case to be heard. However, they requested clarity on whether this rate would apply to all breach proceedings in the county court, including those where the case reached the fixed fee escape threshold. The Bar Council also supported travel and waiting being paid automatically without the threshold having to be reached. However, they made the point that if both civil and criminal contract holders are able to conduct breach proceedings, there should be parity of remuneration for travel and waiting at the current civil rate (£26.28 rather than £24.00). They suggested that this would enable those with a civil contract to conduct breach proceedings with some limited financial certainty as the current magistrates' rate was likely to be changed later this year pursuant to the Legal Aid Transformation criminal litigation reforms set out in Transforming Legal Aid – Next Steps: Government Response.

#### *Government response and conclusion*

20. Travel and waiting time is automatically payable for full representation under the civil legal aid scheme. This means that travel and waiting time for full representation incurred on all applications and appeals of Part 1 injunctions will be remunerated. Given that crime providers currently carry out the majority of their business at magistrates' courts, the

Government considered that it was appropriate that travel and waiting time should be paid to all providers attending breach proceedings in the county court. However, the Government has concluded that in order to try and minimise the impact on legal aid providers, travel and waiting time should be paid to all legal aid providers undertaking breach proceedings in all courts. Travel and waiting will therefore be remunerated at £24<sup>5</sup> per hour. This rate will be paid in addition to the fixed fee payable (and in cases where the escape threshold has been reached in the fixed fee scheme) for representation. Where civil providers undertake breach proceedings on the basis of an ICC, then the applicable rate for travel and waiting would be the same as that applicable to crime providers. We intend to proceed on this basis.

## Equalities Impact

21. The consultation asked:

**Q4. What do you consider to be the equalities impacts on individuals with protected characteristics who will be affected by this policy (i.e. providers of civil and criminal legal aid services (both barrister and solicitors) and their clients? Please give reasons.**

**Q5. Do you agree that we have correctly identified the range of impacts under the reforms proposed in this consultation paper? Please give reasons.**

**Q6. Do you agree that we have correctly identified the extent of the impacts under the reforms proposed? Please give reasons.**

**Q7. Are there forms of mitigation in relation to impacts that we have not considered?**

### *Key issues raised*

22. A number of responses considered that the proposals were likely to impact adversely on vulnerable legal aid clients; specifically those with disabilities including learning difficulties and mental health and capacity issues. Many respondents noted that our proposal for breach proceedings to be undertaken only by criminal legal aid providers would mean that vulnerable clients might have to find a new legal aid provider with a criminal contract and therefore suffer from a loss of continuity of representation. There was also concern that criminal legal aid providers would lack experience and knowledge of housing law and would provide an inferior service to clients. Some also commented that limiting breach proceedings to criminal legal aid providers would negatively impact on civil providers' incomes.
23. Some providers have argued that in breach proceedings the applicable rates of remuneration should be the civil legal aid rates on the basis that breach proceedings will be heard mainly in the county court. Paying the lower, criminal rates would put legal aid providers at a disadvantage.

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<sup>5 5</sup> It should be noted, however, that this rate may change later this year as a result of the Legal Aid Transformation criminal litigation reforms set out in Transforming Legal Aid – Next Steps: Government Response (available at: <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/transforming-legal-aid-next-steps-respons.pdf>).

24. Some respondents raised the concern that many clients who would previously have been granted legal aid for an ASBO case would now be unlikely to pass the civil legal aid means and merits test for a Part 1 injunction application or appeal. This could lead to many vulnerable people appearing in court without legal representation.
25. One respondent commented on the inequality between those who can pay for legal representation and those who are unable to, suggesting that it can be difficult to find legal aid representation. For those with a disability this can make it difficult to attend a solicitors' office within a reasonable commute.

#### *Government response*

26. Whilst the Government does not accept that the proposals will adversely affect vulnerable clients, to help offset the potential risk of loss of continuity of service we intend to allow civil providers to undertake breach proceedings where the LAA considers it is appropriate to do so. Civil providers can apply for an ICC which, if justified and agreed by the LAA, will enable a civil provider to continue to represent a legal aid client in breach proceedings where, for example, the legal aid client would benefit from continuity of representation, perhaps because the client has incapacity issues or learning difficulties.
27. We do not agree, however, that the proposals to remunerate breach proceedings at criminal rates will have a negative impact on legal aid providers. Given that the burden of proof required will remain the same (i.e. beyond reasonable doubt), it is therefore not expected that this will result in additional work compared to that undertaken by a legal aid provider on an ASBO breach case, albeit that there may be a change of venue. Remunerating legal aid providers at the rates applicable in what are currently ASBO proceedings is therefore not expected to present any disadvantage to legal aid providers.
28. The Government recognises that defendants in ASBOs are likely to pass the criminal merits (interests of justice) test but due to the application of the civil merits test a number of individuals may not be granted legal aid. However, the number of cases where this will occur is difficult to estimate due to the case-by-case variance in merits. To assess the potential for disproportionate impact we have considered the protected characteristics of the criminal legal aid client population (being those who would have been eligible under the criminal legal aid scheme). As men and BAME people are overrepresented among criminal legal aid clients in comparison to the general population, the application of the civil merits test may have a disproportionate impact on them. As ASBO-type proceedings often involve juveniles, there may be a disproportionate impact on under-18s too. However, we consider any such impact to be justified by the need to target limited public funding on the cases and persons that most require it. In respect of breach (or any case deemed so serious as to warrant being classified as a 'criminal charge'), criminal legal aid will remain available.
29. We do not believe that the changes to legal aid remuneration proposed in this consultation will impact on clients' ability to find a legal aid provider. As the reforms should ensure that necessary services remain available and are not expected to adversely affect providers, we do not expect there to be any impact on the sustainability of the legal aid market or the quality of legal services provided on anti-social behaviour matters.

## Annex B: Remuneration rates

**Table 1: Remuneration for legal aid services: Applications for and appeals against Part 1 Injunctions – Proposed rates**

### CONTROLLED WORK: LEGAL HELP

<i>Rate<sup>6</sup></i>	<i>Escape threshold<sup>7</sup></i>	<i>Applicable rate where escape threshold reached<sup>8</sup></i>	
£157	£471	Preparation, attendance and advocacy	£46.53 (London rate) £43.88 per hour (Non London Rate)
		Travel & waiting time	£24.62 per hour £24.62 per hour
		Routine letters out and telephone calls	£3.60 per item £3.47 per item

### LICENSED WORK: LEGAL REPRESENTATION

<i>Activity<sup>9</sup></i>	<i>Higher Courts</i>	<i>County Courts &amp; Magistrates' Courts</i>
Routine letters out	£6.75 per item	£5.94 per item
Routine telephone calls	£3.74 per item	£3.29 per item
Preparation and attendance	£71.55 per hour (London rate) £67.50 per hour (Non-London rate)	£63.00 per hour (London rate) £59.40 per hour (Non London rate)
Attendance at court or conference with Counsel	£33.30	£29.25
Advocacy	£67.50 per hour	£59.40 per hour
Travelling and waiting time	£29.93 per hour	£26.28 per hour

<sup>6</sup> Schedule 1, Part 1, Table 1, Civil Legal Aid (Remuneration) Regulations 2013 (as amended)

<sup>7</sup> Schedule 1, Part 1, Table 1, Civil Legal Aid (Remuneration) Regulations 2013 (as amended)

<sup>8</sup> Schedule 1, Part 2, Table 7(e), Civil Legal Aid (Remuneration) Regulations 2013 (as amended)

<sup>9</sup> Schedule 1, Part 3, Table 10(a), Civil Legal Aid (Remuneration) Regulations 2013 (as amended)

**REMUNERATION OF BARRISTERS IN INDEPENDENT PRACTICE IN RELATION TO WORK THAT IS NOT CONTROLLED WORK, ADVOCACY SERVICES IN FAMILY PROCEEDINGS OR OTHER LEGAL SERVICES IN RELATION TO INQUESTS<sup>10</sup>**

<i>Category</i>	<i>Hourly Rate</i>
Preparation and attendance in the High Court or Upper Tribunal	£71.55 (London rate) £67.50 (Non-London rate)
Preparation and attendance in the County Court	£63.00 (London rate) £59.40 (Non-London rate)
Attendance at court or conference in the High Court or Upper Tribunal	£33.30
Attendance at court or conference in the County Court	£29.25
Advocacy in the High Court or Upper Tribunal	£67.50
Advocacy in the County Court	£59.40
Travel and waiting time in the High Court or Upper Tribunal	£29.93
Travel and waiting in the County Court	£26.28

<sup>10</sup>Schedule 2, Civil Legal Aid (Remuneration) Regulations 2013. The rates applicable to the Youth Courts, where Counsel is assigned to a hearing, would be those that apply for County Courts. Where Counsel is assigned in the Crown Court, the applicable rates will be those that apply to the High Court.

**Table 2: Remuneration for legal aid services: Breach of a Part 1 Injunction – Proposed rates**

**STANDARD FEES<sup>11</sup>**

	Lower Standard Fee (£)	Lower Standard Fee Limit (£)	Higher Standard Fee (£)	Higher Standard Fee Limit (£)
<b>Undesignated Area Standard Fees</b>				
Category 1B	158.27	272.34	380.70	471.85
Category 2	279.45	467.84	640.94	779.64

**ESCAPE THRESHOLD RATES**

	<i>All areas</i>
Routine letters written and telephone calls per item	£3.56
Preparation hourly rate	£45.35
Advocacy hourly rate (including applications for bail and other applications to the court)	£56.89
Hourly rate for attendance at court where Counsel is assigned (including conferences with Counsel at court)	£31.03
Travelling and waiting hourly rate	£24.00

<sup>11</sup>Paragraph 5, Schedule 4, Criminal Legal Aid (Remuneration) Regulations 2013 (as amended). It should be noted, however, that these rates may change later this year as a result of the Legal Aid Transformation criminal litigation reforms set out in Transforming Legal Aid – Next Steps: Government Response (available at: <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/transforming-legal-aid-next-steps-respons.pdf>). In addition, only the undesignated area standard fixed fees are used as the designated area fees correspond to CJS areas. These are not readily compatible with the county court regime.



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