

Legal Aid: Paying for permission work in judicial review cases Equalities Statement

Introduction

1. The Government is mindful of the importance of considering the impact of legal aid proposals on different groups, with particular reference to users and providers of legally aided services.
2. In accordance with our duties under the Equality Act 2010 we have considered the impact of the proposals on individuals sharing protected characteristics in order to give due regard to the need to eliminate unlawful conduct, advance equality of opportunity and foster good relations.
3. Our analysis of the original proposal was included in the April 2013 consultation *Transforming Legal Aid: delivering a more credible and efficient system*.¹ We summarised the key issues that were raised in relation to equalities in our September 2013 response, *Transforming Legal Aid: Next Steps*.²
4. In *Judicial Review: Proposals for further reform*,³ we set out our initial view that the revised proposal would mitigate many of the equality-related concerns raised by respondents in response to the April consultation.
5. This annex builds on this previous equality analysis. It considers this proposal against our responsibilities under the Equality Act 2010 and specific equality issues raised by respondents.

Legal Duties

6. Under section 149 of the Equality Act 2010 (“the Act”), when exercising its functions the Ministry of Justice is under a legal duty to have ‘due regard’ to the need to:
 - Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Act;
 - Advance equality of opportunity between different groups (those who share a protected characteristic and those who do not); and
 - Foster good relations between different groups.
7. The relevant protected characteristics for those purposes are: age, disability, gender reassignment, marriage and civil partnership (the first limb of the duty), pregnancy and maternity, race, religion or belief, sex, and sexual orientation. However, the data presented here is that available, namely on clients’ age, gender, disability status and race, and for providers’ disability status, sex and race. Respondents did not raise particular points regarding the other protected characteristics, and this proposal raises no particular issues in respect of them.

¹ <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>, pages 148 to 149.

² <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps>, pages 202 to 203.

³ <https://consult.justice.gov.uk/digital-communications/judicial-review>

8. Consistent with the duty, and with the statutory objectives of section 149 of the Act in mind, we have considered whether and how the policies in question are likely to impact on people sharing protected characteristics.
9. The provisions of the Act currently in force contain, in Chapter 2, several forms of prohibited conduct, namely:
 - direct discrimination (section 13)
 - discrimination arising from disability (section 15)
 - pregnancy and maternity discrimination (section 17 and section 18)
 - harassment (section 26)
 - victimisation (section 27)
 - breach of a non-discrimination clause (section 61)
 - indirect discrimination (section 19)
 - failure to comply with a duty to make reasonable adjustments (section 20 and section 21)
10. Those forms of prohibited conduct are considered, where relevant, in more detail in the analysis that follows.
11. In relation to the second and third statutory objectives – advancement of equality of opportunity and fostering good relations – to which, under section 149, the Ministry is obliged to have due regard, guidance is provided in section 149(3) and (5):

‘(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to – remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; take steps to meet the needs of persons who share a relevant protected characteristic that are connected to that characteristic; encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.’

‘(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to— tackle prejudice and promote understanding.’
12. Those provisions indicate that the matters to which the Ministry must have due regard include the need for steps to be taken – although the duty remains one of due regard (as opposed to, for example, a duty actually to take steps or a duty to achieve a particular result). We have considered the relevance and implications of the policies in question for the advancement of equality of opportunity and the need to foster good relations with the guidance in section 149(3) and (5) in mind. Where relevant, we address the second and third limbs of the duty in more detail in the analysis that follows.

Methodology

13. In line with guidance published by the Equality and Human Rights Commission (EHRC), our approach to assessing the potential for particular disadvantages resulting from the proposals has been to identify the individuals whom the proposals would impact (the 'pool').
14. In this case the 'pool' is all JR cases which received legal aid funding in 2012/13. Cases affected by the proposals are those within this pool where permission is refused and cases where there is uncertainty as to whether payment would be made under the LAA's discretionary payment mechanism.
15. The aim of this analysis is to identify, where possible, whether persons who might be expected to lose as a result of the proposal share a protected characteristic and are expected to be disproportionately affected when compared to those who do not share that characteristic, as well as having due regard to the need to advance equality of opportunity and foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
16. In the case of clients, we have considered the impact on clients in all cases in receipt of legal aid for a JR case in 2012/13, and compared the characteristics of clients in cases that are expected to be affected by the proposals with those that are not. However, while the provider will bear a direct loss in all affected cases, the impact on the client is uncertain since the outcome from their case is not expected to change.
17. In the case of providers, we have assessed the impact on all providers in receipt of legal aid for JR work in 2012/13, and looked at whether there is any evidence that the proposal puts at a particular disadvantage a group sharing a protected characteristic. The detailed methodology for this analysis is described below.
18. In seeking wider views we also asked an equalities related question in the consultation:
Question 43: From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?
The Government would welcome examples, case studies, research or other types of evidence that support your views. The Government is particularly interested in evidence which tells us more about applicants for judicial review and their protected characteristics, as well as the groups on which they brought their claim.

Data sources

19. We have identified the following data sources as providing the most relevant information on potential equality impacts:
 - Legal Aid Agency (formerly the Legal Services Commission) (LAA) data on clients collected through provider billing for 2012/2013 (LAA Client Data). This includes records of clients' sex, age, race, and illness or disability status.
 - Legal Services Research Centre (LSRC) provider data, collected to support their *Routine Diversity Monitoring of the Supplier Base* reports. The survey was most recently undertaken in 2010 and represents the diversity profile of those managing / controlling legal aid providers' offices.
 - Published 2011 Census data, to enable comparisons with the general population.

20. Each of these data sources has some limitations. None of the data cover all of the protected characteristics. Our statistical analysis therefore only considers the available data on age, sex, race and disability. In addition:
- LAA client data is recorded by providers, not legal aid clients themselves, and is therefore unlikely to be as accurate as self defined data, particularly in respect of disability / illness and race.
 - As with many administrative datasets, the quality of the LAA client data is affected by the extent of missing data, particularly regarding illness / disability status and race.
 - LSRC's provider equality data is based on a survey of providers which collectively have a 69% response rate.
21. Around 60% of providers who undertook legally aided work in Judicial Review cases were matched to data on protected characteristics. Therefore the equalities analysis is based on around 60% of those providers who undertook work on a permission application in a JR case in 2012/13. While this does not therefore present a complete picture, we are satisfied that the sample size is sufficient to draw robust conclusions.

Initial Analysis

Transforming Legal Aid: initial analysis

22. The Government set out our initial analysis and sought views about the equalities impact of our proposals in the *Transforming Legal Aid* consultation.⁴

Final analysis

Judicial Review: Proposals for Further Reform: Key Issues Raised

23. Respondents to the further consultation have suggested that vulnerable people and certain groups with protected characteristics (in particular disabled people) would be particularly affected by proposals to limit permission payments for JR, as these groups are more likely to make up the client base for such cases. For example, respondents have argued that disabled people already face particularly high barriers to finding a legal aid practitioner in community care cases because they find it difficult to produce evidence of eligibility and to find a suitable adviser in what is a complex area of law already serviced by few firms. Community care cases, which generally involve disabled, mentally ill or elderly clients, can involve time-critical life and death situations, and may concern physical or emotional abuse, deprivation of liberty or a failure by public authorities to provide the services which the client requires (and to which they are entitled).
24. In *Judicial Review – Proposals for further reform*, we set out our initial view that the revised proposal should mitigate many of the concerns raised by respondents in response to the *Transforming Legal Aid* consultation regarding vulnerable clients who have meritorious cases. Respondents argued that any system of payment at risk, even with the possibility of discretionary payment, will carry adverse equalities impacts. One of the reasons put forward in support of this is that there is often a significant amount of work involved in permission applications. Respondents have argued that as a result of this, providers will be forced to turn clients away because

⁴ Transforming Legal Aid: delivering a more credible and efficient system (April 2013): <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid> (Annex K).

they simply will not be able to afford to take the risk that they will not be paid for their work.

25. One respondent stressed that even with the discretionary payment mechanism, implementation of the proposal would mean that community care cases will not be brought, meaning that access to justice will be denied to the disabled and mentally ill clients that generally make up the client base for those cases. It has also been argued that the risk to providers is also likely to lead to the Official Solicitor not being in a position to instruct solicitors to bring such challenges on behalf of protected parties with the result that they will not be able to access the services that they require.
26. Some respondents have argued that disabled people lack the capacity to represent themselves, unlike non-disabled clients, which places them at a further disadvantage when compared with non-disabled clients.
27. Other respondents highlighted the impact that the proposal would have on children and those from Black, Asian and minority ethnic (BAME) backgrounds. They have argued that in judicial review cases, which may include education, social services or community care challenges, children may be in care and are more likely to be from a BAME or migrant background.
28. Respondents argued that teenagers and young adults will be particularly disadvantaged because they are less reliable and more likely to disengage from proceedings, meaning that the uncertainties providers face are greater in their cases.
29. One respondent raised concerns about the impact on claimants in immigration cases and argued that the cumulative impact of reforms to legal aid and changes to judicial review must be assessed, noting that the proposed residence test would also have an impact on this group. It was also argued that the proposal may impact on the ability to bring challenges on public sector equality duty grounds.
30. Some responses raised concerns about the impact on the Junior Bar who are often instructed to draft summary grounds and therefore would either be required to undertake work at risk, or providers would no longer instruct barristers on permission applications. Responses argued that the proposal would therefore impact disproportionately on providers from a BAME background and women.
31. Respondents argued more generally that firms will not be able to operate when they do not know whether or not they will be paid for the work that they do and that the possibility of being paid in the future under the discretionary criteria will not alleviate this chilling effect. They argue that they will no longer be able to offer publicly funded judicial review work.

Government response

32. We set out in *Transforming Legal Aid: Next Steps* that we continue to believe that taxpayers should not be expected to pay the legal bills for a significant number of weak judicial review cases which are not permitted by the court to proceed as they fail the test for permission in judicial review. However, we acknowledged that respondents raised concerns about the equality impacts of the proposal. We therefore undertook further consultation on a proposal to introduce a discretion to permit the Legal Aid Agency to pay providers in certain cases which conclude prior to a permission decision. We believe that the additional flexibility provided through the factors that will be taken into account by the LAA, which have been modified and placed on a non-exhaustive basis following consultation, will mitigate many of the concerns raised by respondents.
33. The Government continues to believe that limited legal aid resources should be properly targeted at those judicial review cases where they are needed most, if the legal aid system is to command public confidence and credibility. Under our proposal the provider would still receive payment for meritorious cases through one of three routes: i) the case is granted permission (and therefore will be guaranteed payment at either legal aid or *inter-partes* rates); ii) if a case does not proceed to a permission decision, costs are agreed as part of a settlement or through a costs order; iii) if costs cannot be recovered in such a case, for example where a settlement which is clearly in the best interests of the client is only offered on the basis of no costs, but the case was meritorious, then the provider will be able to recover payment at legal aid rates under the LAA's discretion.
34. We consider this and the adjustment to the factors under the LAA discretion will ensure that pre-permission meritorious cases will continue to be paid.
35. We do not accept that the proposal would undermine access to justice. It is legitimate for Governments to focus limited resources on the cases that really require it and we do not believe it is right for unmeritorious cases to receive funding. Providers will continue to be paid, as now, for the earlier stages of a case and, where the courts grant permission, providers will continue to be paid for their work on the permission application. In meritorious cases which conclude prior to a permission decision but in which claimants are unable to recover costs as part of a settlement or through a costs order, providers may be able to obtain a discretionary payment from the LAA. In both cases, legal aid for the client will not be affected. We therefore do not agree, as suggested by some respondents, that the proposal would make it extremely difficult for most people with protected characteristics to qualify for legal aid to challenge decisions made by the state.
36. This reform affects the payment of providers and we do not consider that it impacts on clients other than in relation to unmeritorious cases which, following more careful scrutiny at the pre-action stage, may no longer be taken forward by providers. Clients could be more widely affected in their ability to pursue a judicial review if the changes were to have an impact on the sustainability of the legal aid market resulting in an adverse effect on service provision; however for the reasons set out in the Government response we believe this is unlikely. Potential impacts on clients may also depend upon behaviour change amongst providers, which cannot be predicted.

37. We have considered the implications of the reforms for the advancement of equality of opportunity and the need to foster good relations. We have considered the extent to which the proposed changes are compatible with the need to encourage such participation. We consider that where relevant, the reforms do not undermine attainment of those objectives.
38. The reform is intended to target limited legal aid resources at those judicial review cases where they are needed most, if the legal aid system is to command public confidence and credibility. For the most part, we do not consider changes in legal aid remuneration to be relevant to the need to advance equality of opportunity or foster good relations.
39. The primary responsibility of MoJ in administering the legal aid system must be to provide fair and effective legal aid to those clients most in need. While we have taken into account points made by respondents about the potential effect of this reform on providers and the junior bar, the specific levels of representation within given practice areas at the Bar and in the solicitors' profession are primarily the responsibility of the BSB and SRA.
40. Although MoJ is mindful of the need to encourage those with a protected characteristic to participate in public life and the need to advance equality of opportunity generally, MoJ does not believe that legal aid remuneration is the most appropriate policy instrument by which to achieve diversity within the professions or the judiciary. Were the reform to make the attainment of the objectives more difficult, we consider that the changes are necessary and justified in all of the circumstances (including the financial context), for the reasons we have set out.
41. We have considered how potential adverse impacts could be mitigated. We have revised the discretionary criteria consulted upon to take respondents' concerns into account. For example, the criteria will be non-exhaustive and instead become factors that the LAA would take into account in determining, in a case which concludes prior to permission, whether it is reasonable to make payment. This introduces a further degree of flexibility under which providers will be able to argue that they ought to be paid, further mitigating the potential effects on legally aided JR clients raised by consultees.

Impact on providers

42. We do not accept that providers will leave the market as a result of our proposal leading to a denial of access to justice for clients who may hold strong cases. We consider that it is likely that there will remain providers who undertake judicial review work, taking on cases which they consider to be of merit. It is proper that they scrutinise claims carefully before applying to the LAA for funding, but in a case where the LAA and the provider agree that the case is meritorious the client will still be represented (albeit that the provider will act at risk up to the point of a permission decision). In a meritorious case the provider will still be paid, either through costs from the defendant at *inter partes* rates or at legal aid rates because the case is granted permission or concludes prior to permission and LAA exercises its discretion in the provider's favour. For these reasons we do not accept that the proposal gives rise to a chilling effect on access to justice or is unlawful.
43. If providers continue to carry out work on the permission stage on a case but do not receive payment for that work then they will be negatively impacted by the proposal.

Methodology

44. Data is available on the following protected characteristics of legal aid providers: gender, race and disability status. These characteristics are based on majority ownership or majority control (OMC) of an organisation. LAA closed case administrative data shows that in 2012/13, 524 providers were recorded as receiving legal aid in a Judicial Review (JR) case. These providers have been matched to data held on the protected characteristics of the OMC of these organisations. Around 60% of providers in JR cases were matched to data on protected characteristics, meaning that equalities analysis can be carried out on around 60% of providers in receipt of legal aid for a JR case in 2012/13.
45. We have considered the characteristics of providers that are expected to be affected by the reforms, those carrying out cases where permission was refused (endpoint codes F & G) and all cases where payment may not be awarded (endpoint codes B, E, F & G)⁵ and compared these with all providers in receipt of legal aid for a JR case in 2012/13. Using this data, the analysis looks at what proportion of providers in receipt of legal aid for a JR case in 2012/13 would have been impacted by the reforms, and what the mean and median loss would have been for these providers. This allows us to look at whether majority owned or majority controlled providers with certain protected characteristics are more or less likely to be impacted by the proposed reforms. Median and mean losses are shown as a proportion of a provider's intake from the civil legal aid fund,⁶ rather than as an absolute loss. Mean losses should be treated with caution as these are skewed by a small number of firms seeing high losses and therefore the median is a better measure of comparison when looking at average losses for providers of different characteristics.
46. The analysis also looks at whether a particular group is over-represented compared with the general population and could therefore against this measure be put at a particular disadvantage as a result of the proposal.

Key Findings

47. The analysis finds that (within the pool of JR providers) providers where a member of the OMC is long-term ill or disabled are no more likely to be affected by the proposals than providers where no-one is disabled. Similarly, BAME providers are no more likely to be affected compared to White British providers, although where BAME providers do see a loss it is expected to be slightly higher on average compared with White British providers.
48. When looking at just cases where permission is refused, female majority owned/controlled providers are no more likely to be affected than male providers. However, when all possible losses are considered, there is evidence to suggest that female majority owned/controlled providers are more likely to be affected than male providers; however, the low number of female owned/controlled providers means this result cannot be stated with any confidence.

⁵ Endpoint codes are described in the accompanying impact assessment: *Reforms to Judicial Review*, paragraph 2.85.

⁶ It is not possible to incorporate LASPO changes into firm's fund take.

49. When compared with the general population, the analysis shows that male providers and providers of BAME race are over-represented compared with the general population. This suggests that these two groups could be disproportionately impacted by the proposals.

Race

50. Table 1 shows the proportion of providers that are expected to suffer a loss in revenue as a result of payment not being made in cases where permission is refused split by the race of the management. The table also gives mean and median loss in revenue for affected providers as a proportion of their civil fund take.⁷
51. The table shows that based on 2012/13 work undertaken, 36% of White British providers would have experienced a loss in revenue compared with 45% of BAME providers. However, this difference is not large enough to be statistically significant,⁸ meaning that it is not possible to conclude that BAME providers are more likely to be impacted by the proposals compared with White British providers.
52. Table 1 also gives the mean and median loss as a proportion of the civil legal aid fund take for providers that are affected by the proposals. This shows that BAME providers see slightly higher losses compared with White British providers: the median loss is 1.2% of civil fund take for BAME providers compared with 0.8% for White British providers. However, this difference in median loss is small.

Table 1: Revenue reduction as a % of civil fund take by race; reduction based on definite losses (endpoint codes F & G)

	Number of Providers	% affected	As % of Civil Fund Take	
			Mean Loss	Median Loss
White British	225	36%	13	0.8
BAME	78	45%	8	1.2
Split	26	65%	9	0.7
Total	329	41%	11	0.8

53. Table 2 gives the same data, but where the drop in revenue is based on all possible losses, both cases where permission is refused (endpoint codes F and G) and cases that end before a permission decision or where there is uncertainty as to whether payment would be made (endpoint codes B, E, F and G). Unlike with certain losses, the proportion of providers that could lose is slightly higher (75%) for White British providers compared with BAME providers (71%); however, again this is not a statistically significant result. This means that White British providers are no more likely to be affected by the reforms compared with BAME providers.
54. As with table 1, BAME providers have a slightly higher median loss than White British providers. While the difference is not large, when taken with table 1 this does suggest that losses for BAME providers are likely to be slightly higher than for White British providers.

⁷ 'Civil fund take' refers to total income from the civil legal aid fund.

⁸ Statistical significance looks at how certain we can be, given the difference in the size of the two groups, that two groups differ from each-other.

55. In conclusion, tables 1 and 2 suggest that while BAME providers are no more or less likely to be affected by the reform than White British providers; although where providers do see a loss in revenue this loss is likely to be slightly higher on average for BAME providers compared to White British providers. Whilst the consultation responses suggested that BAME providers would be especially hard hit and put at significant disadvantage due to the high proportion of BAME firms with five or fewer solicitors being driven out of the market, our analysis shows only a slight loss in average revenue.

Table 2: Possible revenue reduction as a % of civil fund take by race; all possible losses (endpoint codes B, E, F & G)

	Number of Providers	% affected	As % of Civil Fund Take	
			Mean Loss	Median Loss
White British	225	75%	12	1.1
BAME	78	71%	11	1.5
Split	26	92%	9	3.0
Total	329	75%	11	1.4

56. However, BAME providers are over-represented compared with the general population as 24% of JR providers have a majority management or ownership with a BAME background. This is higher than the general population, suggesting that against that measure the proposal could have a disproportionate impact on BAME providers.

Gender

57. Table 3 shows the proportion of providers that will suffer a loss in revenue as a result of payment not being made in cases where permission is refused split by the gender of the management. The table also gives the mean and median loss in revenue for affected providers as a proportion of their civil fund take.

58. Table 3 shows that for providers expected to be negatively impacted by the reforms, a slightly higher proportion of male providers are affected (43%) compared to female providers (34%). However, this is not a statistically significant difference meaning that male providers are no more likely to suffer loss than female providers.

59. Looking at the size of the losses shows that the median loss is slightly higher for male providers compared with female providers. However, this difference is marginal supporting the finding that male providers are no more likely to be affected compared to female providers.

Table 3: Revenue reduction as a % of civil fund take by gender; reduction based on definite losses (endpoint codes F & G)

	Number of Providers	% affected	As % of Civil Fund Take	
			Mean Loss	Median Loss
Male	182	43%	14	0.8
Female	74	34%	1	0.5
Split	71	42%	12	1.4
Total	327	41%	11	0.8

60. Table 4 gives the same split as table 3, but where the proportion affected covers cases where permission is refused and cases which finish before a permission decision or where there is uncertainty in the data as to whether the provider would be paid. Table 4 shows that when the analysis is extended to cover all cases where a provider could lose payment, 82% of female providers are affected compared with 71% of male providers. This difference is statistically significant at the 90% degree of confidence, but not at the 95% level. This means we can say there is weak evidence that female led providers are more likely to be affected by the reforms, but that we cannot say this with any confidence due to the low number of female led providers.
61. Table 4 shows that median losses are very similar for male and female providers. This suggests that female providers that do lose are likely to suffer similar sized losses to male led providers that are affected by the reform.
62. When the analysis is extended to all possible losses, there is weak evidence to suggest that a higher proportion of female led providers may suffer loss compared with male providers. However, for providers that are affected, the size of the losses is expected to be similar.

Table 4: Expected revenue reduction as a % of civil fund take by gender; all possible losses (endpoint codes B, E, F & G)

	Number of Providers	% affected	As % of Civil Fund Take	
			Mean Loss	Median Loss
Male	182	71%	14	1.3
Female	74	82%	2	1.1
Split	71	79%	14	2.2
Total	327	76%	11	1.4

63. Analysis compared with the general population suggests that male providers are slightly over-represented compared with the general population. 56% of JR providers have a majority management or ownership that is male compared with 49% of the general population, suggesting that the proposal does disproportionately affect male providers.

Disability Status

64. Table 5 shows the proportion of providers that are expected to suffer a loss in revenue as a result of payment not being made in cases where permission is refused split by the whether a member of the management is ill or disabled. The table also gives mean and median loss in revenue for affected providers as a proportion of their civil fund take.
65. Table 5 shows that 44% of providers where a member of the management is ill or disabled are expected to lose from the reforms; however, this is very similar to the proportion for majority owned or majority controlled providers where no-one is ill or disabled (40%) and the difference is not statistically significant. Median losses are also similar for ill or disabled and non-disabled providers, suggesting that ill or disabled providers are no less likely to be affected by the reforms than non-disabled providers.
66. From this table we can conclude that providers where a member of the management or ownership is ill or disabled are no more likely to be affected compared to providers where no member of the management is ill or disabled.

Table 5: Revenue reduction as a % of civil fund take by disability; reduction based on definite losses (endpoint codes F & G)

	Number of Providers	% affected	As % of Civil Fund Take	
			Mean Loss	Median Loss
No illness/disability	304	40%	12	0.8
Any illness/Disability	27	44%	1	0.6
Total	331	40%	11	0.8

67. Table 6 gives the proportion of providers impacted when the drop in revenue is based on both cases where permission is refused and cases that finish before a permission decision or where there is uncertainty as to whether payment would be made.
68. The table shows that while 85% of providers where a member of the management is ill or disabled are expected to lose, this is not statistically significantly higher than the proportion majority owned or majority controlled providers where no-one is ill or disabled (74%). The reason that the difference is not statistically significance is because the small number of providers where a member of the management is ill or disabled (27) means it is not possible to conclude that ill or disabled providers are more likely to be affected than non-disabled providers.
69. The table shows that median losses are the same for ill or disabled and non-disabled providers. The high mean loss for non-disabled providers will be skewed by a small number of providers seeing very high losses.
70. Table 6 shows that providers where are member of the management is ill or disabled are no more likely to be impacted than non-disabled providers.

Table 6: Expected revenue reduction as a % of civil fund take by disability; all possible losses (endpoint codes B, E, F & G)

	Number of Providers	% affected	As % of Civil Fund Take	
			Mean Loss	Median Loss
No disability	304	74%	12	1.4
Disability	27	85%	4	1.4
Total	331	75%	11	1.4

71. Analysis compared with the general population suggests that disabled providers are not over-represented compared with the general population. Just 8% of JR providers have a member of the management that is ill or disabled. This is below the proportion for the general population, suggesting that the proposal does not disproportionately affect disabled providers.

Impact on clients

72. Clients will only be directly affected if the provider refuses to take on the case. If the provider still takes on the case then the provider will bear the cost rather than the individual client. As a result, the reform should only impact on clients in relation to unmeritorious cases, given that the proposal is designed to incentivise providers to consider more carefully whether to issue the claim. It is important to note that the reform affects the provider's remuneration, and not the grant of legal aid to the client. The client will remain in receipt of legal aid for the life of the case (unless it is withdrawn for other reasons).

73. However, taking into account points made by consultees (and in case of any indirect impacts on clients as a result of non-payment to providers) we have considered the protected characteristics of clients, both in relation to those cases where permission is refused and payment is no longer made to the provider, as well as those where the provider may still be paid under the LAA's discretion.
74. Data is available on the following protected characteristics of individuals claiming legal aid for a Judicial Review case in 2012/13: age, gender, race and disability status.
75. The main Impact Assessment showed that in 2012/13 there were 3,617 Judicial Review cases which received legal aid funding. Of these, 751 cases were refused permission and therefore the provider would no longer be paid as a result of this policy; these were identified from end-point codes F & G.
76. The Impact Assessment also noted that there may be up to an additional 1,732 cases in which the provider is no longer paid, but it is not possible to tell from the data. These are either cases where it is not known whether a permission application was made, or cases that settled before a permission decision and may or may not receive legal aid funding from the LAA under the discretionary payment mechanism. These were identified from end-point codes B and E.
77. Together, these two groups make up the 2,483 clients that could potentially be affected by the proposals (if the provider no longer took the case), out of a total of 3,617 clients that receive legal aid funding for a JR case in 2012/13 ('the pool'). The analysis below considers whether there is any evidence that the proposal disproportionately impacts against a group with a protected characteristic, and also looks at whether a group with a protected characteristic amongst legally aided JR clients is over-represented compared with the general population.

Indirect discrimination

78. Table 7 gives the protected characteristics of the 'pool', those in receipt of legal aid for a JR case in 2012/13, and compares the characteristics of those affected by the proposals with those that are not affected. Those affected are the 2,483 clients whose case may no longer receive funding as a result of the proposal, while the 'not affected' group is the remaining 1,134 cases that received legal aid funding for a JR case in 2012/13.
79. Table 7 shows that there is no evidence of indirect discrimination in the categories of race, disability or gender, as a result of the proposal as the protected characteristics of clients affected by the proposals matches the characteristics of those not affected. For example, 48% of those affected by the proposals have a BAME race, compared with 46% of those not affected. Similarly, for disabled individuals the proportion not affected and affected that is disabled is equal at 25%. The proportion of men in the affected group is slightly higher than the non-affected group, 64% compared to 61%, but this difference is within the margin of error suggesting that men are not disproportionately impacted. The proportion of 18-24 year olds is slightly higher amongst the affected group compared to the non-affected group, and so the proposal could have a slightly disproportionate on younger individuals although the difference is marginal.

Table 7: Characteristics of clients in receipt of legal aid for a JR case in 2012/13, split by 'affected' and 'not affected' cases

Protected Characteristics		Affected (Case may not receive funding under proposals) n=2483	Not Affected (Case would still receive funding) n=1134	All JR Clients, n=3617
Race	White	27%	28%	27%
	BAME	48%	46%	47%
	Unknown	25%	27%	25%
Age	18–24 years	16%	12%	15%
	25–64 years	64%	62%	63%
	65 yrs and older	3%	3%	3%
	Other	17%	23%	19%
Disability	Disabled	25%	25%	25%
	Non-Disabled	44%	43%	43%
	Unknown	31%	32%	31%
Sex	Male	64%	61%	63%
	Female	35%	37%	36%
	Unknown	1%	2%	2%

80. It is possible that the proposal may disproportionately impact a certain group as a result of a group with a particular characteristics being over-represented in the 'pool' affected by the proposals. Table 8 therefore gives the characteristics of all JR clients ('the pool') in order to look at whether a particular group could be disproportionately impacted by the proposals compared with the general population.

Table 8: Characteristics of clients in receipt of legal aid for a case in 2012/13 compared with the general population

Protected Characteristics		All JR Clients, n=3617	General Population
Race	White	27%	86%
	BAME	47%	14%
	Unknown	25%	
Age	18-24 years	15%	12%
	25-64 years	63%	67%
	65 yrs and older	3%	21%
	Other	19%	
Disability	Disabled	25%	18%
	Non-Disabled	43%	82%
	Unknown	31%	
Sex	Male	63%	49%
	Female	36%	51%
	Unknown	2%	

81. Table 8 shows that clients of a BAME race are over-represented amongst JR clients, compared with the general population. This suggests that the proposal could disproportionately impact against those of a BAME race, although this result should be treated with some caution since a large proportion of clients (25%) report their race as 'unknown'.

82. Table 8 also shows that 15% of individuals affected by the proposals are aged 18-24 compared with 12% of the general population. This implies that young people are slightly over-represented and therefore could be disproportionately impacted by the proposal, although the age distribution is not greatly different from the overall population.

83. On disability, 25% of the affected pool is ill or disabled compared to 18% of the general population. This implies that disabled people are likely to be disproportionately impacted by the proposals, although there is a large proportion where client disability is reported as 'unknown' meaning that this result should be treated with some caution.
84. With regard to sex, the table shows that men are disproportionately represented compared with the general population as 63% of affected clients are male compared with 49% of the population as a whole.

Cumulative Analysis

85. Some respondents also raised the potential for adverse equality impacts arising from the previous JR permission proposal under *Transforming legal aid: delivering a more credible and efficient system*. In *Transforming legal aid: Next Steps*⁹ (paragraphs 20.2 to 20.9) we set out the cumulative impact of the reforms to be implemented. We set out the cumulative effect of four areas which may be negatively impacted by more than one of the proposals.
86. Building on the cumulative analysis we published in *Next Steps*, we have undertaken additional analysis looking at whether providers sharing a protected characteristic could be disproportionately affected when the impact of the JR proposal is combined with one or more of the previous *Transforming Legal Aid* proposals most likely to affect JR providers. This analysis looks at providers just affected by the JR proposal, and compares firms impacted by at least one of the following proposals with those that are not. The *Transforming Legal Aid* proposals included here are: prison law reform, the removal of the asylum and immigration uplift, and the reduction in the representation fee for family law cases.
87. As set out in paragraph 72 above, we do not consider that this proposal will have a direct impact on clients as it affects the provider's remuneration, not the grant of legal aid to the client. Clients could be affected if the changes have an impact on the sustainability of the legal aid market resulting in an adverse effect on service provision; however we believe this is unlikely. As a result, there is no cumulative impact on clients.

Methodology and Data Sources

88. In order to look at whether providers sharing a protected characteristic could be disproportionately impacted by a combination of the proposals we have taken providers carrying out work on a JR case in 2012/13 (524) and split these into three groups:
- JR providers not affected by the proposals (136)
 - Providers affected by just the JR proposal (148) – providers with a case in 2012/13 where permission was refused, or a case where payment under the proposals is uncertain.
 - Providers affected by both the JR proposal and at least one of the other *Transforming Legal Aid* proposals (240).

⁹ <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps>

89. In order to assess whether providers sharing a protected characteristic are likely to be disproportionately impacted by the cumulative effect of the JR proposal with other LAT reforms, we have compared the proportion of firms just affected by the JR proposal with the proportion of firms affected by both JR at least one of the LAT reforms considered here.
90. The analysis is based on the protected characteristics of the majority ownership or majority control (OMC) of an organisation.

Race

91. Analysis on the protected characteristics of JR providers finds that BAME providers are more likely to be impacted by the combined impact of the JR proposal and the other *Transforming Legal Aid* reforms compared with White British providers:
- Of White British providers affected by the JR proposal based on 2012/13 data, 37% would be impacted by just the JR proposal while 63% would be impacted by both the JR proposal and at least one of the other *Transforming Legal Aid* reforms.
 - Of BAME providers impacted by the JR proposals, 20% would be impacted by the just the JR proposal and 80% by both the JR proposal and at least one of the other *Transforming Legal Aid* reforms.

Gender

92. Analysis on the protected characteristics of JR providers finds then male providers are more likely to be impacted by the combined impact of the JR proposal and at least one of the other *Transforming Legal Aid* proposals compared with female providers:
- Of male providers affected by the JR proposals, 25% would be impacted by just the JR proposal and 75% would be impacted by both the JR proposal and at least one of the other *Transforming Legal Aid* reforms.
 - Of female providers affected by the JR proposals, 44% would be impacted by just the JR proposal and 56% would be impacted by both the JR proposal and at least one of the other *Transforming Legal Aid* reforms.

Disability

93. Analysis on the protected characteristics of JR providers find that providers where a member of the management is ill or disabled are no more likely to be impacted by the combined impact of the JR proposal and the other *Transforming Legal Aid* proposals compared with providers where no member of the management is ill or disabled:
- Of providers where a member of the management is ill or disabled, 30% would be impacted by the JR proposal alone while 70% would be impacted by both the JR proposal and at least one of the other *Transforming Legal Aid* reforms considered here.
 - Of providers when no-one is ill or disabled, 33% would be impacted by just the JR proposal while 70% would be impacted by both the JR proposal and at least one of the other *Transforming Legal Aid* reforms.

Cumulative Conclusions

94. Our assessment of the potential cumulative impact shows that the reforms may have a disproportionate impact on male and BAME majority managed/owned firms who will be disadvantaged by the loss of income from more than one of the reforms.
95. While this analysis shows that the combination of the JR permission payment proposal with the other LAT reforms could have further impact on BAME providers, we do not consider that it would be possible to make any further changes to mitigate the impact on these providers as opposed to other providers, given the policy objective.

Conclusions

96. By reference to the pool of JR cases, the analysis finds that providers where a member of the OMC is long-term ill or disabled are no more likely to be affected by the proposals than providers where no-one is disabled. Similarly, BAME providers are no more likely to be affected by this proposal compared to White British providers, although where BAME providers do see a loss it is expected to be slightly higher on average compared with White British providers. BAME providers are also over-represented compared with the general population, suggesting that there is the likelihood that this policy could put BAME providers at a particular disadvantage.
97. When looking at just cases where permission is refused, female majority owned/controlled providers are no more likely to be affected than male providers. However, when all possible losses are considered, there is evidence to suggest that female majority owned/controlled providers are more likely to be affected than male providers; however, the low number of female owned/controlled providers means this result cannot be stated with any confidence. Male providers are, however, over-represented compared with the general population, suggesting that the policy could put male providers at a particular disadvantage for this reason.
98. The analysis of clients' protected characteristics shows that within the pool of JR cases, where legal aid might no longer be paid there is no direct impact on clients that are disabled, clients from a BAME race, or clients of a particular gender. There is evidence that the proposal has a slight disproportionate impact on younger individuals. When compared with the general population (and taking into account what respondents said about their client base in JR cases) the analysis shows that men, BAME individuals, younger individuals and those with a disability are over-represented compared with the general population and therefore on this measure are likely to be put at a particular disadvantage.
99. However, the conclusions on client's disability and race should be treated with caution, since for a large proportion of clients the disability status and race is recorded as 'unknown'. It is therefore difficult to draw concrete conclusions about the impact of the policy on these two groups.
100. Clients in JR cases should only be directly affected if the provider refuses to take on the case. If the provider still takes on the case then the provider will bear the cost rather than the individual. However, taking into account the potential for indirect impacts we cannot entirely rule out that there is the potential for some clients with protected characteristics to be negatively impacted. We consider this risk to be mitigated by the fact that payment will continue to be made for meritorious cases which are granted permission, and for meritorious cases which conclude prior to a

permission decision (either because costs are recovered as part of or following settlement, or because the case is granted discretionary payment by the LAA). We have also listened to respondents to both consultations and adjusted our proposals in response, in particular by proposing the discretionary payment mechanism for pre-permission cases, and, following the second consultation, by adjusting those criteria still further, so that providers will be paid in meritorious cases which conclude prior to a permission decision. Taking these adjustments into account, where we have identified a disproportionate impact, we believe the proposal is a proportionate means of achieving its aims.