

<b>Title:</b> Payment to providers to work carried out on an application for Judicial Review  <b>IA No:</b> MoJ 215  <b>Lead department or agency:</b> Ministry of Justice  <b>Other departments or agencies:</b>	<b>Impact Assessment (IA)</b>		
	<b>Date:</b> 06/09/2013		
	<b>Stage:</b> Consultation		
	<b>Source of intervention:</b> Domestic		
	<b>Type of measure:</b> Secondary Legislation		
<b>Contact for enquiries:</b> David Holmes David.Holmes@justice.gsi.gov.uk			
<b>Summary: Intervention and Options</b>		<b>RPC Opinion:</b> Not applicable	

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out? Measure qualifies as
£m	£m	£m	No   N/A
			No   N/A

**What is the problem under consideration? Why is government intervention necessary?**

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. In the recent Legal Aid Transformation consultation, we proposed transferring the financial risk of the application to the provider. We have listened to concerns raised by respondents who argued that the original proposal would also unfairly affect meritorious cases where permission is not granted simply because the case concludes prior to consideration by the court. Our revised proposal introduces the discretion to deal with this.

The Government is responsible for the terms and conditions of access to legal services funded by the legal aid budget; hence government intervention is necessary in order to make any changes.

**What are the policy objectives and the intended effects?**

We consider 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. The intended effect is to reduce spending on weak Judicial Review cases that do not have merit. At the margin it is possible that fewer weaker Judicial Review permission applications might be sought from the court, which probably would not have secured permission had they been pursued.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

Option 0: Do Nothing  
 Option 1: Payment to provider for work carried out on an application for permission for judicial review contingent on permission being granted, but with discretion for the Legal Aid Agency (LAA) to pay providers in certain cases which conclude prior to a permission decision where the provider has been unable to secure a costs order or agreement.

<b>Will the policy be reviewed?</b> It will/will not be reviewed. <b>If applicable, set review date:</b> Month/Year					
Does implementation go beyond minimum EU requirements?				Yes / No / N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)				<b>Traded:</b>   <b>Non-traded:</b>	

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible SELECT SIGNATORY:  Date: 06/09/2013

# Summary: Analysis & Evidence

# Policy Option 1

**Description:** Payment to provider contingent on permission being granted, but with discretion for the LAA to pay providers in certain cases which conclude prior to a permission decision where the provider has been unable to secure a cost order or agreement as part of a settlement.

## FULL ECONOMIC ASSESSMENT

Price Base Year 12/13	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	£1m	
High	Optional	£3m	
Best Estimate	Negligible		

### Description and scale of key monetised costs by 'main affected groups'

Legal aid providers: Will experience a fall in income from legal aid provision for Judicial Review cases where permission is not granted. This is expected to be in the range of £1million-£3million per annum. It is possible in some cases that the same amount of work as now will be undertaken, but will not be funded by the legal aid budget. In other cases less work may be undertaken, for example if fewer applications for permission in Judicial Review cases are sought in future.

### Other key non-monetised costs by 'main affected groups'

Legal Aid Agency (LAA): There will be small ongoing costs as a result of having to consider whether to award payment in cases that conclude before a permission decision.  
 HM Courts and Tribunals Service (HMCTS): May experience reduced court fee income if fewer applications for permission in Judicial Review cases are sought in future.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	£1m	£1m
High	Optional	£3m	£3m
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

LAA: There will be savings in the range of £1million-£3million from no longer paying legal aid providers in cases where permission is not granted. In addition there may be savings from reduced court fee expenditure if fewer legally aided Judicial Review permission applications are made in future.

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

HMCTS: May experience reduced court costs if fewer Judicial Review permission applications are made in future.  
 Legal aid providers: In cases where less work is undertaken resources would be freed for other profitable

Key assumptions/sensitivities/risks	Discount rate (%)
<ul style="list-style-type: none"> <li>LAA end-point codes have been used to assess the costs and benefits of the proposals. The description of the end-point codes means there is some uncertainty as to how many cases would be affected by the proposal which is why the costs and benefits are presented as a range.</li> <li>Savings are also subject to the number of cases in which the LAA's discretion to pay the provider (in cases which conclude before permission is considered by the court) is exercised in the provider's favour, and in which a provider obtains costs from the opponent.</li> <li>Possible costs to HMCTS from reduced total court fee income are assumed to be comparable to possible benefits to HMCTS from reduced overall costs.</li> </ul>	

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	In scope of OITO?	Measure qualifies as
Costs: n/a      Benefits: n/a      Net: n/a	No	N/A

# Evidence Base (for summary sheets)

## Introduction

### Background

1. This Impact Assessment (IA) accompanies the Ministry of Justice's (MoJ's) consultation on *Judicial Review: Proposals for further reform*. This is a further proposal to that set out in the Legal Aid Transformation document *Transforming Legal Aid: Delivering a More Credible and Efficient System*" (pages 30-33) That consultation document was published on 9 April 2013 and can be found at: [www.justice.gov.uk](http://www.justice.gov.uk).
2. The legal aid scheme involves the public procurement of legal services and determines the terms and conditions of access to these services. Legal aid fund expenditure was almost £2bn in 2012/13, with around £975m spent on criminal legal aid and £940m spent on civil legal aid<sup>1</sup>. The Legal Aid Agency (LAA) is responsible for administering the legal aid scheme in England and Wales.

### Policy Objectives

3. The main policy objective and intended effect is to ensure public confidence in the civil legal aid system. In reviewing every area of expenditure to achieve savings to reduce the fiscal deficit, the Government is concerned to ensure that limited public resources are targeted at those cases which justify it and those people who need it.
4. 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. In the *Transforming Legal Aid Consultation*, published in April this year, we proposed transferring the financial risk of the application to the provider in order to provide a greater incentive to give careful consideration to the strength of the case before applying for permission for Judicial Review.
5. We have listened to concerns raised by a number of respondents who argued that the original proposal would also unfairly affect meritorious cases where permission is not granted simply because the case concludes in the claimant's favour prior to consideration by the court. As a result, the revised policy on which we are now consulting introduces a discretion to permit the LAA to pay the provider in certain cases which conclude prior to a permission decision without a costs order or agreement. We have proposed a set of criteria for the LAA to apply when considering whether or not to exercise this discretion in individual cases.

### Policy

6. The policy option considered in this Impact Assessment is as follows:
  - Restriction of legal aid payments so that providers are only paid for work on a Judicial Review permission application (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward appeal to the Court of Appeal) if permission is granted or if the LAA chooses to exercise discretion to pay providers in certain cases which conclude prior to a permission decision without a costs order or agreement.

### Main Affected Groups

7. The following key groups are likely to be affected by the proposals:
  - Civil legal aid claimants

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<sup>1</sup> Rounded to the nearest £5m. Source: <http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf>

- Civil legal aid providers
- Defendants
- The LAA, which is responsible for administering legal aid.
- Her Majesty's Courts and Tribunals Service (HMCTS)

## Costs & Benefits

8. This IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact on society might be from implementing these proposals. The costs and benefits of each proposal are compared to the do nothing option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However there are some important aspects that cannot always sensibly be monetised.
9. All savings figures have been rounded to the nearest £1million.

## Assumptions

10. The following assumptions have been made in the estimation of the costs and benefits.
  - (i) The provider response to the proposal is uncertain. Existing means and merits tests are not being changed as part of this proposal. Providers should be incentivised to consider cases more carefully before issuing Judicial Review proceedings. We have assumed that at the margin there may be a reduction in the number of weaker Judicial Review permissions applications, and that these probably would not have secured permission had they been pursued.
  - (ii) The proposed discretion of the LAA to award payment in cases that conclude before a permission decision is made by the court is designed to ensure that legal aid providers do not refuse to take on genuinely meritorious Judicial Review cases more generally, given the risk of non payment.
  - (iii) The civil legal aid remuneration reforms have been modelled against a flat baseline of 2012/13 closed cases.
11. The data used in this Impact Assessment is drawn from the LAA and includes Judicial Review work undertaken at the pre-action stage before court proceedings have been issued. The accuracy of this data is dependent upon how case outcomes have been recorded by legal aid providers. These volumes are not directly comparable to the Administrative Court data on the overall volumes of Judicial Review cases where court proceedings have been issued (i.e. cases that are formally lodged at the Administrative Court) and which are included in the other Impact Assessments and consultation document.

## Option 0: Do Nothing

12. At present all Judicial Review cases funded by legal aid receive payment for the permission application stage of their case. In the do nothing option this would continue and providers would be paid for the work on all permission applications regardless of the outcome.
13. As this option is compared against itself, its costs and benefits are necessarily zero, as is its Net Present Value (NPV).

## **Option 1 – Payment to provider for work carried out on an application for permission for Judicial Review contingent on permission being granted; with a discretion to permit the LAA to pay providers in certain cases which conclude before a permission decision**

## Description

14. This option proposes that providers should only be paid for work carried out on an application for permission (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission appeal to the Court of Appeal), if permission is granted by the Court. Legal aid would still be available for pre-proceedings work, and reasonable disbursements such as expert fees and court fees (but not Counsel's fees) which arise in preparing the permission application will be paid. This option also includes the introduction of a discretion to permit the LAA to pay providers in certain cases which conclude prior to a permission decision. In addition if an initial permission application is not successful but permission is subsequently secured, e.g. at an oral renewal, then the legal aid provider would be paid for all work including that relating to the initial permission application.

## Costs

### Legal aid providers

15. Legal aid providers would experience a reduction in income from the legal aid fund in relation to cases which do not secure permission in future and which are no longer funded by the LAA. The analysis below estimates the possible aggregate size of this reduction in income.
16. In some cases the legal aid provider might undertake the same amount of work as now but receive less income from the LAA. In other cases the legal aid provider might undertake less work, for example if permission is not sought in future.
17. Where permission is not sought in future this is assumed to apply only to weaker applications which probably would not have secured permission had they been pursued.
18. Table 1 presents data drawn from the LAA<sup>2</sup> showing the number of Judicial Review cases that received legal aid funding in 2011/12 and 2012/13. The data is split by LAA end-point codes<sup>3</sup>. Legal aid providers are asked to select one of codes E-J when recording the outcome of a Judicial Review certificate but LAA records show that providers have also been selecting A-D in judicial review cases (those codes are normally only for non Judicial Review cases). For this reason all Judicial Review certificates recorded against end-point codes A-J have been considered in this Impact Assessment.
19. Table 1 gives the best available data on the number of Judicial Review cases that received legal aid funding for legal representation. The costs and benefits have been calculated using the latest data, 2012/13 end-point codes, but both 2011/12 and 2012/13 are shown below for completeness.

**Table 1: LAA Judicial Review end-point code data**

End-point Code	Description	2011/12 Cases	2012/13 Cases
A	No proceedings issued	618	597
B	Proceedings issued, no final hearing	291	315
C	Determined at final hearing	181	148
D	Determined on appeal	9	8
E	No proceedings have been issued or where a case is withdrawn or settled before the court makes an initial decision whether or not to grant permission	1657	1424
F	Permission not granted, concluded at first application stage (usually papers)	652	538
G	Permission not granted, concluded after renewed application	193	216

<sup>2</sup> The data on the number of legally aided JR cases in this Impact Assessment are drawn from the Legal Aid Agency and includes JR work undertaken at the pre-action stage. As such, these volumes are not directly comparable to the data on the overall volumes of JR applications (i.e. cases that are formally lodged at the Administrative Court) which are included in the other Impact Assessments and consultation document

<sup>3</sup> [www.justice.gov.uk/downloads/forms/legal-aid/civil-forms/certificate-outcomes-checklist-version-2.pdf](http://www.justice.gov.uk/downloads/forms/legal-aid/civil-forms/certificate-outcomes-checklist-version-2.pdf)

H	Permission granted, no final hearing took place	332	282
I	Permission granted, determined at final hearing	109	74
J	Permission granted, determined on appeal	32	31
N/K	No Endpoint 1 code submitted	111	232

20. The data in table 1 provides the following information about the number of cases affected by the proposal:

- In 2012/13 there were 3,633<sup>4</sup> Judicial Review cases which received legal aid funding for legal representation, compared with 4,074 in 2011/12 (endpoint codes A-J);
- In 2012/13 543 cases had permission granted and would continue to receive funding under the proposal, this compares with 663 in 2011/12 (endpoint code C, D, H, I&J);
- In 2012/13 no proceedings issued in 597 cases and in 618 cases in 2011/12. These cases would not be affected by the proposal (endpoint code A);
- In 2012/13 permission was refused in 754 cases and in 845 in 2011/12. These cases would no longer receive legal aid funding under the proposal (endpoint codes F&G);

21. Due to the descriptions in the end-point codes and how case outcomes have been recorded by providers there is some uncertainty in respect of two of the end-point codes:

- In 2012/13 there were 315 cases (end-point B) where proceedings issued but there was no final hearing, there were 291 of these cases in 2011/12<sup>5</sup>. It is not known whether permission was granted in these cases and therefore whether they would be affected by the proposals.
- In 2012/13 there were 1,424 cases (endpoint E) where no proceedings were issued or where a case was issued but withdrawn or settled before it was considered by the Court; in 2011/12 there were 1,657 of these cases. A proportion of cases where proceedings were issued and then withdrawn or settled would be affected by the proposal but there is uncertainty as to the number because of the way in which they have been recorded. We expect that a proportion of these cases would receive a discretionary payment from the LAA, but we cannot say with certainty how many. It is also likely that some of these cases will not have issued proceedings and will therefore not be affected by the proposals.

22. We are unable to establish the exact cost of preparing permission applications; however the LAA have advised that the default emergency certificate limit is £1,350 per case. This has therefore been used as the estimated cost to the provider for each case for which legal aid is no longer paid out.

23. From the 2012/13 data, we can be certain that payment would not be made in 754 cases where permission was not granted. This places an additional cost on providers, who will no longer receive funding in these cases, to the sum of approximately £1million per annum. The data also shows that in 2012/13 there were up to an additional 1,739 cases that could be affected by the proposals (endpoint codes B&E). If payment were no longer received in all of these cases this would be at an additional cost to providers of approximately £2million per annum. This gives a cost to providers in the range of £1-£3million<sup>6</sup>. The split of the costs is shown in Table 2.

**Table 2: Cost to providers of Judicial Review payment changes (£millions; 2012/13)**

Case Outcome	Number	Low	High
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<sup>4</sup> The 3,633 figure refers to cases which received Legal Representation and does not include cases which received Legal Help. We are unable to determine how many Legal Help cases involved giving advice on a (potential) judicial review. This also excludes cases lacking any code (N/K)(111 in 2011/12 and 232 in 2012/13).

<sup>5</sup> There is also a possibility that this figure could include some cases in which applications for interim relief are made, but the permission application is not ultimately lodged. Such cases would not be affected by our proposal.

<sup>6</sup> This will include cases where costs were obtained from the other side which may have resulted in a lower or zero bill for the LAA.

Heard and permission refused (endpoints F&G)	754	1.0	1.0
Proceedings issued, no final hearing (endpoint B)	315	0.0	0.4
Concluded before a permission decision, but uncertain if issued (endpoint E)	1,424	0.0	1.9
<b>Total</b>	<b>2,493</b>	<b>1</b>	<b>3</b>

Note: costs have been rounded to the nearest £1m.

24. There may also be additional costs to providers who settle before a permission decision if they have to pay legal costs that were previously paid by the LAA.

### Claimants

25. It is likely that fewer weaker Judicial Review permission applications will be made. It is unclear whether this would generate a cost to claimants, as these cases probably would not have secured permission had they been pursued. There may be a **cost** to such claimants from a reduced delay in resolving their Judicial Review, if they value reduction in delay positively.

### HMCTS

26. If fewer permission applications are made there might be a reduction in total court fee income. This is assumed to be comparable to the consequent reduction in overall court costs. HMCTS operates on a cost recovery basis in the longer term.

### LAA

27. Removing payments for permission application in JR will lead to a small one-off increase in LAA administration costs. The LAA may need to amend its IT systems to implement this policy. Some additional training may also be required.

28. There will also be ongoing costs to the LAA as it will be at the discretion of the LAA whether to award costs in cases that conclude before a permission decision. There will also be costs associated with the internal review process.

### Benefits

#### LAA

29. LAA 2012/13 closed case administrative data has been used to estimate the benefits of this policy. We estimate that there will be a saving of between £1million and £3 million per annum for the legal aid fund as a result of anywhere from 754 to 2,493 fewer cases being funded as a result of this proposal.

30. The LAA may also benefit from administrative cost savings if there is a reduction in the volume of legally aided Judicial Review permissions sought.

#### Defendants

31. Defendants may gain from reduced legal costs if there is a reduction in the volume of weaker Judicial Review permissions sought, assuming that defendants do not recover all of their legal costs in cases which they win.

#### Legal aid providers

32. In some cases the legal aid provider might undertake the same amount of work as now and might receive less income from the LAA. In other cases the legal aid provider might undertake less work,



for example if permission is not sought in future. In such cases resources would be freed for other profitable activities.

## **HMCTS**

33. If fewer permissions are sought from the court there might be a reduction in overall court costs. This is assumed to be comparable to the consequent reduction in total court fee income, as HMCTS operates on a cost recovery basis in the longer term. Any HMCTS resources freed up as a result are assumed to be allocated to reducing waiting times and case durations in other court cases, including other Judicial Review cases.

## **Claimants**

34. It is likely that fewer weaker Judicial Review permissions will be sought from the court. As implied above, this might have positive implications for the waiting times and case durations of other, meritorious Judicial Review cases. It is unclear how significant this impact might be. This might be beneficial for these other Judicial Review claimants, if they value quicker case resolution positively.

## **Wider benefits**

35. It is expected that the introduction of the proposal where the provider is not paid for work carried out on an application for permission for Judicial Review will have the wider benefit of helping to command public confidence in the civil legal aid system.

## **Risks and uncertainties**

36. The uncertainties in the Judicial Review legal aid data mean that the upper bound costs and benefits of this proposal are uncertain. These uncertainties have been explained in the section above. There is also a risk that volumes could change in the future compared to the 2012/13 data, altering the costs and benefits presented here.
37. The assumed cost of preparing a permission application is uncertain. In some circumstances it might be higher and in other circumstances it might be lower than assumed. The estimated cost to providers might therefore be higher or lower than estimated.
38. Individuals may choose to address their disputes in different ways. They may represent themselves in court as litigants in person, pay for private representation or decide not to tackle the issue at all.
39. At present, a case might conclude once permission has not been granted. It is possible that in future the legal aid provider might pursue a subsequent oral renewal in order to recover their costs, however the prospects of this are unclear as an unsuccessful oral renewal would leave the provider worse off than if they did not pursue the oral renewal.
40. There could be increased costs to HMCTS for example from an increase in oral renewals or rolled up hearings, from increased satellite litigation, or from more litigants in person. HMCTS operates on a cost recovery basis in the longer term.

## **Enforcement and Implementation**

Subject to the outcome of the consultation, it is currently anticipated that this proposal will be implemented through secondary legislation to be laid early next year.

## **One In Two Out**

Legal Aid is out of scope of 'One In, Two Out' as it is classified as procurement spend.