

<b>Title: Costs of court appointees</b> <b>IA No: MoJ036/2016</b>  <b>RPC Reference No:</b>  <b>Lead department or agency: Ministry of Justice (MoJ)</b> <b>Other departments or agencies: Legal Aid Agency (LAA)</b>	<b>Impact Assessment (IA)</b>				
	<b>Date:</b> 10/02/2017				
	<b>Stage:</b> Development/Options				
	<b>Source of intervention:</b> Domestic				
	<b>Type of measure:</b> Secondary Legislation				
	<b>Contact for enquiries:</b> <u>David.Carter@justice.gsi.gov.uk</u>				
<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	In scope of One-In, Two-Out?	Measure qualifies as
n/a	n/a	n/a	n/a	n/a

**What is the problem under consideration? Why is government intervention necessary?**  
Under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 ("s38"), where a defendant is prohibited from personally cross-examining a prosecution witness, the court can appoint a lawyer to cross-examine the witness(es) in the interests of the defendant. Under section 4A of the Criminal Procedure (Insanity) Act 1964 ("s4A"), where a defendant has been found unfit to stand trial, the court can appoint a lawyer to put the case for the defence in a hearing to decide whether the defendant "did the act or made the omission charged against him". Such work is currently paid at private rates, which are 4-5 times higher than legal aid rates.

**What are the policy objectives and the intended effects?**  
The policy objective and intended effect is to correct a historical anomaly in legal aid remuneration. Any other work done by a criminal defence lawyer, whether under a representation order or otherwise, subject to consultation, should be remunerated on the same basis as legal aided defence work. This will have the consequence of reducing the cost to the public purse of court appointees.

**What policy options have been considered, including any alternatives to regulation?**  
The following options have been considered:  
0) Do nothing  
1) Cap court appointees' costs at legal aid rates.  
  
Option 1 is the preferred option as this would achieve the policy objective.

**Will the policy be reviewed?**  
It will be reviewed. Date and form of review to be determined

Does implementation go beyond minimum EU requirements?				N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	<b>Micro</b> N/A	<b>&lt; 20</b> N/A	<b>Small</b> N/A	<b>Medium</b> N/A	<b>Large</b> N/A	
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)				<b>Traded:</b> N/A	<b>Non-traded:</b> N/A	

**I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.**

Signed by the responsible Minister:  Date: 10-02-17

# Summary: Analysis & Evidence

# Policy Option 1

**Description:** To cap the rates at which section 38 and section 4A appointees are paid. Appointees will be paid at rates in line with the legal aid fee scheme, instead of at typically higher private rates.

## FULL ECONOMIC ASSESSMENT

Price Base Year 2015-16	PV Base Year n/a	Time Period Years one year – steady state	Net Benefit (Present Value (PV)) (£m)		
			Low: £0m	High: £0m	Best Estimate: £0m

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	£6m	n/a
High	N/A	£8m	n/a
Best Estimate	N/A	£7m	n/a

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

- The best estimate is a central estimate between the defined ranges.
- The total cost to section 38 and section 4A appointees would be £6-8m per annum in steady state. It is estimated that the capping of rates will affect 9,000 section 38 and section 4A appointments annually.

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

- N/A

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	£6m	n/a
High	N/A	£8m	n/a
Best Estimate	N/A	£7m	n/a

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

- The best estimate is a central estimate between the defined ranges.
- The taxpayer would benefit from a saving of £6-8m per annum in steady state. The saving would be to LA Central Funds, from which section 38 and section 4A appointees are paid.

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

- The rates paid to solicitors under legal aid arrangements would be equal to the rates paid to section 38 and section 4A appointees, thus removing any unfairness of current arrangements.

### Key assumptions/sensitivities/risks

Discount rate n/a

- We assume the volume of appointees remains constant at the 2015-16 level, and that type of cases does not change.
- We assume that solicitors carry out all of the work. This is consistent with current appointees, where 99 per cent of work is carried out by solicitors.
- We assume that current claims from Central Funds do not include enhanced fees.
- We use a magistrates' court billing profile to determine the phasing of the saving to the LAA, this is consistent with current claims where 99 per cent of appointees are to magistrates' court proceedings.
- Uncertainty arises from the limited data on the billing records of section 38 and section 4A appointees. The data does not give a comprehensive breakdown of what work was involved. Further, data has only been collected since October 2014 on these appointees.

## 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	Costs: N/A	Benefits: N/A

Signed by the responsible Minister:



Date: 10-02-17

# Evidence Base (for summary sheets)

## A. Background

1. Section 38 of the Youth Justice and Criminal Evidence Act 1999 (“section 38”)<sup>1</sup> makes provision for legal representatives to be appointed to conduct the cross-examination when an unrepresented defendant is prevented from cross-examining under sections 34, 35 or 36 of the Act. If a defendant is prevented from personally cross-examining a particular witness, the court will invite him to appoint his own legal representative to carry out that cross-examination, and to let the court know that he has made an appointment by a set time. If he does not, the court should know before the start of the proceedings that no legal representative has been appointed.
2. If the defendant does not appoint a legal representative, the court will have to consider whether it is necessary, in the interests of justice, for the witness to be cross-examined. If it decides that it is, it will appoint a legal representative with rights of audience in the court to cross-examine the witness in the interests of the defendant. However, a court-appointed representative will not have been instructed by the defendant and so cannot be responsible to him.
3. Under section 4A of the Criminal Procedure (Insanity) Act 1964<sup>2</sup> (“s4A”), where a defendant has been found unfit to stand trial because they are “under a disability” (for example, they are suffering from a mental disorder which prevents them from understanding the trial process), the court can appoint a lawyer to put the case for the defence in a hearing in which a jury decides whether or not the defendant “did the act or made the omission charged against him”. The purpose of the hearing is to ensure that someone who did not in fact do the act charged does not have proceedings hanging over them, and someone who did do the act can face trial at a later date if they become fit to stand trial.
4. Court appointees are currently paid from central funds at private rates using the Solicitors' guideline hourly rates<sup>3</sup> published by HM Courts and Tribunals Service (HMCTS), which can be four to five times higher than legal aid rates. In magistrates' courts, for example, current legal aid remuneration rates<sup>4</sup> range from £24 per hour for travel, to £57 per hour for advocacy, while the guideline private hourly rates for the level of professional expected to undertake this work are around £192 per hour.

## B. Rationale and policy objectives

5. The policy objective and intended effect is to correct a historical anomaly in legal aid remuneration. This work should not be distinguished from any other work done by a criminal defence lawyer, whether under a representation order or otherwise and, subject to consultation, should be remunerated on the same basis as legal aided defence work. This will have the consequence of reducing the cost to the public purse of court appointees, as we have already done in relation to Defendants' Costs Orders.

## C. Affected Stakeholder Groups, Organisations and Sectors

6. The proposal assessed in this Impact Assessment (IA) will directly affect the following groups:
  - Legal service providers, i.e. solicitors and barristers who conduct cross-examination on behalf of unrepresented defendants under section 38, and who put the case for the defence under s4A. These are often, but not exclusively, current legal aid providers

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/1999/23/contents>

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/1964/84/contents>

<sup>3</sup> <https://www.gov.uk/guidance/solicitors-guideline-hourly-rates>

<sup>4</sup> [http://www.legislation.gov.uk/ukxi/2016/313/pdfs/ukxi\\_20160313\\_en.pdf](http://www.legislation.gov.uk/ukxi/2016/313/pdfs/ukxi_20160313_en.pdf)

- Unrepresented defendants who are prohibited from cross-examining certain witnesses, or who have been found unfit to stand trial
- The Legal Aid Agency (LAA)
- Her Majesty's Courts and Tribunals Service (HMCTS)

## D. Description of Options Considered

7. To meet the above policy objective, the following two options are considered in this IA:

- **Option 0/‘Do nothing’: Continue to remunerate court appointees at private rates**
- **Option 1: To cap costs for court appointees at legal aid rates**

### *Option 0*

8. Under this option, section 38 and s4A court appointees would continue to be paid at private rates. We cannot make forecasts of the future caseload but, as an indication, £11m was spent in this area in 2015-16.

### *Option 1*

9. We consider that, despite the fact that acting as a court appointee can be a sensitive task, the work is in reality no different to that undertaken by lawyers acting for a defendant under legal aid. Therefore, subject to consultation, we propose capping such costs at legal aid rates, as we have already done in relation to Defendants' Costs Orders.
10. Our estimate of the potential annual saving is £6m to £8m, with the range based on uncertainty around the degree to which enhancements are claimed.
11. As option 1 meets the policy objective set out above, it is the preferred option.

## E. Cost and Benefit Analysis

12. This IA identifies impacts on individuals, groups and businesses in England and Wales, with the aim of understanding what the overall impact to society might be from implementing the options considered. The costs and benefits of the policy proposal are compared to the 'do nothing' option. As this involves comparing the do nothing option with itself, the costs and benefits are necessarily zero as is the associated Net Present Value (NPV).
13. IAs 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 important aspects that cannot sensibly be monetised which might include how the proposals impact differently on particular groups of society or changes in equity and fairness.
14. The estimates in this IA have been rounded: any additional costs below £1 million have been rounded to the nearest £100,000 and those above £1 million to the nearest £1million. The number of cases affected by the proposal has been rounded to the nearest 1,000. The number of providers affected by the proposal has been rounded to the nearest 10. Consequently, totals may not agree due to rounding. Note that we have generally presented as a range, as uncertainty over the figures remains due to the modelling approach and our modelling assumptions.

## **Option 1: Capping at legal aid rates**

### **Costs of Option 1**

#### *Implementation Costs*

15. In order to implement capping effectively, lawyers and the Legal Aid Agency staff assessing claims would need to be made aware of the relevant rates and of the circumstances in which the fees can be enhanced.
16. It is presently expected that the costs of reissuing guidance, publicising capping and informing stakeholders of its introduction would be minimal and could be absorbed into existing resource allocations.

#### *Ongoing Costs*

17. By capping fees at legal aid rates, we estimate that the total amount paid to legal providers who are appointed in section 38 and s4A cases could fall by £6m to £8m per annum in steady state. This fall in income is equivalent to the saving the policy could generate for central funds. As this is essentially a redistribution from legal providers to central funds, the NPV is zero.
18. It is assumed that a judge's decision to appoint representation would be unchanged by the proposal, and therefore that the number of appointments would not change. Accordingly, there is no expectation of any further ongoing costs compared to the status quo.

### **Benefits of Option 1**

19. The main benefit of Option 1 would be to correct a historical anomaly in funding, and equalise the payment that solicitors and barristers receive for doing what is essentially the same work. This would remove any unfairness from current funding arrangements, and benefit the taxpayer by maintaining service delivery at a lower overall cost.
20. Option 1 would also provide a saving to the LAA as a result of paying section 38 and s4A appointees at legal aid rates instead of private rates. If implemented in April 2017, the policy is estimated to reach a steady state saving to central funds of £6m to £8m per annum.

## **F. Assumptions, Risks and Uncertainties**

### **Key modelling assumptions**

21. To estimate the monetised impacts of Option 1, we have used a model which takes data on cases where legal representation was ordered under section 38 and s4A and granted public funding at private rates from LAA Central Funds and compares this to an estimated cost of the same legal representation where fees are capped at legal aid rates. The capped rates are calculated from current costs for legally aided representation by a solicitor at Crown and magistrates' courts. The model gives a range of estimates based on uncertainty around the claiming of enhancements.

22. Our modelling aims to provide the most accurate estimate of policy impacts possible. However, we cannot say with certainty how things might change under the preferred option so we have made some simplifications and assumptions where necessary. To do this, we have conferred with subject matter experts within the LAA.

23. Our high level assumptions include the following:

- The data for cases closed in 2015-16 are representative, i.e. the case type and volumes of publicly funded section 38 and s4A cases remains constant over time;
- The nature and amount of work involved in each case type remains constant over time;
- The data available indicates that solicitors carry out 99 per cent of work in these cases, attracting 97 per cent of the funding. Therefore we assume that all work is carried out by solicitors and thus all work would be paid in future at legal aid rates for solicitors;
- The work carried out in each case, on average, comprises certain activities in certain proportions, which are set out below in Table 1. The value of work billed for writing letters is minimal based on low unit costs and thus does not factor into the analysis;

**Table 1: Assumed breakdown of work per case**

	<b>Proportion of work billed</b>
<b>Preparation</b>	50%
<b>Advocacy and attendance</b>	40%
<b>Travel and waiting</b>	10%
<b>Letters</b>	0%

- The cost of advocacy and attendance work is split 65 per cent and 35 per cent respectively;
- The cost of cases billed on which the analysis is based does not include enhanced fees, which are available in “exceptional” cases; and
- As 99 per cent of section 38 and s4A cases are heard in magistrates’ courts, we expect any saving to the taxpayer to arise in the same timescale as other legal aid magistrates’ court billing

## **Risks and Uncertainties**

24. There is always uncertainty in the modelling of policy costs. The modelling is more sensitive to some of the assumptions made than others.
25. The principal uncertainty arises from the limited information we hold for providers. Most importantly, data has only been recorded on central funds claims since October 2014, and there is no underlying detail of exactly what the bills comprise. We have used subject matter experts to estimate the composition of the bill, although our analysis of the parameters in Table 1 suggests the likely impact would be small.
26. We assume that our case mix and work done would be the same as in our current case data. It does not include any additional policy changes related to section 38, although none are anticipated. If the case mix and/or work done increases or decreases, savings would decrease or increase accordingly.
27. If some lawyers no longer agree to do this work at reduced rates, it could affect the ability of a defendant to have their case effectively put to the witness(es), or to have the prosecution evidence tested, resulting in the possibility of miscarriages of justice. It may also impact witnesses by prolonging the distress of being involved in criminal proceedings.
28. Further, if there is a shortage of lawyers willing to be appointed to do this work, cases could be delayed creating a backlog in the court system. Costing this delay would prove difficult, however it is important to note the potential impact on HMCTS. However, we believe there is a low risk of this happening, as there is an established market, operating effectively at legal aid rates. Further, the risk could be mitigated further through contractual provision.

## **G. Wider Impacts**

29. The Equalities Impact Assessment –sets out our assessment of who might be affected by the preferred option, in accordance with the Public Sector Equality Duty.
30. We have no evidence to suggest that families would be disproportionately adversely affected by the proposal.

## **H. Monitoring and evaluation**

31. As noted above, some of the impacts of the preferred option are currently uncertain. So far, we have only been able to estimate the potential impacts on providers and we will continue to monitor this. We will monitor management information on the number of cases qualifying for section 38 appointees. We will assess this by different case types, to investigate any emerging trends which may need action. We will also inspect information on appeals and complaints.
32. Although we do not expect any disproportionate impact on protected groups, we will assess this to ensure that is the case. We will monitor data where it is collected, although we recognise that current collections are limited.