

Title: Transforming Legal Aid: Reforming fees in criminal legal aid - response IA No: MoJ197 Lead department or agency: Ministry of Justice Other departments or agencies:	Impact Assessment (IA)	
	Date: 05/09/2013	
	Stage: Final	
	Source of intervention: Domestic	
	Type of measure: Secondary Legislation	
		Contact for enquiries: James MacMillan james.macmillan2@justice.gsi.gov.uk
Summary: Intervention and Options		RPC Opinion: RPC Opinion Status

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, Measure qualifies as One-Out?
£m	£m	£m	No
			NA

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

In a drive to reduce public spending to aid reduction of the fiscal deficit, the Government took steps as a result of its 2010 consultation to reform the legal aid system in England and Wales to achieve savings (including reforms to criminal fees in October 2011). Since then, Government has continued to review expenditure in this area to ensure value for money is achieved in delivering the service required. With the continued need to make savings in public spending, the Government believes that further efficiency and cost savings can be achieved in criminal legal aid remuneration. To make such changes, Government intervention is necessary as it is responsible for the terms of access to legal services funded by the legal aid budget and setting remuneration rates.

What are the policy objectives and the intended effects?

In reviewing every area of expenditure to achieve savings to reduce the fiscal deficit, the Government strives to ensure that expenditure attributed to legal aid represents value for money, provides the level of service necessary whilst ensuring fees paid are sustainable. We want to encourage providers to work efficiently and enable the earliest possible resolution of cases, thereby supporting our wider objective of a more efficient and proportionate criminal justice system, which gets it right first time.

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: Reduce fees paid in Very High Cost Cases (Crime) (VHCCs) by 30%.
Option 2: Reduce the use of more than one advocate.

Will the policy be reviewed? We will monitor the impacts of the policy. If applicable, set review date:

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.	Micro Yes/No	< 20 Yes/No	Small Yes/No	Medium Yes/No	Large Yes/No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

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) that the benefits justify the costs.

Signed by the responsible Minister:



..... Date: 05/09/2013

Summary: Analysis & Evidence

Policy Option 1

Description: Reduce fees paid in Very High Cost Cases (VHCCs) by 30%.

FULL ECONOMIC ASSESSMENT

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

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	-	-	-
High	-	-	-
Best Estimate	Negligible	£20m	

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

Legal Aid Providers: Legal aid providers are estimated to experience a decrease of approximately £20m per annum in their legal aid income.

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

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	-	-	Optional
High	-	-	Optional
Best Estimate	Negligible	£20m	Optional

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

Legal Aid Fund: The proposal is estimated to reduce legal aid expenditure by approximately £20m per annum in steady state.

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

Key assumptions/sensitivities/risks

Discount rate (%)

N/A

- The provider response to the reforms is highly uncertain. There is a risk that some providers may increase or decrease the number of hours worked on each case. There is also a risk that some existing providers might decide not to supply their services to the Legal Aid Agency (LAA) for VHCC cases. This might impact on the quality of service provided to legal aid clients and the estimated savings to the legal aid fund.
- This proposal might lead to more junior legal professionals being allocated to VHCC cases. However, we believe that more junior legal professionals are able provide a sufficiently good quality legal service to enable individuals to be adequately represented in court.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: NA	Benefits: NA	Net: NA	No	NA

Summary: Analysis & Evidence

Policy Option 2

Description: Reduce the use of more than one advocate.

FULL ECONOMIC ASSESSMENT

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

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	-	-	-
High	-	-	-
Best Estimate	Negligible	£10m ¹	-

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

Legal Aid Providers: Legal aid providers (barristers and solicitor advocates) are estimated to experience a decrease of approximately £10m per annum in their legal aid income.

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

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	-	-	-
High	-	-	-
Best Estimate	-	£10m	-

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

Legal Aid Fund: The proposal is estimated to reduce legal aid expenditure by approximately £10m per annum in steady state.

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

Key assumptions/sensitivities/risks	Discount rate (%)	N/A
<ul style="list-style-type: none"> - The savings estimates assume that the restrictions on cases employing more than one advocate lead to a 50% reduction in these cases, which have been randomly selected in the data. For those which are assumed to be reduced to a single counsel, we have assumed the more senior advocate remains instructed . Both of these assumptions are uncertain. - The supply of advocates willing to do legal aid work will be sufficient to meet demand. - The same quality of services will continue to be supplied by advocates. 		

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:	In scope of OIOO?	Measure qualifies as
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¹ In the original Impact Assessment, the restricting the use of two counsel proposal was estimated after the AGFS reforms, meaning it had a £9m impact. We have now estimated the restriction of two counsel before any AGFS reforms are implemented, meaning the revised estimate is a £10m impact.

Evidence Base (for summary sheets)

1. Introduction

Background

1. This Impact Assessment (IA) accompanies the Ministry of Justice's (MoJ's) consultation on "*Transforming Legal Aid: next steps*". The associated consultation document was published on 5 September 2013 and can be found at: 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 aid². The Legal Aid Agency (LAA) is responsible for administering the legal aid scheme in England and Wales.
3. The proposed fee reforms in this IA relate to those outlined in the consultation response. They are summarised below.

Policy objectives

4. Legal aid is a fundamental part of our system but resources are not limitless and, as legal aid is paid for by the taxpayer, value for money must be achieved at all times.
5. Although savings are being achieved as a result of the reforms comprising reductions in fees paid to criminal and civil legal aid service providers and, through the Legal Aid, Sentencing and Punishment of Offenders Act 2010 (LASPO), changes to civil legal aid scope and eligibility, wider fiscal challenges mean there is a need to deliver further savings from the criminal legal aid fund through changes to reduce the unnecessary use of multiple advocates and the Very High Cost Case (Crime) (VHCC) scheme. This is the key driver behind the reforms being proposed to criminal fee remuneration. The proposals seek to deliver savings in a fair and balanced way whilst ensuring market sustainability. The proposed reforms have been guided by the following considerations:
 - the ambition to encourage providers to work efficiently;
 - the need to ensure that clients can continue to receive the services they require at the time that they need them.

² Rounded to the nearest £5m. Source: <http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf>

Policy

6. This IA considers the effect of the proposed reforms in the consultation response paper on criminal fee remuneration. This is done on the basis of the two proposed reforms being implemented as a package. The individual reforms are summarised below:

(i) Reduce fees paid in Very High Cost Cases (VHCCs) by 30%

This proposal reduces the rates payable to both litigators and advocates by 30% for all future work undertaken on existing or new VHCC contracts. The rates for the small number of pre-panel contracts will not be reduced.

(ii) Reduce the use of more than one advocate

This proposal (a) tightens the current criteria which inform the decision made by judges to authorise representation by two or more counsel; (b) takes steps to ensure that they are applied more consistently and robustly in all cases

- (a) The proposal amends the prosecution condition criterion for the appointment of multiple advocates to make clear that it is not sufficient to demonstrate the need for multiple advocates for each and every defendant just by reference to the fact that because the prosecution have instructed multiple advocates.
- (b) Approval of decisions to authorise the use of Queen's Counsel (QC) or multiple counsel will rest with Presiding Judges who will be in a position to provide oversight on a circuit-wide basis in order to ensure consistency of approach between court centres, where differing practices may have evolved over time. Presiding Judges will have the power to delegate their function (e.g. to a resident judge) where they consider it appropriate. This will provide the flexibility to ensure that bureaucracy and delay might be minimised.

Main affected groups

7. The proposals will affect the following groups:

- Criminal legal aid providers (barristers and solicitor advocates) - legal firms contracted with the LAA for publicly funded work and advocates conducting legal representation for clients;
- Legal Aid Agency (LAA) – which is responsible for administering legal aid;
- HM Courts and Tribunals Service (HMCTS) - through changes to court business; and
- The Judiciary

Costs and benefits

8. This IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales, with the aim of understanding the overall impact on society from implementing these proposed fee reforms. The costs and benefits of each reform are compared to the “do nothing” option. The IA places 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 aspects that cannot always be monetised.

9. All savings figures have been rounded to the nearest £1m for estimates below £10m and to the nearest £5m for estimates above £10m. All volume changes have been rounded to the nearest 100 cases below 10,000 volumes and to the nearest 1,000 above 10,000.

10. The financial estimates presented in this document are based on are based on AGFS payments made in 2012-13, to ensure that the data takes account of recent reforms and changes to fee structures.

Methodology and Assumptions

11. The following assumptions have been made in the estimation of the costs and benefits:
- (i) Advocates and litigators are assumed to supply a sufficient quantity of service to meet demand.
 - (ii) Advocates and litigators are assumed to supply the same quality of service at the new fee levels.
 - (iii) The costs and benefits of the policy proposals are assessed on the basis they are implemented together.
 - (iv) The crime VHCC scheme is assumed not to be impacted by the proposal to reduce the use of more than one advocate, as we have assumed these cases are complex and more likely to retain the use of more than one counsel.
 - (v) We assume that the restrictions in cases employing more than one advocate lead to a 50% reduction in these cases. For these cases which have reduced from two advocates to one, we have assumed the leading advocate remains on the case (either as a QC alone or junior alone).. The baseline for the two counsel restriction is based on cases billed in 2012/13, which have had the most recent 2013/14 AGFS rates applied.
 - (vi) We assess the distributional impact of the VHCC proposal assuming that the amount and distribution of work remains at 2012-13 levels, (i.e. we do not incorporate the impact of restricting two counsel in the baseline)³. This is because we have very little way of knowing which two counsel cases would be changed to single counsel, and for those that do, we could not be sure which advocate would remain on the case.

Option 0: Do Nothing

Description

12. The current rates are set out in individual VHCC contracts. If the 'do nothing' option were pursued, then this would mean that the current fee remuneration rates would continue to operate as now.
13. The criteria for the use of more than one advocate are currently set out in the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013. If the 'do nothing' option were pursued, then there would be no change in criteria for the use of more than one advocate.
14. As this option is compared against itself, its costs and benefits are necessarily zero, as is its Net Present Value (NPV).

Option 1: Reduce fees paid in Very High Cost Cases (Crime) (VHCCs) by 30%

Description

15. The proposal entails a flat fee reduction of 30% in all VHCC fee rates (excluding pre-panel cases) for preparation, advocacy and attendance at court, for both litigators and advocates of all levels and in all categories of case. This would be applied to both existing and new contracts, but would not be applied retrospectively to work done prior to implementation of the change. Fees under pre-2008 contracts will not be subject to the reduction.

Costs

³ See Impact Assessment relating to the restriction of 2 counsel and the 30% reduction to Very High Cost Cases (VHCCs).

Costs to legal aid service providers

16. The impacts on legal aid service providers are equal to a reduction of 30% in the income they receive from crime VHCC cases. This would amount to an estimated reduction in income to providers of around £20m in steady state. This would be composed of an approximate £8m reduction for advocates, with the remainder coming from litigation.

LAA Administrative Costs

17. The one-off costs from the reduction in rates are expected to be negligible. There would be additional administrative costs resulting from consulting on and amending VHCC contracts. There would be no IT costs as current systems are sufficient to handle the change.

LAA Administrative Benefits

18. There may be small ongoing benefits. The LAA may be required to deal with fewer providers if some providers choose not to supply their services to legal aid.

Benefits

Legal Aid Fund

19. There will be a financial saving to the Legal Aid Fund. This equates to 30% of the fees currently paid to legal aid service providers. The savings to the Legal Aid Fund are estimated to be approximately £20m in steady state.

Wider economic benefits

20. It is expected that the reduction in expenditure on VHCCs will have the wider benefit of helping to command public confidence in the legal aid system.
21. A reduction in Government spending associated with the reduction in legal aid would contribute to achieving the Government's macroeconomic objectives, in particular contributing to the reduction of the size of the budget deficit.

Risks and Uncertainties of VHCC fee changes

22. The VHCC proposals may lead to a behavioural response with providers changing the number of hours they work on a case. However, LAA contract managers monitor and agree the work and payments for VHCCs. We are uncertain how providers will respond to these fee changes, so we have not included behavioural impacts in the costs and benefits section.
23. On VHCCs, there is also a risk that some providers may decide to terminate their VHCC contract on existing cases or not take on new cases in the future. However, VHCCs will remain high value, long duration cases that, because of the way these cases are managed by the LAA, with regular phased payments, bring certainty of income for providers for the extended period in which they are instructed in these matters. This is particularly important to self-employed advocates. We therefore believe the stability and longevity of VHCC work should be reflected in the fees paid. We also believe more junior legal professionals are able to provide a sufficiently high quality service to enable individuals to be adequately represented in court and that they will continue to meet the minimum quality standards should some of the current VHCC providers decide to withdraw from the market.

Distributional Impact of VHCC fee changes

24. We assess the distributional impact of the VHCC proposal assuming that the amount and distribution of work remains at 2012-13 levels, (i.e. we do not incorporate the impact of restricting two counsel in the baseline). This is because we have very little way of knowing which two counsel cases would be changed to single counsel, and for those that do, we could not be sure which advocate would remain on the case.
25. The distribution of criminal legal aid fee income across advocates is very polarised. Indicative analysis from merging fee income data from Advocates Graduated Fee Scheme (AGFS) and VHCC cases from 2012/13 shown in the table below, suggests around 62% of advocates receive legal aid fee income of £50,000 in a year or less, 17% receive more than £100,000 and 3% receive more than £200,000. While we recognise that individual advocates' fee income reflects both the volume of work and case mix, we think it right that our reductions should affect those with the highest fee income.

Table 1: Legal Aid fee income of criminal barristers based on 2012/13 billing data⁴

2012/13 Criminal Fee Income Band (inc VAT)	<£50k	£50k-£100k	£100k-£200k	£200k+
Number of Criminal Barristers*	2490	850	540	100
<i>as % of all barristers</i>	62%	21%	14%	3%
Number of Criminal Barristers undertaking VHCCs*	50	60	110	50
<i>as a % of barristers in each fee band**</i>	2%	7%	20%	50%

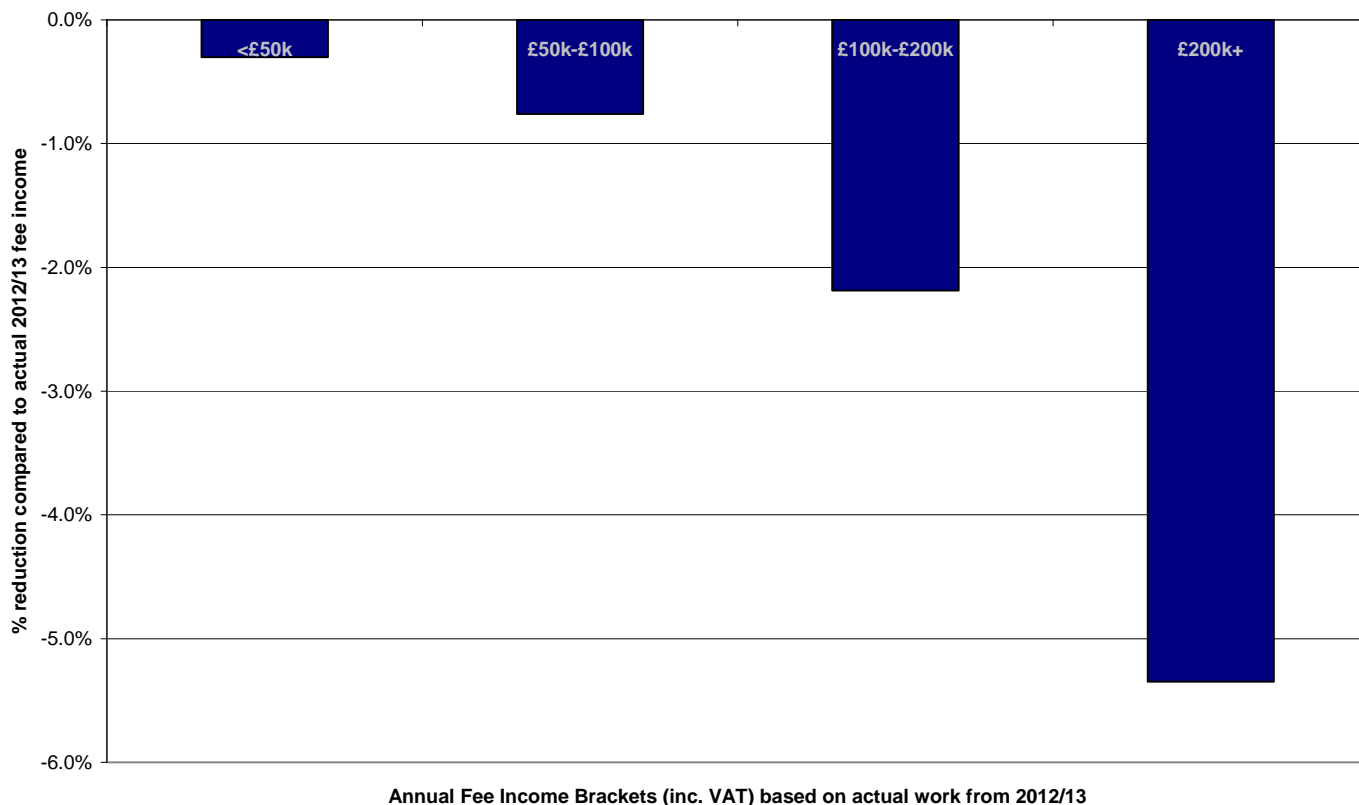
* Figures rounded to nearest 10

** Percentages based on unrounded values

26. The table above indicates that reducing VHCC remuneration is likely to impact most heavily on barristers with higher fee income. Of the 62% of all advocates with fee income of less than £50,000 in 2012/13 just 2% of them received fee income from VHCCs. In contrast, of advocates with fee income in excess of £200k, around half received fee income from VHCCs.
27. Our indicative analysis suggests that the VHCC changes would have a greater impact on those in receipt of high fee payments from criminal legal aid. Those with low fee income would see the smallest decrease in average fees. The effect of the VHCC changes would mean that 92% of barristers would see their income unchanged. We estimate that those receiving relatively lower fee income (under £50,000 in one year) would on average receive a modest decrease in annual fee income of 0.5% compared to their fee income in 2012/13. On the same basis, those on over £200k would on average receive a reduction of 5.5%. The following chart shows the distributional impact split by fee income bands based on 2012/13 data.

⁴ This includes barristers who received an AGFS payment. This will not include a barrister if they just received a VHCC payment but not an AGFS payment. This will also not include a barrister who was just paid a disbursement in 2012/13, but received no other fee.

Chart 1: The distributional impact of the VHCC fee reduction compared to 2012/13 fee income levels



Enforcement and implementation

28. This proposal will be implemented through secondary legislation and changes to contracts made by the end of 2013.

Option 2: Reduce the use of more than one advocate

Description

29. This proposal will tighten the criteria for allowing an individual to instruct more than one advocate, and ensure that the decision to grant a QCs or more than one advocate is approved by a limited cadre of judges to ensure that there is greater consistency in decision making.

Costs

Costs to legal aid service providers

30. The policy only impacts upon providers in cases paid under the AGFS which undertake cases in which a QC or more than one advocate is used. Based on the assumptions outlined in the 'Methodology and Assumptions' section, this policy is estimated to reduce fees paid to legal aid service providers by £10m per annum in steady state.

The Judiciary

31. The impact on the Judiciary is uncertain and is dependent on the process by which the Judiciary deal with applications for more than one advocate and therefore which cases are impacted.

Benefits

Legal Aid Fund

32. There will be a financial benefit to the Legal Aid Fund as a result of the reduction in the use of two advocates representing legally aided clients. Based on the assumptions outlined in the 'Methodology and Assumptions' section, this policy is estimated to save the Legal Aid Fund up to £10m per annum in steady state.

LAA Administrative Benefits

33. There may be small ongoing benefits. The LAA may be required to deal with fewer providers if some providers choose not to supply their services to legal aid.

Wider economic benefits

34. A reduction in Government spending associated with the reduction in legal aid would contribute to achieving the Government's macroeconomic objectives, in particular contributing to the reduction of the size of the budget deficit.

Risks and Uncertainties

35. We have no way of knowing which cases will be reduced from two to single advocate. Additionally, for those that are restricted, we are uncertain which of the two advocates would remain on the case. This may have implications for the estimated levels of savings.
36. The provider behavioural response to the proposed changes in this Impact Assessment is uncertain and therefore has not been included in costs and benefits section.
37. The assumption that 50% of two advocate cases will move to having one advocate is uncertain. The estimated cost to legal aid service providers and saving to the legal aid fund may therefore be different than estimated.
38. For those cases which do change from two advocates to one, we have assumed the more senior advocate remains on the case. The estimated cost to the legal aid service provider and saving to the Legal Aid Fund may therefore be higher than estimated if, instead, the more junior advocates remain on the case.

Enforcement and implementation

39. This proposal will be implemented through secondary legislation and changes to contracts made by the end of 2013.