

Annex E: Supplementary Legal Aid Scheme (SLAS)

2. Costs and Benefits

1. 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 to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. 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. These might include how the policy impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.
2. This Annex assesses the cumulative impact of the SLAS scheme (i.e. taking into account other legal aid reform changes), which will be implemented by regulations made under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act. The overarching IA summarises the cumulative impact of the Government's overall package of legal aid reforms (including those not in the LASPO Act 2012).
3. This Annex relates to the basic policy to introduce a Supplementary Legal Aid Scheme, confirmed in the June 2011 consultation response. That policy remained unchanged during the passage of the LASPO Act. This IA, which was first published alongside the Government's response to the consultation on legal aid reforms, is therefore being republished now in its original form for completeness. The Government has since been considering, and engaging with key stakeholders on the detailed application of the Scheme.
4. All estimates are relative to the 2009-10 baseline. In so doing an implicit assumption has been made that there will be no inflationary uprating of provider fees during the current Spending Review period.

Option 0: Do nothing

Description

5. If the 'do nothing' option was pursued then in a successful legally aided case the legal costs incurred would be recouped from the defendant, if costs are awarded, and the client would be entitled to keep 100% of the damages awarded. If costs are not awarded the LSC are entitled to cover their costs from the damages awarded to the client.
6. The 'do nothing' option is also the base case.
7. The 'do nothing' option is compared against itself hence its costs and benefits are necessarily zero, as is its Net Present Value (NPV).
8. Currently an individual eligible for legal aid has two choices in pursuing a damages case. The first is to receive funding through legal aid. The second is to enter a private Conditional Fee Agreement (CFA)¹. In both cases the claimant would not lose any of their damages if the case was successful, providing the LSC recoups all awarded legal costs from the losing party in the case of legal aid funded damages cases.
9. It is important to note that the 'do nothing' base case reflects any changes which are expected to arise when the recommendations in Lord Justice Jackson's Review of Civil Litigation Costs: Final Report are adopted. These are subject to a separate Impact Assessment. In particular, if Lord Justice Jackson's reforms are implemented in parallel with the SLAS then it is assumed that there will be no movement of cases between those funded by legal aid and those funded by CFAs.

Option 1: Introduce a scheme in which a percentage of general damages is taken from cases where successful claims for damages have been made and the claimant was in receipt of legal aid (known as a Supplementary Legal Aid Scheme or SLAS)

¹ Use of a no win no fee lawyer.

Description

10. The Supplementary Legal Aid Scheme (SLAS) is a scheme in which a percentage of funds are recouped from cases where successful claims for damages have been made and the claimant is in receipt of legal aid.
11. The SLAS policy confirmed in the June 2011 consultation response would apply to all civil cases where a legally aided client had been successful and obtained damages. The SLAS would also apply to claims for damages which are successful in securing legal aid funds for excluded cases.
12. The SLAS will be a partially funded model. The SLAS would take a fixed proportion (a proposed 25%) of all damages other than damages for future care and loss.

Option 1: Costs

Costs for legal aid clients

13. Client-related costs may take the following broad forms:

- (i) In relation to resource transfers, clients who choose to no longer take up legal aid would receive a reduction in the resource transfer from the legal aid budget. Clients who continue to take up legal aid and whose cases are successful would pay the legal aid budget equivalent to 25% of all damages excluding those for future care and loss. In total it is estimated clients would contribute around £7m annually (see Table 1). This change in resource transfers would apply to all clients affected by this policy. Legal Services Commission (LSC) data on damages and on the number of successful damages cases has been used to estimate this £7m saving for legal aid fund. The policy proposes taking a percentage of all damages other than those for future care and loss. The LSC's data does not break down to allow future care and loss cost to be excluded. We have therefore assumed that where the level of damages in a successful case is very high, the proportion of damages relating to future care and loss is likely to be relatively high. The assumed proportion of general damages ranges (i.e. damages not relating to future care and loss) from 90% to 10%.

Table 1: Costs to clients from taking 25% of damages excluding future care and loss²

Category	Steady State Savings (£m)
Clinical negligence	£6m
Actions against the police	£0m
Education	£0m
Public law	£0.5m
Housing	£1m
Total	£7m

- (ii) As a result of this reduction in resource transfers, clients who no longer receive legal aid may choose address their disputes in different ways. They may seek alternative resolution services, may represent themselves in court, may seek to resolve issues by themselves without reference to the courts, may pay for services which support self-resolution, or may decide not to tackle the issue at all.

² All figures have been rounded to the rounding convention stated in the 'Baseline Assumptions' section of the Cumulative IA, therefore the totals may not sum to the individual components.

- (iii) There is evidence that all these different approaches are sometimes undertaken currently by people facing disputes^{3 4}. Although the evidence is inconclusive, there is a risk that outcomes may be worse for some people who no longer receive legal aid as a result of these policies.
- (iv) This may have implications for the economic efficiency of dispute resolution. For example:
 - in some instances, case outcomes may remain the same and the same overall resource may be used to resolve the dispute (although this would no longer be provided by the legal aid fund, so the client may be worse off in this regard) with efficiency remaining the same;
 - in some instances, case outcomes may remain the same but cases which were previously resolved via the courts might in future be resolved using less resource via alternative means. This would improve efficiency; and
 - in some instances, efficiency would be lower where more overall resources are used to achieve the same outcome.
- (v) These policies aim to minimise any adverse impact on the economic efficiency of dispute resolution, for example by still providing legal aid to cases where alternative sources of funding or other resolution routes are less open.
- (vi) The overall implications will depend on the behavioural responses of clients who no longer receive legal aid and upon the nature and effectiveness of different ways of addressing disputes aside from using legally-aided service providers. The evidence on outcomes for individuals who benefit from legal aid compared with those who do not is limited. The CSJS⁵ (Civil and Social Justice Survey) shows that a variety of methods are currently used to resolve disputes with less than 1 in 10 being resolved through the court/tribunal system.
- (vii) We also reviewed the literature on outcomes for “litigants in person”⁶ (individuals in court and tribunal cases who are not legally represented) and found that, in general, being unrepresented is likely to impact on the outcome of the case. The extent to which this general finding applies to these particular reforms is less clear.
- (viii) A range of evidence shows that social, health and justice problems tend to “cluster”. For example, the LSRC’s CSJS indicated that at least one adverse issue (social, economic or health) also arose in approximately 50 per cent of civil justice disputes. These included physical or stress related illness, relationship breakdown and loss of employment or income. The survey also showed that individuals who were involved in crime had experienced one or more difficult to solve civil problems in the past three years.
- (ix) There is very limited evidence on the impact of providing early legally aided advice on the escalation of problems. Very few studies have systematically used robust methods to compare outcomes for those who do and do not receive early legal or other advice.
- (x) Any significant change in case outcomes may be associated with social and economic costs if this leads to wider economic and social issues arising (for example, relating to health, housing, employment or offending). There may then be associated costs to the Ministry of Justice, other government departments or public bodies or to society as a whole.
- (xi) The lack of a robust evidence base means that we are unable to draw conclusions as to whether wider economic and social costs are likely to result from the programme of reform or to estimate their size. The reforms to the legal aid system will reduce the income of those Not-for-Profit (NfP) organisations that hold legal aid contracts, although as legal aid is only one of several funding streams that NfP organisations receive, it is difficult to assess

3 Pleasence, P., Balmer, N., Patel, A and Denvir, C. (2010), Civil Justice in England and Wales: Report of the 2006-9 English and Welsh Civil and Social Justice Survey, LSRC, London.

4 Williams, K (2011) Litigants in person: a literature review. Ministry of Justice Research Summary.

5 Pleasence, P., Balmer, N., Patel, A and Denvir, C. (2010), Civil Justice in England and Wales: Report of the 2006-9 English and Welsh Civil and Social Justice Survey, LSRC, London.

6 Williams, K (2011) Litigants in person: a literature review. Ministry of Justice Research Summary.

the impact that the legal aid reforms will have on the overall sustainability of the NfP sector. However, the Government recognises the important role that NfP organisations play in delivering advice services at a local level, and that the funding framework for this sector is changing. The Government made £16.8million available in November 2011 to support the NfP advice sector in England and Wales in 2012/2013, as it adapts to changes in the way it is funded. This support was administered by the Cabinet Office. Further funding of £16.8 million for 2013/2014 and £16.8 million for 2014/2015 was additionally announced in the Budget in March 2012 to support the outcome of the Cabinet Office review of the long term sustainability of the NfP sector which is due to be published later this year.

14. Moreover these impacts would also only relate to clients who choose not to take up legal aid in light of the fact that, if their case was successful, they would be required to make a contribution to the legal aid fund. In other words these clients would consider that it is no longer worth their while to pursue the claim in light of their revised (and reduced) expected net financial gain. One implication of this is that the cases in question might be relatively low value.
15. There is a risk that there might be upward pressure on damages awards and that this might result in the judiciary awarding a higher amount of damages. If this risk were to materialise then clients may be no worse off than before and there may be no movement of clients away from the legal aid fund.

Costs for unsuccessful defendants

16. If the above risk of a higher amount of damages being awarded materialised then this would have adverse cost implications for defendants. In turn it is possible that any such increase in costs might be borne by insurers if the defendants were covered for their liabilities.

Costs for legal services providers

17. Impacts on legal services providers would relate to the possible behavioural effect associated with the client choosing not to take up legal aid and choosing to resolve their dispute through a different method or not resolving their dispute at all. Given the uncertainty surrounding the possible client response to these policies, the impact on providers is also subject to much uncertainty. The impacts on providers might take the following forms:
 - there might be a loss of business for some legal services providers which are contracted with the LSC to provide legally aided services;
 - there might be an increase in business for other service providers, including perhaps alternative resolution service providers or services which support self-resolution, which are funded by people who previously used to receive legal aid.
18. The overall impact is unclear and would also depend upon how providers adjust to changing patterns of demand.

LSC administration costs

19. The one-off costs from the implementation of a SLAS is estimated to be negligible. These relate to training and amending IT systems as well as other costs, such as temporary staff and contractors.
20. The ongoing administration costs may be in the form of staff to administer the scheme. This is likely to lead to a negligible ongoing cost.

HMCTS costs

21. The volumes of cases that continue to progress to court compared to resolving their problems in other ways is uncertain and, in the case of SLAS, likely to be small. However, if there is an increase in the volume of individuals continuing to go to court without legal representation the potential impacts are outlined below.
22. The Legal Aid Reforms are likely to have two key potential impacts on court/judicial resources and on HMCTS revenue.

- Court/Judicial resources: The volume of cases coming to court might remain the same or fall, however cases might be more complex and are more likely to involve active self represented parties (SRPs). These cases might take longer to resolve, with more hearings and require more Judicial time. A rise in active self represented parties is also likely to put additional pressure on court counter staff.
 - HMCTS revenue: At present court fees for legally aided clients are paid for from the legal aid fund. However, legal aid clients are on low income and are likely to qualify for a court fee remission assuming some of these cases continue to take their issues to court. It is estimated this loss in court fee income might be in the region of £10m based on a number of assumptions.
23. It is difficult to accurately estimate the aggregate direction and the magnitude of these impacts due to limited available evidence on the behavioural response of the individuals impacted by the reforms. The maximum number of individuals that would continue to take their issue to court could be estimated but there is little evidence on the additional resources SRPs might consume.
24. The Ministry of Justice plan to take the following actions to help understand and mitigate the impacts on HMCTS:
- Improve our ability to monitor the volumes and case durations of SRPs. This information will be published in the Court Statistics Quarterly publication from June 2012. There are also plans to improve our evidence base on the characteristics, drivers and support needs of SRPs which will help us better understand the impacts on HMCTS cost base.
 - Offer publicly funded mediation which is likely to divert more people away from court and help dampen the impact on HMCTS.
 - Improve signposting to alternative sources of advice. In response to the Civil Justice Council's recommendations in their report on self-represented litigants⁷ the MoJ have confirmed funding to a number of advice providers to help mitigate the potential impact of SRPs. This includes funding to the Royal Courts of Justice Citizens Advice Bureau for the development of an online diagnostic tool which gives support to SRPs and Advicenow for improving the suitability of their guidance for SRPs. This is likely to help more people get the right sort of advice and mitigate potential impacts on the courts and tribunals.
 - Work with the judiciary to improve guidelines for private law cases to ensure SRP are clear on the procedures they must follow and how they must conduct themselves in the courts and tribunals. This should help reduce the risk of SRPs taking up excessive amounts of courts and tribunals time.
25. The legal services market might also innovate in response to the additional needs of individuals for legal advice. This could include offering low cost advice services which may help prevent an increase in the volume of cases going to court, and providing advice and support services for particular stages or aspects of going to court.

Wider economic costs

26. The section on client related costs incorporates consideration of wider social and economic costs, both tangible and intangible.

Option 1: Benefits

Legal aid fund

27. Savings to the legal aid fund equate to the reduced amounts of legal aid set out in Table 1 and mirror the increased contributions from clients. The total sum is estimated to be £7m. In addition there may be savings from clients who choose not to take up legal aid and whose cases would have been unsuccessful. On the other hand the £7m figure would be lower if some clients choose not to take up legal aid and if their cases would have been successful.

⁷ <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/self-represented-litigants>

Wider economic benefits

28. A reduction in government spending associated with the reduction in legal aid would contribute to achieving the Government's macroeconomic objectives, in particular reducing the size of the Government's fiscal deficit.
29. The reduced subsidisation of particular goods and services may be associated with increased economic efficiency. For example subsidisation of a service in general may lead people to consume this service when better and cheaper alternatives might be available. The policies in this IA would involve reducing the provision of subsidised services.

LSC administrative savings

30. Any ongoing LSC administrative savings would come from any reduction in the volume of damages cases funded by legal aid. This is very much dependent on the behavioural response of the clients to these changes. In the case of no behavioural response then an ongoing cost is likely to remain.

HMCTS savings

31. As explained in the HMCTS Costs section, there will be an increase in the volumes of individuals with legal problems not receiving legal aid. The impact on the volumes and durations of the cases going to court is uncertain. There is a risk that court and tribunal costs might increase in response to the reforms. Equally, courts and tribunals costs might decrease as a result of the reforms for the following reasons:
- More people might decide not to take their legal problem forward or might resolve their issues without the use of the courts.
 - The offer of publicly funded mediation might divert more people away from the courts.
 - New innovations by the legal services market, for example low cost advice services or services targeted at particular stages or aspects of going to court, may help minimise an increase in the volume of cases going to court or in the costs to HMCTS associated with SRPs
32. The aggregate direction and magnitude of the drivers outlined above is difficult to estimate due to a lack of thorough available evidence on the behavioural response of the clients that would have previously received legal aid. The response of the legal services market is also difficult to anticipate.
33. The Ministry of Justice are taking actions to help mitigate the impacts on HMCTS (outlined in the 'HMCTS Costs' section).
34. As explained in the 'HMCTS Costs' section the Ministry of Justice will improve the monitoring of volumes and case durations of SRPs and this information will be published in the Court Statistics Quarterly publication from June 2012.

Risks and Uncertainties

35. In relation to the savings associated with this policy there are risks that;
- an increase in the size of damages awarded would increase the total savings;
 - the number of legally aided damages cases could be higher or lower than estimated;
 - the size of damages excluding those for future care and loss may have been over or under estimated which may lead to higher or lower savings to the legal aid fund;
 - any shift in damages cases from those funded by legal aid to those funded by CFAs might be higher or lower than assumed;
 - legal aid savings might fall depending upon how many clients choose not to take up legal aid and whether their cases would have been successful or unsuccessful.

3. Enforcement and Implementation

36. The current assumed implementation date is April 2013.

4. Specific Impact Tests

Equality Impact Assessment

37. The published accompanying Equality Impact Assessment (EIA) details the equality impacts.

Competition Assessment

38. The policy to recoup a percentage of a legally aided client's damages is unlikely to significantly affect the number or range of civil and family legal aid providers. There may be a small reduction in demand as a result of this policy which may lead to a small reduction in demand for legal aid services. This may negatively impact upon competition if the proposed reforms cause some providers to go out of business.

39. The impact on the incentive to compete vigorously is dependent upon provider reaction to the reforms. Competition for legal aid contracts could be positively impacted if the same numbers of providers are competing for fewer legal aid clients. On the other hand the level of competition may remain the same or decrease slightly if the number of legal aid providers fell in line with or more than the potential reduction in legal aid clients.

Small Firms Impact Test

40. Small firms may be affected by the policies to recoup a percentage of a legally aided client's damages. The reforms may reduce the number of cases entitled to receive legal aid and negatively affect some legal aid service providers. The majority of legal aid providers are small firms therefore, when comparing to the legal services population as whole, small legal aid providers may be disproportionately affected by the reforms. However, if the impact of the policies on small legal aid providers is compared to the legal aid service provider population only, then small firms may not be disproportionately affected.

41. Overall, due to the dominance of small legal services providers in the legal aid market, the majority of providers impacted by this policy are likely to be small providers, however this is dependent on the client response to the policy.

Carbon Assessment

42. We do not consider that there will be any significant change in Greenhouse Gas emissions as a consequence of this policy. The policy may lead to clients having to travel further for legal assistance, although this is dependent upon the impact on the number and range of providers which is subject to uncertainty and likely to be very small for this policy.

Other Environment

43. We do not anticipate any significant impact on the environment as a consequence of this policy.

Health Impact Assessment

44. The impact of this policy is clients will now receive less damages from a legally aided case. The policy applies to all damages (other than future care and loss), therefore there is unlikely to be any impact on a client's future health.

Human Rights

45. The policies in this IA have been subjected to a Human Rights screening to ensure it is compliant with the Human Rights Act.

Justice Impact Test

46. The overall impact on the Justice System is outlined in the evidence base of this IA.

Rural Proofing

47. Approximately 10% of legal aid clients with location data are from rural areas and 90% are from urban areas. It is not possible to determine precisely which damages cases will be impacted in the future as we cannot link geographical client data with data on damages cases. As such, it is not possible to determine whether rural clients will be disproportionately impacted by the reforms. However, there is a risk that the eligibility policies will negatively impact upon clients in rural areas.
48. Approximately 6% of legal aid providers with location data are from rural areas and 94% are from urban areas. It is not possible to determine precisely which damages cases will be impacted in the future as we cannot link geographical client data with data on damages cases and therefore cannot identify precisely which providers would be affected. As such, it is not possible to determine whether rural providers will be disproportionately impacted by the reforms.

Sustainable development

49. The SLAS policy set out in this IA is consistent with the principles of sustainable development. In particular, the policies lead to a sustainable economy and a just society. They are designed to ensure clients that gain from legal aid funding contribute to the future sustainability of legal aid.

Annex 1: Post Implementation Review (PIR) Plan

Basis of the review:

It is intended to review each policy in 2016. The review will form part of a wider review of the entire package of Legal Aid Reform policies implemented following the June 2011 Consultation Response on the Legal Aid Reforms and Legal Aid Sentencing and Punishment of Offenders Act 2012.

Review objective:

To ascertain whether the policy has had the expected impact on behaviour and savings outlined in this Impact Assessment.

Review approach and rationale:

The intention is to monitor and review the impact of the policies on all affected groups outlined in the Impact Assessment, and Equalities Impact Assessment. This is likely to involve the collation of existing administrative data from a variety of sources, including the LSC, HMCTS and providers. We have identified a number of areas where there are limitations in the administrative data and we will explore the feasibility improving data coverage and quality in the medium and longer term. We will complement use of administrative data with bespoke research exercises where appropriate. For example, the MoJ is planning to conduct a new study of legal aid clients to provide additional information on a range of client characteristics, including protected characteristics and income and capital to inform our review of the implementation of these reforms. We are also working with the Legal Services Board (LSB) and the Law Society to produce further research on providers.

Baseline:

The SLAS policy will be assessed against a 2009/10 baseline for LSC damages data which the SLAS costs and savings figures in this IA are based upon.

Success criteria:

Whether the objectives of the reforms outlined in the IAs and in the Consultation Response document have been met.

Monitoring information arrangements:

It is intended to make use of the data LSC systems routinely collect in addition to existing administrative data sources, including HMCTS and providers. As set out above we will explore the feasibility of addressing some of the known limitations of the existing data.

Reasons for not planning a PIR:

N/A