

Annex C: Remuneration in Civil & Family Proceedings

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 policies. The costs and benefits of each policy are compared to the do nothing policy. 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. All estimates are relative to the 2009-10 baseline. In doing so an implicit assumption has been made that there will be no inflationary uprating of provider fees during the current spending review period. Policies implemented post 2009-10 have not been factored into the savings figures. In addition, as was made clear in the consultation response, it has been assumed that the majority of fees paid under the current contracts will be replicated under the new legal aid contracts which will be introduced when the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 is implemented.
3. This Annex assesses the cumulative steady-state impact of the civil remuneration policies. The overarching IA summarises the cumulative steady-state impact of the Government's overall package of legal aid reforms. The policies in this Annex were implemented by secondary legislation under the Access to Justice Act 1999 and amendment to LSC contracts in October 2011 and February 2012 and not implemented by the LASPO Act. This Annex has therefore has been included for completeness.

Option 0: Do nothing

Description

4. If the 'do nothing' policy had been pursued then the previous fee rates and structure would continue to apply. The current fees paid are published on the LSC website¹. The 'do nothing' policy was also the base case.
5. Because the 'do nothing' option is compared against itself its costs and benefits are necessarily zero, as is its Net Present Value (NPV).

Option 1: Reduce all fees paid in civil and family matters by 10%

Description

6. Legal aid fees charged for controlled and certificated work are implemented by the LSC and set by the funding order from the Lord Chancellor. Under Option 1 the Government reduces all fees paid in civil and family matters by 10%. This applies both to prescribed hourly rates and to all civil standard and graduated fees. However it does not apply to the lower rates (known as 'risk rates') which are currently paid on non family high cost cases as these are already well below other rates when enhancements are taken into account. It also does not apply to family mediation fees.

Option 1: Costs

Costs for legal services providers

7. The impacts on legal service providers is equal to a 10% reduction in income from legal aid cases. This would amount to an estimated cost to legal service providers of around £50m. This would take the form of an efficiency saving as the same services and assumed quality of service are to be provided but at lower cost to the legal aid fund.

¹ www.legalservices.gov.uk/docs/civil_contracting/payment_annex_2010_-_Dec_09.pdf

8. The overall impact on providers would depend upon their response to the fee cut. It is possible that some providers may reduce the amount of legal aid work they supply, or refocus their legal aid work into the most profitable categories. They may also become more efficient in their processes as a result of the cut. This may lessen the stated impact on legal services providers. However, providers (particularly in the not-for-profit sector) who are heavily dependent on legal aid funding may be particularly affected by this reduction in income, especially when coupled with changes to the scope of legal aid. However, we had no firm evidence regarding the provider response.

Costs for legal aid clients

9. The potential costs to legal aid clients are likely to depend upon the provider response to the fee cuts. Providers may devote less resource to legal aid including devoting less experienced legal professionals. This might lead to a poorer quality of service and, possibly, poorer customer service for legal aid clients. However, this would still need to meet current LSC minimum quality standards.
10. These potential impacts on client service availability and on the quality of provision are currently being flagged up as risks. These risks have been discussed further in the 'key risks' section of this IA.

LSC administration costs

11. The one-off costs from the reduction in rates are likely to be negligible. These relate to training and to amending IT systems to take account of the changes.
12. The ongoing costs are likely to be neutral as there is unlikely to be any resulting volume change from this policy.

Option 1: Benefits

Legal aid fund

13. LSC accounts data has been used to calculate the benefit of this policy. Total expenditure minus disbursements has been used to calculate the total fees previously paid by the LSC to legal service providers. 10% of this total was taken for both Legal Representation and Legal Help to calculate the total saving to the legal aid fund. The savings, presented in Table 1, should be regarded as efficiency savings.

Table 1: Legal aid fund saving 2009/10²

Category	Legal aid fund savings in steady state	
	Family	Civil
Legal Help	£1m	£10m
Legal Representation	£30m	£5m
Total	£30m	£15m

Wider economic benefits

14. 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.

Option 2: Cap enhancements to hourly rates payable to solicitors in civil non-family cases

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.

Description

15. The hourly rates paid to solicitors are set out in the Community Legal Service (Funding) Order 2007. Prior to consultation, these rates could be 'enhanced' (i.e. increased) on assessment by up to 100% for cases heard in the County Court, and by up to 200% for cases in the High Court. Enhancements are based upon a range of factors including the skill, competence, expertise and speed of the work and complexity of the case. Typically enhancements are currently estimated to be between 30% and 50%.
16. Option 2 proposed that the enhancements which are paid to solicitors should be capped at 100% for cases in the High Court, Court of Appeal and Supreme Court and 50% for all other courts. Following consultation it was decided to cap enhancements to hourly rates payable to solicitors in civil cases generally as proposed but to also apply the 100% cap on enhancements to civil (non-family) cases in the Upper Tribunal.

Option 2: Costs

Costs for legal services providers

17. The impact on legal services providers of the policy is likely to be limited and is uncertain. Enhancements are awarded on a case by case basis and typically are below the new thresholds. Some legal services providers are likely to be affected. However, the costs are likely to be small.
18. The overall impact on providers will depend upon their response to any reduction in income. It is possible that some providers may reduce the amount of legal aid work they supply and focus on other types of client or other areas of business. Some providers may also become more efficient in their processes as a result of a reduction in income. However, we have no firm evidence regarding the provider response.

Costs for legal aid clients

19. Significant impacts on clients are not anticipated. There is a possible risk that in some cases providers may respond to the reforms by providing a reduced level and quality of service. There might be other possible risks relating to client choice and the supply of services. The probability of these risks materialising might be high in some cases.

LSC administration costs

20. One-off costs to the LSC from changes to the enhancement thresholds are likely to be negligible. These relate primarily to training and to amending IT systems to take account of the changes and have been incorporated into the overarching impact assessment.
21. The ongoing costs are estimated to be around £0.5m. These result from the application of more detailed assessment criteria on enhancements.

Option 2: Benefits

Legal aid fund

22. The benefits to the legal aid fund are uncertain. Enhancements are offered on a case by case basis and there is no central record of specific enhancements paid per case. It is therefore uncertain how many cases are currently above the new thresholds. However, while any direct savings are likely to be small given that typical enhancements are currently between 30% and 50% it will provide improved control over the risk of future increases in the cost of legal aid cases.

Wider economic benefits

23. 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.

Option 3: Codify rates paid to barristers in civil non-family matters subject to a 10% reduction

Description

24. In cases where risk rates do not apply barristers have historically been paid 'benchmark rates'. These rates, including the 10% reduction, are set out in Annex 2. The rates for junior Counsel in the County Courts set out in Annex 2 were subject to a discretion that will permit the LSC to allow a higher rate if they consider it appropriate. That discretion does not exist for cases in the higher courts. This reflects current provision.
25. Option 3 proposed that barristers' benchmark rates should be codified to provide greater clarity and control, and be subject to a further 10% reduction in line with the general reduction in rates described above. Barristers' rates have now been codified and reduced by 10%. In the consultation it was identified that the suggested current benchmark rate of £120 proposed for junior counsel in the county court was incorrect. This was modified in implementation.

Option 3: Costs

Costs for legal services providers (barristers)

26. Costs to legal service providers will depend upon barristers' response to the fee cuts. The overall impact on providers would depend upon their response to any reduction in income. It is possible that some providers may reduce the amount of legal aid work they supply and focus on other types of client or other areas of business. Some providers may also become more efficient in their processes as a result of a reduction in income. We have had no firm evidence regarding the provider response.
27. This policy is a subset of Policy 1. The costs to barristers from the 10% cut are not broken down separately. Therefore we can assume that the cost to the barrister is a subset of the 10% (£35m) reduction in fees for certificated work or Legal Representation.

Costs for legal aid clients

28. Costs to legal aid clients will depend upon the response of the barristers to the fee cuts. Barristers may devote less resource to legal aid cases leading to a backlog in legal aid cases meaning the client would experience delays.
29. There is a possible risk that in some cases providers may respond to the reforms by providing a reduced level and quality of service by, for example, passing the work onto more junior colleagues to undertake. However, this would still need to meet current LSC minimum quality standards. There might be other possible risks relating to client choice and the supply of services. These impacts are currently being flagged up as possible risks.

LSC administration costs

30. The one-off costs from codifying and reducing barristers rates are likely to be negligible. These relate primarily to training and amending IT systems to take account of the changes.
31. The ongoing costs are likely to be neutral as there is unlikely to be any resulting volume change from this policy.

Option 3: Benefits

Legal aid fund

32. The benefits from this policy are likely to equal the cost to legal services providers. Total benefits from this policy are a subset of the benefits from Option 1.

Benefits for legal services providers (barristers)

33. Codification may provide greater consistency, transparency and certainty surrounding payments. Net benefits would arise if codification was not associated with disproportionate restrictions in relation to price setting and service provision.

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 reducing the size of the Government's fiscal deficit.

Option 4: Cap enhancements to hourly rates payable to solicitors in family cases

Description

35. The hourly rates paid to solicitors are set out in the Community Legal Service (Funding) Order 2007. Prior to consultation, these rates could be 'enhanced' (i.e. increased) on assessment by up to 100% for cases heard in the County Court, and by up to 200% for cases in the High Court. Enhancements are based upon a range of factors including the skill, competence, expertise and speed of the work and complexity of the case. Typically enhancements are currently estimated to be between 30% and 50%.
36. Option 4 proposes that the enhancements which can be paid to solicitors should be capped at 100% for cases in the High Court, Upper Tribunal, Court of Appeal and Supreme Court and 50% for all other courts. This policy has now been implemented.

Option 4: Costs

Costs for legal services providers

37. The impact on legal services providers of this policy is likely to be limited and is uncertain. Enhancements are awarded on a case by case basis and typically are below the new thresholds. Some legal services providers are likely to be affected. However, given that this change is not intended to result in a pro rata reduction in the level of enhancements currently paid that are below the new limits, the costs are likely to be small.
38. The overall impact on providers depends upon their response to any reduction in income. It is possible that some providers may reduce the amount of legal aid work they supply and focus on other types of client or other areas of business. Some providers may also become more efficient in their processes as a result of a reduction in income. However, we have had no firm evidence regarding the provider response.

Costs for legal aid clients

39. Significant impacts on clients are not anticipated. There is a possible risk that in some cases providers may respond to the reforms by providing a reduced level and quality of service. However, this would still need to meet current LSC minimum quality standards. There might be other possible risks relating to client choice and the supply of services. These impacts are currently being flagged up as possible risks. The probability of these risks materialising might be high in some cases.

LSC administration costs

40. One-off costs to the LSC from changes to the enhancement thresholds are likely to be negligible. These relate primarily to training and to amending IT systems to take account of the changes.
41. There are likely to be ongoing costs from the application of more detailed assessment criteria on enhancements. These are a subset of the ongoing costs from Option 2.

Option 4: Benefits

Legal aid fund

42. The benefits to the legal aid fund are uncertain. Enhancements are offered on a case by case basis and there is no record of specific enhancements paid per case. It is therefore uncertain how many cases are currently above the new thresholds. However, while any direct savings are likely to be small given typical enhancements are between 30% and 50% it will provide improved control over the risk of future increases in the cost of legal aid cases.

Wider economic benefits

43. 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.

Option 5: Restrict the use of Queens Council (QC) in family cases

Description

44. QCs were funded by legal aid predominantly in care proceedings. The LSC's view, supported by a number of consultation responses, was that the LSC funded more QCs in these cases than local authorities. The use of QCs is a very expensive and specialised resource. The Government believes that this should only be provided at public expense where it is truly necessary. The Government believes that the previous guidance did not adequately achieve this.
45. Option 5 proposed that the engagement of a QC in a family case (whether the case is above or below the VHCC threshold) should only be approved by the LSC subject to provisions equivalent to those applying in criminal cases. In brief, these provisions are that; the case involves substantial novel or complex issues of law or fact which could only be adequately presented by a QC and; either the opposing party has engaged a QC or senior Treasury Counsel, or the case is exceptional for some other reason. This policy has now been implemented.
46. In addition it should be mentioned that Option 1 (10% fee rate reduction) also includes reducing QC rates by 10%. Analysis of the costs and benefits of this 10% fee reduction for QCs have been incorporated in the analysis of Option 1.

Option 5: Costs

Costs for legal services providers (QCs)

47. Subject to the particular features of individual cases, there will be a reduction in the number of QCs involved per case, which will mean that QCs are likely to engage in less legal aid business and in aggregate will receive less income relating to legal aid clients.
48. The overall impact on providers will depend upon their response to any reduction in legal aid business. It is possible that some providers may focus on other types of client or other areas of business instead of legal aid business. Some providers may also become more efficient in their processes as a result of a reduction in income. We have had no firm evidence regarding the provider response.

Costs for legal aid clients

49. Significant impacts on clients are not anticipated. There is a possible risk that in some cases clients may experience a reduced level and quality of service. There might be other possible risks relating to client choice and the supply of services.

LSC administration costs

50. The one-off costs from restricting the use of QCs and reducing their rates by 10% are likely to be negligible and, in any event will be a subset of the costs of Option 1. These relate to training and to amending IT systems to take account of the changes.

51. There are likely to be marginal ongoing costs which will result from the additional assessment on the use of QCs.

Option 5: Benefits

Legal aid fund

52. The benefits from this policy are likely to equal the cost to legal services providers. However, similarly to the costs to providers, total benefits from the 10% fee cut are a subset of the benefits from Option 1.
53. The benefits of restricting the number of QCs are uncertain. The savings will depend upon the judgement of the LSC. The data on total spend on QCs in legal aid cases is not recorded, neither is the complexity of each individual case and so the benefits are uncertain.

Wider economic benefits

54. 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.

Key risks

55. The possible risks outlined below would only arise if a shortfall in the quality and/or supply of legally aided services was to emerge and if the Government did not respond to any such shortfall. This would be equivalent to a de facto reduction in legal aid scope or eligibility.
56. There is limited information on the legal service market in England and Wales. Our assessment of the available evidence³ has highlighted that between 1995 and 2008 there has been significant growth in the UK legal services market, with increases of 34% in the number of legal service enterprises and nearly 300% in terms of turnover. At least one in four of all solicitors firms in the UK undertook some legal aid work in 2008/9, with English and Welsh legal aid expenditure representing around 10% of the total turnover for solicitors in the UK. Additionally, the ratio of lawyers per head of population has increased from around 1:1000 to 1:400 in the last 20 years. However, there has been a downward trend in the overall number of providers dealing with civil and family legal aid work, a decrease of around 23% between 2006/07 and 2009/10. This is attributed to the continuing process of providers that do small amounts of legal aid work leaving the market or merging with other firms, in addition to the LSC terminating dormant accounts where no work was being done.
57. While previous fee cuts to date do not appear to have had an adverse impact on market sustainability, there is a risk that the legal aid services market may not be able to sustain the cuts to fees. There are two potential adverse impacts on the market: the number and type of suppliers; and the quality of advice received. The most recent survey of law firms was commissioned by the Law Society during the consultation period⁴. This suggested that while the fee cuts are likely to be broadly sustainable, the market may not be able to sustain the additional proposed scope cuts, with particular risks for civil/family firms more generally. However, the quantitative results are based on a small and possibly unrepresentative sample. In addition, there are issues with self-reporting and it is unclear whether the assumptions used to drive the financial calculations are robust, so the extent to which the results are reliable and representative of the wider market cannot be validated. Evidence from the Scottish Legal Aid Board suggests that there was a confirmed increase in solicitors' firms registered to provide legal aid services, despite cuts in legal aid fees paid to suppliers in Scotland⁵. However we cannot assume that the market in England and Wales will behave in the same way.
58. To mitigate any potential risk that clients may not be able to access legally aided services the Government is working with the LSC to ensure that they have robust mechanisms in place to identify any developing market shortfall and that they are able to respond promptly, effectively and appropriately, should this materialise in any form. This is being accompanied by the development of an appropriate client and provider strategy which includes consideration of the best way that services

3 Office for National Statistics and Legal Services Reforms: Catalyst, Cataclysm or Catastrophe? Professor Stephen Myerson, Legal Services Policy Institute speech, 21 March 2007.

4 Otterburn (2011) Law Society: Impacts of the MOJ Green Paper proposals on legal aid firms

5 Scottish Legal Aid Board (2011) Press release, February 17 2011. <http://www.slab.org.uk/news/index.html> Accessed 23 May 2011.

remaining in scope can be bundled in future procurement rounds to ensure that clients are able to access the services they need. In the longer term, the move to competition is designed to ensure that legal aid services are procured at a rate the market is able to sustain.

59. If the policies in this IA lead to reductions in the supply of legally aided services, and if this was not addressed, then client-related costs may arise. These would be similar to the costs associated with reductions in legal aid scope and eligibility.

3. Enforcement and Implementation

60. The remuneration reforms for most civil work were implemented in October 2011 which included housing work not covered by the Unified Contract. However, the changes to family work and housing work covered by the Unified Contract were not implemented until February 2012,

4. Specific Impact Tests

Equality Impact Assessment

61. The published equivalent Equality Impact Assessment (EIA) details the equality impacts.

Competition Assessment

62. The reforms to civil and family fees for legal aid providers may indirectly affect the number, and possibly the range, of civil and family legal aid providers. There is a risk some civil and family providers may decide not to offer provision of legal aid services under the proposed level and structure of civil and family fees. This could lead to less competition between providers.

63. However, the net impact on competition of the civil and family fees policies is uncertain and very much dependent upon provider response.

Small Firms Impact Test

64. Small firms will be affected by the reforms of civil and family fees. The reforms will impact upon all civil and family legal aid service providers. The majority of these legal aid providers are small firms therefore, when comparing to the legal services population as whole, small legal aid providers are likely to be disproportionately affected by the proposed 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 will not be disproportionately affected.

65. Overall, due to the dominance of small legal services providers in the legal aid market, the majority of legal aid providers impacted by this policy are likely to be small providers.

Carbon Assessment

66. We do not consider that there will be any significant change in Greenhouse Gas emissions as a consequence of this policy. The policies 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.

Other Environment

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

Health Impact Assessment

68. Providers that receive less income from legal aid may suffer from a negative impact on their health. This may include a reduction in income from a reduction in fees paid. However, we do not believe these impacts will be significant.

69. There are unlikely to be any significant impact on lifestyle related activities, such as diet or physical activity, or demand for health and social services.

Human Rights

70. 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

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

Rural Proofing

72. Approximately 6% of civil providers with location data are based in rural areas, and 94% of civil legal aid providers are based in urban areas. It is not possible to determine precisely which cases might not be funded in future as we do not have all the appropriate data and therefore cannot identify precisely which providers would be affected. As such, it is not possible to determine whether the cases assumed to no longer be funded would impact on providers in either rural or urban areas. However, there is a risk that the policies will negatively impact upon providers in rural areas.

Sustainable development

73. The civil and family fee reforms set out in this IA are consistent with the principles of sustainable development. In particular, the policies on civil fee cuts contribute to a sustainable economy and a just society. They are designed to ensure providers are supplying legal aid at a lower, more efficient rate.

Annex 1: Post Implementation Review (PIR) Plan

Basis of the review:

It is intended to review each policy between three and five years after the implementation date. 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 changes to the level and structure of civil fees have had the expected impact outlined in this IA.

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:

All civil and family remuneration policies will be assessed against a 2009/10 baseline for LSC expenditure and volumes data which all the policy 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

Annex 2: LSC “benchmark” hourly rates for barristers in civil non-family

Table A2.1: LSC “benchmark” hourly rates for barristers in civil non-family

	Current Hourly Rate	Proposed Hourly Rate (-10%)
Junior counsel in County Court	£125 (outside London) £150 (in London)	£112.50 (outside London) £135 (in London)
Senior counsel alone or leading in High Court	£150	£135
Led junior counsel in High Court or Court of Appeal	£125	£112.50
Leading senior counsel in Court of Appeal	£175	£157.50
Queen’s Counsel (where approved for instruction by LSC) in the High Court or Court of Appeal	£200	£180
Leading senior counsel in the Supreme Court	£200	£180
Queen’s Counsel (where approved for instruction by LSC) in Supreme Court	£250	£225
Noter/Pupil/2 nd led junior counsel	£40	£36