

## **Annex F: Expert Fees**

### **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 the 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. 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. In addition, as was made clear in the consultation response, it assumes that the majority of fees paid under the current contracts will be replicated under the new legal aid contracts that will be introduced when the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 is implemented.
3. This Annex assesses the cumulative impact of the expert fees policy. The overarching IA summarises the cumulative 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 amendments to LSC contracts in October 2011. The policy option was not implemented by the LASPO Act. This annex has therefore been included for completeness.

#### **Option 0: Do nothing**

##### Description

4. If the 'do nothing' option was pursued then payments to experts would remain without structure or consistency or statutory limitation.
5. The 'do nothing' option was also the base case.
6. 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: Codify 'benchmark' hourly rates for experts and reduce them by 10%**

##### Description

7. Experts are a disparate group, with a wide range of specialist skills and knowledge, who are used to provide information in court cases. The Legal Services Commission (LSC) does not contract directly with experts and there is no intention for it to do so as a result of the implementation of this policy.. The costs incurred by solicitors for expert evidence are included in the invoice they present to the LSC for 'disbursements', which also includes travel and the other out-of-pocket expenses of the case.
8. Payments to experts are not currently recorded separately from other disbursements by the LSC. At the time of consulting, there were no published guideline rates in civil matters. In criminal matters, however, the Ministry of Justice had set out guideline rates for the purposes of guiding court staff dealing with claims from expert witnesses in respect of court attendance under the Costs in Criminal Cases Regulations 1986.
9. Most experts were previously paid at hourly rates, and the LSC sought to control excessive expenditure through a process of 'prior authority' (where providers seek permission to incur experts' costs) and through the application of guideline or 'benchmark' hourly rates on assessment of solicitor's bills. However, there was no requirement on the LSC to apply the 'benchmark' rates, it was not compulsory to seek prior authority, and higher rates could be allowed by the court on final assessment in certain cases. The ultimate decision on whether an expert is used lies with the court. Because there were no official or binding rates, the LSC has probably historically been paying

different amounts for similar work by different experts across different categories of law. This is in potential conflict with the LSC's responsibility under the Access to Justice Act 1999 to achieve value for money in the services it funds.

10. Option 1 proposed that the guideline or 'benchmark' hourly rates previously referred to by LSC caseworkers when considering whether experts' fees were reasonable, should be codified, and reduced by 10% (consistent with the reforms to fees payable to legal aid lawyers in civil and family cases). Following implementation, these rates apply to civil, family and criminal cases and are set out in the Community Legal Service (Funding) Order 2007 (as amended by the Community Legal Service (Funding) (Amendment No.2) Order 2011) and the Criminal Defence Service (Funding) Order 2007 (as amended by the Criminal Defence Service (Funding) (Amendment) Order 2011) and are also dealt with under the LSC's civil and criminal contracts and Funding Code Guidance. Where there are no prescribed rates or fees the LSC assess these costs on an individual basis with regard to the rates set out in the Funding Orders,
11. These rates are now binding on the courts and the LSC can only be exceeded in exceptional circumstances by seeking prior authority from the LSC. In the longer term, the Government's intention is to introduce a system of fixed and graduated fees.

## Option 1: Costs

### *Costs for legal services providers (experts)*

12. The costs to experts equate to the difference between income they previously received and income they currently receive under the new fee scheme for the same work. Currently the LSC do not record payments made to experts separately from other disbursement costs. The reforms are expected to exert greater control over the costs of experts and therefore, some experts will be paid less as a result of this policy.
13. The potential costs to providers are presented in Table 1. LSC data on Legal Representation net of disbursements (excluding disbursements met by opponents) has been used to estimate potential costs to experts of this policy. It is assumed that approximately two-thirds of expenditure on disbursements is attributed to experts. A 10% reduction in the estimated spend on experts is estimated to increase the cost on providers by approximately £10m. This equates to an increase in economic efficiency as we assume that the same volume and quality of services will be provided but at lower cost.

**Table 1: Reduction in Income to Providers<sup>1</sup>**

Category	Net Disbursements 2009/10	Expert Fees	Potential Costs to Providers
Civil	£20m	£15m	£1m
Family	£70m	£50m	£5m
Criminal	£90m	£60m	£6m
<b>Total</b>	<b>£180m</b>	<b>£120m</b>	<b>£10m</b>

### *Costs for legal aid clients*

14. There is a possible risk that in some cases providers (experts) 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. These impacts are currently being flagged up as possible risks. However, there is no measurable evidence to date to suggest that providers are responding in this way.

### *LSC administration costs*

<sup>1</sup> 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.

15. The costs of codifying expert hourly rates through a Funding Order are likely to be negligible. There may be additional one off or ongoing administrative costs following implementation relating to amending IT systems to take account of any ongoing monitoring system, form changes or training required.
16. There are likely to be ongoing costs. These are estimated to be around £0.5m and would result from an increase in staffing costs from an increase in the rejection of applications for expert funding and an increase in appeals, as well as increased data capture costs. The LSC are currently monitoring this.

### **Option 1: Benefits**

#### *Legal aid fund*

17. The benefit to the legal aid fund will equate to the reduced income to experts set out in Table 1. This is estimated to be around £10m. This equates to an increase in economic efficiency.

#### *Wider economic benefits*

18. A reduction in government spending associated with the reduction in legal aid will contribute to achieving the Government's macroeconomic objectives, in particular reducing the size of the Government's fiscal deficit.

### **Key risks**

19. The possible risks outlined below would only arise if a shortfall in the supply and/or quality of experts was to emerge and if the Government did not respond to any such shortfall. The Government does not intend this situation to arise and is currently considering a number of options on monitoring the impact of the reforms on both clients and expert witnesses.
20. If the policies in this IA lead to reductions in the quality and/or supply of expert services, and if this was not addressed, then client-related costs may arise. These would be similar in nature to the costs associated with reductions in legal aid scope and eligibility, as set out in the IAs relating to these reforms.
21. The behavioural response of experts is very difficult to predict. We have found no robust evidence to suggest there is any shortage of experts following the reforms. To mitigate against any potential shortage of experts in the system the LSC will be able to authorise increased rates in exceptional cases where required. In addition, the MoJ will continue to work with the LSC to ensure that a proportionate but effective monitoring mechanism is put in place to enable a better understanding of the effect of the introduction of the reduced, codified rates on all affected groups.

## **3. Enforcement and Implementation**

22. The statutory expert witness fee policies were implemented in October 2011.

## **4. Specific Impact Tests**

#### *Equality Impact Assessment*

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

#### *Competition Assessment*

24. The reforms to fees for experts may indirectly affect the number, and possibly the range, of experts who would be willing to supply their services to courts. There is a risk some providers may decide not to offer provision of their services under the proposed level and structure of expert fees. This could lead to less competition between providers.
25. However, the net impact on competition is uncertain and very much dependent upon provider response.

### *Small Firms Impact Test*

26. The reforms impact upon all experts that provide their services in legally aided cases and if these services form a major part of their workload they would be disproportionately affected by the policy. However, anecdotal evidence suggests that for the majority of experts, services to the courts are undertaken in addition to their main source of income.

### *Carbon Assessment*

27. 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 experts having to travel further to provide their assistance, although this is dependent upon the impact on the number and range of experts which is subject to uncertainty.

### *Other Environment*

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

### *Health Impact Assessment*

29. Experts that receive less income from legal aid may suffer from a negative impact on their health. However, we do not believe these impacts will be significant.

### *Human Rights*

30. 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*

31. The overall impact on the Justice System is outlined in the evidence base of this impact assessment.

### *Rural Proofing*

32. The reforms may have a disproportionate impact on the rural community. However, available data on the geographical location of experts is not available to assess whether rural areas will be disproportionately affected.

### *Sustainable development*

33. The expert fee reforms set out in this Impact Assessment are consistent with the principles of sustainable development. In particular, the policies on expert fee cuts contribute to a sustainable economy and a just society. They are designed to increase control over the rising cost of experts.

## 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 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 expert 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 research on providers. We will keep research needs in this area under review.

**Baseline:**

All expert fee policies will be assessed against a set baseline. Expert fee data collection options are currently being explored and this is likely to be used as the baseline.

**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