

Title: Criminal Legal Aid funding for prison law categories of work – Category A reviews of individuals held in a young offender institution and restricted status reviews IA No: MoJ004/2018 RPC Reference No: Lead department or agency: Ministry of Justice Other departments or agencies: Legal Aid Agency	Impact Assessment (IA)			
	Date: 11/05/2018			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Secondary legislation			
Contact for enquiries: Stephen Gascoigne				

Summary: Intervention and Options	RPC Opinion: Not Applicable
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Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year	One-In, Three-Out?	Business Impact Target Status
N/A	N/A	N/A	Not in scope	Non-qualifying provision

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

‘Prison law’ work describes any advice and assistance, including representation, which is provided by a legal representative to a prisoner whilst they are in prison. In December 2013, the previous Government introduced reforms reducing the range of prison law categories of work for which criminal legal aid funding was available. Following a judicial review challenge against the cuts and the subsequent Court of Appeal judgment of 10 April 2017, the Government responded by extending the scope of criminal legal aid funding to four categories of prison law work, including Category A prisoner reviews. Whilst these changes came into force on 21 February 2018, further analysis has indicated that additional discrete categories of prison law work related to, or closely associated with, Category A prisoner reviews also need to be brought within scope of criminal legal funding in order to avoid the risk of unfair decision-making identified by the Court of Appeal. Government intervention is now required to extend the scope of criminal legal aid, accordingly.

What are the policy objectives and the intended effects?

The Government plans to respond by extending criminal legal aid to restricted status reviews for prisoners or those held in a young offender institution (YOI) and to Category A reviews where the individual is being held in a YOI (the earlier regulations which included reinstatement of criminal legal aid for Category A reviews had been limited only to those Category A prisoners held in an adult prison).

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

- **Do Nothing:** This is not recommended as the Court of Appeal made a finding of inherent or systematic unfairness in the absence of legal aid or other suitable safeguards for Category A reviews, which are very closely related to the two categories of work being considered in this impact assessment.
- **Option 1:** Introduce regulations to reinstate legal aid for Category A reviews where the individual is held in a YOI and restricted status reviews.

Option 1 is the preferred option as this is the most effective way to ensure that the Court of Appeal’s concerns about the risk of unfair decision-making are properly addressed.

Will the policy be reviewed? It will not be reviewed separately, but as part of the review of the Legal Aid, Sentencing and Punishment of Offenders Act. **If applicable, set review date:** N/A

Does implementation go beyond minimum EU requirements?	N/A			
Are any of these organisations in scope?	Micro N/A	Small N/A	Medium N/A	Large N/A
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)	Traded: N/A		Non-traded: N/A	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister: _____ Date: _____

Summary: Analysis & Evidence

Policy Option 1

FULL ECONOMIC ASSESSMENT

Description: Introduce regulations to reinstate criminal legal aid for Category A reviews of individuals held in a YOI and restricted status reviews.

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: N/A	High: N/A	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate	£30,000	£12,500	N/A

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

This policy will result in increased expenditure from the Criminal Legal Aid Fund estimated at £12,500 per year (the changes which came into force on 21 February 2018 have been estimated to cost an additional £1.1 million per year). The Legal Aid Agency (LAA) will incur additional one-off implementation costs from making the requisite changes to their IT systems and these are estimated at about £30,000.

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

Criminal legal aid funding for prisoners/inmates is made available in the form of 'advice and assistance'. The administrative burden for assessing the prisoner/inmate's eligibility for advice and assistance (both merits and means) is delegated by the LAA to the provider. Therefore, solicitors will experience an increased administrative burden in acting for prisoners/inmates in the categories of prison law concerned, although the costs of this cannot be estimated.

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

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

None identified. Solicitors will receive around £12,500 in additional income per year.

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

Prisoners/inmates will benefit from the policy change as they will be able to receive criminal legal aid for areas of prison law for which funding had previously been unavailable.

Key assumptions/sensitivities/risks

Discount rate

N/A

Current volumes for all Category A reviews (for both adult prisoners and offenders in a YOI) and restricted status reviews are assumed to represent steady state volumes. The potential complexity of individual cases funded by legal aid advice and assistance and the disbursements that may be charged are uncertain, and the available data is not robust enough to assess payments accurately. Assumptions have been required to give an idea of the potential legal aid costs.

The impact of volumes being 20% higher or lower has been included in sensitivity analysis. As the impacts depend directly on case volumes, results in overall spend may be 20% higher or lower.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: N/A	Benefits: N/A	Net: N/A	
			N/A

Evidence Base

A. Background

1. 'Prison law' work is used to describe any advice and assistance, including representation, which is provided by a legal representative to a prisoner whilst they are in prison.
2. The Government's consultation exercise '*Transforming legal aid: delivering a more credible and efficient system*' (which ran between 9 April and 4 June 2013) included proposals to narrow the scope of criminal legal aid for prison law work¹. In '*Transforming legal aid: next steps*'² (which ran between 5 September and 18 October 2013), the Government set out its response to the consultation proposals as well as further proposals for additional reform; as part of this document, the Government made clear its intention to introduce the prison law scope changes in secondary legislation and these came into effect on 2 December 2013.³
3. The effect of the scope changes was to restrict criminal legal aid advice and assistance to those prison law matters regarding:
 - An individual's sentence where the calculation of the date on which the individual is entitled to be released by the Secretary of State, or eligible for consideration by the Parole Board for a direction to be released, is disputed;
 - An individual's disciplinary hearing where the proceedings involve the determination of a criminal charge for the purposes of Article 6(1) of the European Convention on Human Rights, or where the Governor has exercised their discretion to allow advice and assistance under certain specified criteria⁴; and
 - Proceedings before the Parole Board where the Parole Board has the power to direct the individual's release.
4. The Howard league for Penal Reform and the Prisoners' Advice Service challenged the scope cuts by way of judicial review on the basis that the absence of legal aid prevented the effective participation of the prisoner in the respective prison process, giving rise to an unacceptable risk of unfair decision-making in a number of areas of prison law.
5. In its judgment of 10 April 2017, the Court of Appeal found that the absence of legal aid did not give rise to an unacceptable risk of unfair decision-making in relation to two categories of prison law: decisions about access to offender behaviour programmes; and disciplinary procedures which do not involve the determination of a criminal charge under Article 6(1) of ECHR or where the governor has not exercised their discretion.
6. However, the Court of Appeal did conclude there was an unacceptable risk of unfair decision-making in relation to three categories of prison law:
 - Pre-tariff review hearings and other advice cases before the Parole Board involving life and other indeterminate sentence prisoners where the Board does not have the power to direct release but

¹ https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/transforminglegalaid.pdf

² https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/transforminglegalaidnextsteps.pdf

³ <https://www.legislation.gov.uk/uksi/2013/2790/contents/made>

⁴ See PSI 2011/47 - <https://www.justice.gov.uk/offenders/psis/prison-service-instructions-2011>

advises the Secretary of State on whether the prisoner is suitable for a move or return to open conditions;

- Category A prisoner reviews⁵; and
 - Referrals to and from a close supervision centre.
7. The Lord Chancellor addressed the concerns highlighted by the Court by reinstating criminal legal aid for the three categories of prison law affected. These regulations came into force on 21 February 2018 and were accompanied by publication of a full Impact Assessment (IA)⁶.
 8. As part of the regulations, the Lord Chancellor also decided to make criminal legal aid funding available for advice and assistance regarding directions as to a prisoner's placement in a separation centre within a prison.
 9. Since these changes came into force, the Lord Chancellor has taken the decision to extend criminal legal aid funding to restricted status reviews in light of the strong similarities with Category A prisoner reviews, both in terms of the processes and the regimes which apply. Additionally, he has decided to make explicit that the decision to reinstate criminal legal aid for Category A reviews should extend not only to adult prisoners but also to those individuals held in a YOI.
 10. This IA assesses the impacts of these latter decisions.

B. Policy Rationale and Objectives

11. The conventional economic rationales for government intervention are based on efficiency and equity arguments. The government may consider intervening if there are failures in the way markets operate (e.g., monopolies overcharging consumers) or where there are failures with existing government interventions (e.g., waste generated by misdirected rules). The proposed new interventions should avoid creating a further set of disproportionate costs and distortions. The government may also intervene for equity (fairness) and re-distributional reasons (e.g., to reallocate goods and services to the more disadvantaged groups in society).
12. The principal rationale for this reform is equity. The wider policy objective for extending criminal legal aid has been prompted by the Government's obligation to address the concerns raised by the Court of Appeal judgment. The discrete policy objective to extend the scope of criminal legal aid to restricted status reviews reflects the close link and similarities with Category A prisoner reviews in terms of the conditions which may be imposed on the prisoners and the procedures which may be applied, including the requirement for the prisoner/inmate's security status to be reviewed annually. In addition, as the restricted status population is overwhelmingly comprised of female prisoners and

⁵ PSI 40/2011 defines a Category A prisoner as one whose escape would be highly dangerous to the public, or the police or security of the state, and for whom the aim must be to make escape impossible: www.justice.gov.uk/downloads/offenders/psipso/psi-2011

⁶ <http://www.legislation.gov.uk/uksi/2017/1319/contents/made>.

young adult males, any policy decision not to extend criminal legal aid to this population would be likely to amount to sex and age discrimination.

13. Accompanying this latest change, the Government also wants to make clear that the earlier decision to reinstate criminal legal aid for Category A prisoner reviews should extend to those held in a YOI and not just an adult prison.
14. In October 2017, the Government announced details of the post-implementation review of the legal aid changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.⁷ This review includes the changes made to the scope of the criminal legal aid scheme, including those made in 2013 to prison law categories of work. The outcome of the review, which commenced in April 2018, will help to inform policy development in this area.

C. Description of Options Considered

15. This IA assesses the following two options:

- **Option 0 – Do nothing.** Under this option, there would be no reinstatement of criminal legal aid for Category A reviews involving an individual held in a YOI or for restricted status reviews.
- **Option 1 –** This option will reinstate criminal legal aid for Category A reviews involving an individual held in a YOI and for restricted status reviews.

16. Option 1 is the Government's preferred option as it best meets the policy objectives.

D. Main Affected Groups

17. The following key groups are likely to be affected by the proposals:

- Prisoners/inmates who will be able to access criminal legal aid services in those categories of prison law work for which funding is to be made available;
- Defence solicitors who hold a relevant criminal legal aid contract with the Legal Aid Agency (LAA) and are able to act for prisoners in the categories of prison law affected by legal aid reinstatement;
- The LAA, which is responsible for administering the criminal legal aid scheme; and
- Her Majesty's Prisons and Probation Service (HMPPS) which is responsible for management of the prison estate and the individuals held within it.

E. Cost & Benefit Analysis

18. 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 on society might be from

⁷ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-10-30/HCWS204/>

implementing the preferred option. These costs and benefits are compared to Option 0, the 'do nothing' option. As Option 0 is being compared to itself, its costs and benefits are necessarily zero.

19. IA's place a strong emphasis on valuing the costs and benefits in monetary terms but there are some aspects that cannot always be meaningfully monetised. This IA considers the impact of the proposed reform in isolation.

Rounding

20. In this Impact Assessment, the estimated costs and benefits have been rounded to the nearest £2,500.

Option 1: Reinstatement of criminal legal aid

Costs of Option 1

Legal Aid Agency

21. There will be an increased cost to the criminal legal aid fund as prisoners take advantage of the provision of 'advice and assistance' both to prepare and make written representations to the relevant authorities and to fund advocacy services where an oral hearing is required. It has been estimated that the additional spend falling to the Legal Aid Fund will be in the region of £12,500 per year.

- Restricted status reviews - £12,500
- Category A reviews involving offenders held in a YOI – the IA accompanying the regulation changes which came into effect on 21 February 2018 estimated the total cost of reinstating criminal legal aid for **all** Category A reviews at approximately £0.4 million per year. As this estimate included both adult prisoners and those held in a YOI, there are, therefore, no additional costs to be factored in from this latest change.

22. There will be one-off implementation costs to the LAA, primarily through IT changes – estimated at about £30,000 – and updating guidance.

Criminal legal aid providers

23. As the assessment of a prisoner/inmate's eligibility for criminal legal aid 'advice and assistance' rests with the provider, there will be an increase in the administration burden placed on the defence solicitor when they take initial instructions from their client.

Her Majesty's Prisons and Probation Service

24. In making criminal legal aid available to prisoners/inmates, there may be potential staff resource implications for HMPPS – if legal representatives identify and raise new arguments to support the prisoner as well as to challenge any assertions about their conduct, it is possible that HMPPS may require more resource to oppose such arguments. It has not been possible to quantify this potential impact as this would arise from a number of behavioural uncertainties.

Benefits of Option 1

Criminal legal aid providers

25. Criminal legal aid providers are likely to experience an increase in demand for their services and a consequential increase in fee income if an increasing range of prison law work is brought within scope of the criminal legal aid scheme.

26. Approximately 25 prisoners/inmates will now be eligible for legal aid in respect of a restricted status review. Those YOI inmates held as Category A would also be eligible for legal aid funding in relation to the annual review of their security classification.

F. Assumptions and Risks

27. The following assumptions and the associated main risks underlie the above impacts.

	Assumptions	Risks
Case Volumes:	<p>It is assumed that once public funding is made available to all prisoners/inmates in the categories of prison law affected, all prisoners/inmates will wish to take advantage of it.</p> <p>This will bring around 25 restricted status reviews within the scope of the criminal legal aid scheme. This is based on case volumes provided by HMPPS.⁸</p> <p>In addition, inmates held as Category A in a YOI will become eligible for criminal legal aid when their annual review takes place. Whilst we have not been able to identify how many such reviews take place each year, the Impact Assessment accompanying the regulation changes which came into effect on 21 February 2018 estimated the total cost of reinstating criminal legal aid for all Category A reviews at approximately £0.4 million per year. As this estimate included both adult prisoners and those held in a YOI, there are no additional costs to be factored in from this latest change.</p> <p>It is assumed that all prisoners/inmates will pass both the financial eligibility and ‘sufficient benefit’ (merits) test. Given the seriousness of the issues raised in the categories of prison law affected, the merits test is very likely to be met in all cases. However, as the financial eligibility test takes account of a spouse or partner’s income and capital, it is possible that some prisoners/inmates may be found financially ineligible for criminal legal aid.</p>	<p>If these volumes are lower or higher than estimated in the future, the cost of reinstatement will be lower or higher. Sensitivity analysis assessing the impact of case volumes being 20% higher or lower is presented in Section G.</p>

⁸ HMPPS reported 20 restricted status prisoners/inmates in April 2017, and 25 restricted status prisoners/inmates in April 2018.

Costs:

The potential complexity of individual cases funded by legal aid advice and assistance and the disbursements that may be charged are uncertain, and the available data is not robust enough to assess payments accurately. As such, assumptions have been required to provide an idea of the potential costs. The costs quoted include VAT, and would be met by the Legal Aid Fund.

The costs are based on both the current Prison Law fee scheme for advice and assistance, and average related fees paid in LAA billing data.

It has been assumed:

- Restricted status reviews share the same cost profile as Category A reviews, namely: fees will range from around £250 to £1,900, depending on case complexity. **1%** are assumed to be the most complex and require an oral hearing⁹, and are assumed to cost £1,900 per hearing. **49%** are assumed to be less complex¹⁰ and are assumed to cost around £700 per case. The remaining 50% are assumed to be more straightforward cases with costs totalling around £250 per case.
- No additional costs are provided in respect of Category A reviews for YOI inmates as **ALL** Category reviews were reflected in the Impact Assessment accompanying the regulation changes which came into effect on 21 February 2018.

Assumptions have been required as the LAA prison law billing data is not granular enough to identify case types and it's not recorded how long each case billed for has lasted. Given the uncertainties, we have leant towards using the upper range of expected costs.

G. Sensitivity Analysis

28. We have sensitivity tested the impact of case volumes being 20% higher and lower than the headline position and this results in a cost range of £10,000 to £15,000 compared with the headline cost of £12,500.

H. Enforcement and Implementation

29. The regulations and operational arrangements to support reinstatement of criminal legal aid for the specific categories of prison law work described in this IA came into force on 4 June 2018. The changes apply to any decision taken on or after these dates that an individual qualifies for advice and assistance in relation to the respective categories of prison law covered by the regulations.

I. Monitoring and Evaluation

30. The Legal Aid Agency will monitor the volume and details of cases of work funded under the new arrangements (NB. the additional IT codes to track these changes may not be in place until later in 2018). In any event, it is not expected that any data will be captured until approximately 4 months

⁹Source: HMPPS

¹⁰ A qualitative assumption.

after the 'go-live' date (this reflects that at the conclusion of each case, the provider has up to 3 months to submit bills for the work he/she has undertaken).

31. As noted at paragraph 14 (above), the Government recently commenced the wider post-implementation review of the legal aid changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.¹¹ This review includes the changes made to the scope of the criminal legal aid scheme, including those made in 2013 to prison law categories of work. The outcome of the review will help to inform future policy development in this area.

¹¹ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-10-30/HCWS204/>