

Title: Criminal Legal Aid funding for prison law categories of work IA No: MoJ023/2017 RPC Reference No: Lead department or agency: Ministry of Justice Other departments or agencies: Legal Aid Agency	Impact Assessment (IA)			
	Date: 19/12/2017			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Secondary legislation			
Contact for enquiries: Stephen Gascoigne				

Summary: Intervention and Options **RPC Opinion:** Not Applicable

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?
 In December 2013, the previous Government introduced reforms reducing the range of prison law categories of work for which criminal legal aid funding was in scope. This was challenged by way of judicial review brought jointly by the Howard League for Penal Reform and the Prisoners' Advice Service. In its judgment of 10 April 2017, the Court of Appeal found that in the absence of legal aid, prisoners were unable to participate effectively in relation to three specific categories of prison law and, therefore, faced an unacceptable risk of unfair decisions being taken against them. Government intervention is necessary to address the Court's concerns. In April 2017, the Government created separation centres within prisons to combat extremism. The Government is considering if legal aid should be extended to those facing placement in such centres.

What are the policy objectives and the intended effects?
 The Government intends to respond to the Court's concerns by restoring criminal legal aid for: Pre-tariff review hearings and other advice cases before the Parole Board where it does not have the power to direct release but advises the Secretary of State on whether the prisoner is suitable for a move/return to open conditions; Category A reviews; and decisions regarding placement in a close supervision centre. In parallel, it is extending legal aid regarding directions as to a prisoner's placement in a separation centre.

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.
- **Option 1: (preferred option):** Introduce regulations to reinstate criminal legal aid for the three categories of prison law highlighted by the Court of Appeal. This is the most practical way to address the Court's concerns. The regulations will also extend legal aid for directions as to a prisoner's placement in a separation centre.

Will the policy be reviewed? It will not be reviewed. If applicable, set review date: Month/Year					
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: Dominic Raab Date: 19/12/2017

Summary: Analysis & Evidence

Policy Option 1

FULL ECONOMIC ASSESSMENT

Description: Introduce regulations to reinstate criminal legal aid for the three categories of prison law highlighted by the Court of Appeal.

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	£20,000	£1.1m	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 in the region of £1.1 million per year. The Legal Aid Agency (LAA) will also incur additional one-off implementation costs from making the requisite changes to their IT systems and these are estimated to cost around £20,000.

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

Criminal legal aid funding for prisoners is made available in the form of 'advice and assistance'. The administrative burden for assessing the prisoner'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 in the categories of prison law concerned, although the costs 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 £1.1m in additional income, but it is assumed they would find other work to do if this policy change was not made.

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

Prisoners 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 category A reviews (CARs), pre-tariff review (PTRs), and close supervision centres (CSCs) are assumed to represent steady state volumes. As separation centres (SCs) are relatively new (introduced in April 2017), it's assumed all current SC spaces could be allocated in steady state.

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 being 20% higher or lower (+ or - £0.2m).

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. The Government's consultation exercise '*Transforming legal aid: delivering a more credible and efficient system*' (9 April to 4 June 2013) included proposals to narrow the scope of criminal legal aid for prison law work¹. In '*Transforming legal aid: next steps*' (5 September to 18 October 2013), the Government made clear its intention to introduce the scope changes in secondary legislation which came into effect on 2 December 2013 (<https://www.legislation.gov.uk/ukxi/2013/2790/contents/made>).
2. 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 ECHR, or where the Governor has exercised their discretion to allow advice and assistance under certain specified criteria²; and
 - Proceedings before the Parole Board where the Parole Board has the power to direct the individual's release.
3. 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.
4. 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.
5. 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 (PTRHs) before the Parole Board involving life and other indeterminate sentence prisoners where the Board does not have the power to direct

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. Not all types of prison law work are funded by the criminal legal aid scheme.

² See PSI 2011/47 - <https://www.justice.gov.uk/offenders/psis/prison-service-instructions-2011>

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

- Category A prisoner reviews³ (CARs); and
 - Referrals to and from a close supervision centre (CSC).
6. The Lord Chancellor has decided to address the concerns highlighted by the Court through reinstating criminal legal aid for the three categories of prison law affected.
7. As part of the amending regulations for this purpose, the Lord Chancellor has also decided to make criminal legal aid funding available for advice and assistance regarding directions as to a prisoner's placement in SC within a prison. SCs were introduced after the Court of Appeal's judgment and there are strong parallels between the processes involved with regards to placement in CSCs and SCs.

B. Policy Rationale and Objectives

8. The policy decision to reinstate criminal legal aid has been prompted by the Government's obligation to address the concerns raised by the Court of Appeal judgment. The additional, discrete policy decision to extend the scope of criminal legal aid to directions regarding a prisoner's placement in a SC reflects the strong parallels shared with the processes involved with CSCs and the recognition that similar safeguards should be in place for both.
9. The Government recently announced details of the post-implementation review of the legal aid changes introduced by Legal Aid, Sentencing and Punishment of Offenders Act 2012.⁴ This review will include 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 policy development in this area.

C. Description of Options Considered

10. This IA assesses the following two options:
- **Option 0 – Do nothing.** Under this option, there would be no regulation amendments reinstating criminal legal aid for the categories of prison law highlighted by the Court of Appeal judgment and no extension of criminal legal aid regarding directions as to a prisoner's placement in a SC. This does not allow us to meet the policy objective of addressing the Court of Appeal's concerns.
 - **Option 1 –** This option will reinstate criminal legal aid for the three categories of prison law work identified by the Court of Appeal judgment. In addition, this option will ensure that criminal legal aid funding is extended to those prisoners' subject to a direction regarding placement in a SC. The effect of this option would be, through regulations, to reinstate criminal legal aid for the three categories of prison law highlighted by the judgment and extend the scope of criminal legal aid to SCs.
11. For the above reasons, Option 1 is the Government's preferred option.

³ 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

⁴ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-10-30/HCWS204/>

D. Main Affected Groups

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

- Prisoners 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 LAA and are able to act for prisoners in the categories of prison law affected by legal aid reinstatement;
- The Legal Aid Agency (LAA), which is responsible for administering the criminal legal aid scheme;
- Her Majesty's Prisons and Probation Service (HMPPS) which is responsible for management of the prison estate and the individuals held within it; and
- The Parole Board which is responsible for hearing pre-tariff review and other advice cases and advises the Secretary of State on whether a prisoner is suitable for a move or return to open conditions.

E. Cost Benefit Analysis

13. 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 implementing the proposal. The costs and benefits are compared to Option 0, the 'do nothing' option. IAs place a strong emphasis on valuing the costs and benefits in monetary terms but there are some aspects that cannot always be meaningfully monetised. The IA considers the impact of the reform proposed in isolation.

Rounding

14. The following rounding conventions have been adopted in this IA:

- Percentages are given to the nearest 5%.
- Volumes above 50 have been rounded to the nearest 50, and those below to the nearest 10.
- Costs and benefits have been rounded as follows:
 - below £1,000 to the nearest £50
 - Above £1,000 and below £100,000 to the nearest £100
 - Above £100,000 to the nearest £0.1m

Option 1: Reinstatement of criminal legal aid

Costs of Option 1

Legal Aid Agency

15. 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 £1.1 million per year.

- CARs - £0.4 million
- PTRHs (including pre-tariff sifts) - £0.4 million
- CSCs referrals and monthly review hearings - £0.2 million.

- SC referrals and quarterly review hearings - £0.1 million.

16. There will be one-off implementation costs to the LAA, primarily through IT changes – estimated at approximately £20,000 – and updating guidance.

17. As the volume of prison law legal aid work increases, there may be an increasing number of cases triggering the ‘escape fee,’ meaning remuneration is calculated by an hourly rate rather than a fixed fee. As these cases need to be assessed individually, this may require an additional FTE case worker. Due to the behavioural uncertainties, it has not been possible to quantify this potential cost.

Criminal legal aid providers

18. As the assessment of a prisoner’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

19. In making criminal legal aid available to prisoners, 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

Defence solicitors

20. Defence solicitors will benefit from additional income of around £1.1m. This has not been included as a key benefit on the summary sheet as it is assumed they would find other work to do if this policy change was not made.

Criminal legal aid providers

21. 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.

Prisoners

22. The prisoners that will now be eligible for legal aid would benefit from publicly funded legal representation. Each year, this is assumed to impact around:

- 800 prisoners undertaking CARs.
- 400 prisoners who face a pre-tariff sift⁵, and 150 prisoners facing a PTRH.
- 50 prisoners in CSCs, for referrals and monthly reviews.
- 30 prisoners in SCs, for referrals and quarterly reviews.

Parole Board

23. Access to legal aid for pre-tariff review cases will not change the number of cases the Parole Board has referred to it by the Secretary of State for Justice. The Parole Board may see a reduction in delays to case conclusion, both at the planning and preparation stage, and on the day of the oral hearing, as the prisoner will now be formally represented. This should reduce the burden on the Parole Board members having to advise the prisoner. On the day, oral hearings should be able to proceed more swiftly.

⁵ To determine whether they are referred to the Parole Board for a PTRH.

F. Assumptions and Risks

24. 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 in the categories of prison law affected, all prisoners will wish to take advantage of it.</p> <p>This will bring around 800 CARs, 400 Pre-Tariff Sifts, and 150 PTRHs, back in scope of legal aid per year. Around a further 20 CSC referrals and 600 monthly review hearings are also assumed to be brought back in scope per year⁶. This is based on 2016-17 case volumes provided by HMPPS, which are assumed to represent steady state volumes.</p> <p>It is assumed that all prisoners 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 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 has been included, which shows the estimated cost could range from around £0.9m to £1.3m</p>
Case Volumes:	<p>It has been assumed all of the current SC centre spaces (30) could be allocated at steady state, which would house 30 prisoners.</p> <p>There are only 3 spaces currently allocated, but the centres are relatively new (introduced in April 2017). To account for these uncertainties, it has been assumed all the spaces could be allocated in steady state.</p> <p>This assumes around 10 SC referral hearings and 100 quarterly review hearings would be in scope of legal aid per year⁷.</p>	<p>Similarly, if the actual volumes fluctuate so will the estimated cost. The sensitivity analysis described above should account for a reasonable range of future volumes.</p> <p>This volume could increase if more separation centres are introduced in the future.</p>

⁶ In HMPPS data around 40% of the CSC population (around 50) were new referrals in 2015-16. As such, 40% of the population (20) are assumed to have one referral and 11 reviews each year, and the rest (around 30) are assumed to have 12 review hearings each year.

⁷ 40% of the SC population (around 10) are assumed to have one referral and 3 referrals each year, and the rest (around 20) are assumed to have 4 reviews each year.

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, including average parole board hearing fees.

It has been assumed:

- The impact of CARs 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 hearing⁸, and are assumed to cost £1,900 per hearing. **49%** are assumed to be less complex⁹ 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.
- Pre-tariff Sifts are assumed to cost the LAA around £300 each, and £1,900 for each PTRH.
- CSCs are assumed to cost around £700 per referral, and £250 per monthly review¹⁰. HMPPS data suggests new referrals could be around 40% of the annual population¹¹.
- SCs are assumed to also cost around £700 per referral and quarterly review. As prisoners are reviewed less frequently in SCs than CSCs, it's assumed the SC reviews could incur the same fee as the referral. In the absence of robust SC data, annual referrals are similarly assumed to also be 40% of the population per year.
- There are assumed to be additional annual disbursements charged of around £700 per CSC and SC case.¹²

Assumptions have been required as the LAA prison law billing data isn't 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.

⁸ Based on HMPPS judgement.

⁹ A qualitative assumption.

¹⁰ Prison Law advice and assistance has a fixed fee of £200.75 excluding 20% VAT. Cases where costs exceed an escape threshold are paid by way of hourly rates. The escape threshold is £602.25 plus 20% VAT. Adding on 20% VAT to these base rates gives the fees mentioned above.

¹¹ Based on 2016-17 HMPPS CSC data.

¹² Based on average disbursements paid in in 2012-13 and 2014-15 LAA billing data.

G. Sensitivity Analysis

25. The impacts of case volumes being 20% higher and lower than the case volumes estimated in the main body of the Impact Assessment have been estimated to provide an idea of a range of impacts. As the costs and benefits are linear to case volumes, this gives an estimated cost to the legal aid fund of between £0.9m and £1.3m respectively.

H. Enforcement and Implementation

26. The regulations and operational arrangements to support reinstatement of criminal legal aid for the specific categories of prison law work described in this Impact Assessment come into force on 21 February 2018. The changes apply to any decision taken on or after this date that an individual qualifies for advice and assistance in relation to any of the categories of prison law covered by the regulations.

I. Monitoring and Evaluation

27. The Legal Aid Agency will monitor the volume and details of cases funded under the new arrangements. It is not expected that any data will be captured until approximately 4 months 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).
28. As noted at paragraph 9 (above), the Government recently announced details of the wider post-implementation review of the legal aid changes introduced by Legal Aid, Sentencing and Punishment of Offenders Act 2012.¹³ This review will include 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.
29. Public Protection Casework Section (PPCS) of the Safer Custody and Public Protection Group/HMPPS, as part of its general casework function will monitor whether the provision of legal aid in pre-tariff cases results in more effective participation in Parole Board hearings at the pre-tariff stage. Effectiveness will likely be measured by the quality and timeliness of submissions on behalf of the offender, leading to timely preparation of a case. Additionally, PPCS will monitor the impact on resources both in terms of PPCS case managers and prison-based resource.
30. The Parole Board monitors all pre-tariff cases and will continue to do so.

¹³ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-10-30/HCWS204/>