Ministry of JUSTICE

Clarifying the circumstances under which compensation is payable for Miscarriages of Justice (England & Wales)

Impact Assessment

9 May 2013

Title: Clarifying the circumstances under which compensation is payable for Miscarriages of Justice (England & Wales).

IA No: MOJ202

Lead department or agency: Ministry of Justice

Other departments or agencies:

-

Impact Assessment (IA)

IA No: MOJ202

Date: 9 May 2013

Stage: Development/Options

Source of intervention: Domestic

Type of measure: Other

Contact for enquiries:
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Summary: Intervention and Options

RPC Opinion: Awaiting Scrutiny

Cost of Preferred (or more likely) Option				
Total Net Present Value	**Business Net Present Value**	**Net cost to business per year** (EANCB on 2009 prices)	**In scope of One-In, One-Out?**	**Measure qualifies as**
£0.9m	NQ	NQ	Out of scope	N/A

What is the problem under consideration? Why is government intervention necessary?
Section 133 of the Criminal Justice Act 1988 does not define what a Miscarriage of Justice is for the purposes of eligibility to the compensation scheme. The Government have been relying on case law, but the court's definition of a miscarriage of justice is not always clear, is open to continuous change, and its application is the subject of frequent legal challenge. This makes it difficult for potential applicants to know whether they should apply and for the Secretary of State to determine eligibility. The definition has generated a significant body of case law, demonstrating a lack of agreement amongst the judiciary of what the term should mean.

What are the policy objectives and the intended effects?
The amendment is being made to ensure that eligibility to the scheme is limited to applicants who can show that they are clearly innocent. The intended effect is to lessen the burden on taxpayers and reduce unnecessary and expensive legal challenges to Government decisions to refuse compensation. Recent decisions by the courts have exposed conflicting interpretations of the term "miscarriage of justice" and this provision will provide greater clarity and certainty as to eligibility for State compensation. By confirming a relatively narrow definition, the provision seeks to generate a more predictable and consistent approach to identifying cases where a miscarriage of justice has taken place. A clear definition enshrined in statute would make it easier for meritorious claimants to claim, and would make decisions on eligibility more transparent, and less likely to be the subject of legal challenge.

Decisions on compensation for miscarriages of justice are wholly devolved in Scotland. They are also largely devolved in Northern Ireland, however the Secretary of State for Northern Ireland determines most applications for compensation in Northern Ireland which involve national security information. The scope of the new measure should cover cases in England and Wales which are determined by the Justice Secretary, and those cases in Northern Ireland which are determined by the Secretary of State for Northern Ireland – i.e. those cases which involve national security material.

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

Option 0: Do nothing

Both the Government and applicants would continue to be reliant upon case law for the definition of a miscarriage of justice. This definition has been subject to repeated change over a number of years, despite a "definitive" judgment from the Supreme Court in May 2011. Most recently the Divisional Court (a lesser court) provided an amended definition in their judgment of January 2013.

Option 1: Legislate to ensure that eligibility to the scheme is limited to applicants who can show that they are clearly innocent.

This option would ensure that the term 'miscarriage of justice' would be unambiguous and would have a settled meaning. This would ensure that only those who are entitled to compensation receive it, there is a reduction in unmeritorious claims, and a reduction in the number of legal challenges to the Secretary of State's decisions.

Option 1 is the preferred option and is consistent with wider Government policy.

Will the policy be reviewed? yes If applicable, set review date: 3 years after Royal Assent is received

Does implementation go beyond minimum EU requirements?			No		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	**Micro** N/A	**< 20** **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 (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY: Damian Green Date: 9/5/13

Summary: Analysis & Evidence

Policy Option 1

Description: Legislate to ensure that eligibility to the scheme is limited to applicants who can show that they are clearly innocent.

FULL ECONOMIC ASSESSMENT

Price Base Year 2013/14	**PV Base Year** 2013/14	**Time Period Years** 10	**Net Benefit (Present Value (PV)) (£m)**		
			Low: -	**High: -**	**Best Estimate:** £0.9m

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low	-	n/a	-	-
High	-		-	-
Best Estimate	0		0	0

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

None

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

None

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low	-	n/a	-	-
High	-		-	-
Best Estimate	0		£0.1m	£0.9m

Best Estimate	0		£0.1m	£0.9m

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

Increased transparency and certainty is expected to reduce the number of challenges to decisions on these Miscarriages of Justice applicants. Fewer funds will be required to defend judicial review proceedings, which we envisage will be greatly reduced following the implementation of the new legislation. It is expected that instead of 1 in 10 refused cases challenging the decision, only 1 or 2[1] in 40 would challenge the decision under this proposal. The new legislation will come into force on Royal Assent (expected to be during 2013/14).

There is an estimated benefit of around £100k per year from the year implementation, arising from a reduction in the number of legal challenges to decisions made. This leads to an estimated 10 year Present Value benefit of £0.9m in England and Wales.

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

Over time, the narrower test is likely to result in fewer unmeritorious claims, as a result of the greater clarity of the test, and the reduced risk that it will change during consideration of the application. This may lead to a reduction in any associated administrative burden.

Key assumptions/sensitivities/risks 3.5

The number of legal challenges to the Government's decisions to refuse compensation is expected to rise considerably over the coming years if no legislative action is taken. Every case which is considered by the Court provides an opportunity for the creation of new case law which would change the eligibility test.

Compensation for victims of a miscarriage of justice is a vexed subject, particularly since the abolition in 2006 of the ex-gratia scheme, leaving the statutory scheme under s. 133 as the only route to claim compensation. Some MP's and pressure groups may be opposed to any limitations of the current scheme. However, there would be a reduction in the amount of tax payers' funds that are spent on litigation in a challenging economic environment. The Government also has a strong record of success in relevant Judicial Review proceedings.

There is an assumption that fewer applicants will seek legal challenge to any Government decision to refuse compensation following implementation of the new legislation. However, there is a potential risk of an initial spike in the number of applications for judicial review and no reduction compared to the current level thereafter. That said, we would expect the Courts to apply a more robust approach in refusing permission for judicial review, meaning the Government would only be liable for the costs at permission stage (approx £5,000 plus VAT) and would not incur the additional cost of around £50k if the case went to a full hearing.

It is assumed that the number of applications for Miscarriage of Justice compensation that are accepted each year remains constant. A clearer definition in statute may have the impact of reducing the number of applications accepted per year, thereby potentially reducing the amount paid out in compensation. On the other hand, fewer applications being accepted would mean a larger number of applications refused and therefore a potentially larger number of challenges to the decision (though we would not expect many of these to receive permission – see previous paragraph).

There are currently around 20 Miscarriage of Justice cases still to be finally determined by the Court process. This volume of cases results from a "bulge" in judicial review applications following the new definition created by the Supreme Court in May 2011. These cases will be assessed under definition which was in force when the initial decision was made and therefore this proposal does not have an immediate impact on these cases. Should the Administrative Court (or the Court of Appeal in relation to judicial reviews already heard) decide in favour of the claimants and remit the cases back to the Justice Secretary for reconsideration, the legislation (assuming it is by that time in force) would mean that compensation would only be payable if the claimant was clearly innocent.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: NQ	**Benefits:** NQ	**Net:** NQ	No	N/A

[1] We have used the upper bound of 2 in 40 in our calculations in order to estimate the maximum potential cost

Evidence Base (for summary sheets)

Introduction

1. The State has offered compensation since 1905 to persons who have suffered a miscarriage of justice, to recognise the hardships caused by a wrongful conviction. The legislation that provides for such compensation to be paid now is s.133 of the Criminal Justice Act 1988, which implements in the UK article 14(6) of the International Covenant on Civil and Political Rights.
2. This particular proposal stands alone from the other measures proposed by the Government within the Anti-social behaviour, crime and policing Bill. Its purpose is to ensure that there is a consistent and unambiguous definition of what a miscarriage of justice is for the purposes of identifying eligibility for compensation under section 133 of the Criminal Justice Act 1988.

Problem under Consideration

3. Section 133 of the Criminal Justice Act 1988 does not define what a Miscarriage of Justice is for the purposes of eligibility to the compensation scheme. The Government has therefore been reliant on case law, but the court's definition of a miscarriage of justice is not always clear and is subject to frequent change as the case law develops. In addition, the Secretary of State's decisions are open to legal challenge by disappointed applicants. This makes it difficult for potential applicants to assess how likely it is that they will receive compensation, and for the Secretary of State to determine eligibility. It also means that it is difficult for members of the public to understand the basis on which decisions are taken, reducing transparency. The definition has generated a significant body of case law, demonstrating the lack of a common understanding amongst the judiciary of what the term should mean.
4. As a direct consequence of the ambiguity of the definitions provided by the Supreme Court (in 2011) and the Divisional Court (in 2013) as to what a Miscarriage of Justice is, the taxpayer is asked to spend many thousands of pounds in defending judicial review proceedings brought against the Government by disgruntled applicants who have been refused compensation.

Rationale for Intervention

5. The conventional economic rationale for government intervention is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are strong enough failures in existing government interventions (e.g. waste generated by misdirected rules). In both cases, the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and distributional reasons (e.g. to reallocate goods and services to more needy groups in society)
6. The rationale behind this proposal is based on both efficiency and equity grounds. Currently, a large amount of resource is used to defend judicial review proceedings challenging the Secretary of State's decisions not to pay compensation. By confirming a relatively narrow and clear definition enshrined in statute, decisions on eligibility would be more transparent and therefore less likely to be the subject of legal challenge. This would reduce the amount of resource, and the associated cost and time required for these cases, thereby creating a net efficiency saving. Having a clear definition of a 'Miscarriage of Justice' in statute would also ensure that compensation is given to

those individuals who are entitled to receive it, thereby increasing the welfare of this group of people.

Main affected groups

7. This reform will impact on:
   I. The Ministry of Justice (MoJ)
   II. The Northern Ireland Office (NIO)
   III. Applicants for Miscarriage of Justice compensation and their solicitors
   IV. HMCTS
   V. The Treasury Solicitor's Department

Costs and benefits

8. This Impact Assessment 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 of implementing these reforms. The costs and benefits of the reforms are compared to the base case ("do nothing") scenario. Impact Assessments 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 proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.

9. This Impact Assessment sets out our current estimates for the costs and benefits of the policy to the affected groups. These estimates are based on the evidence that is currently available, and are subject to change if the evidence base improves. As such, the estimates are represented as ranges based on the assumptions detailed in the discussion of costs and benefits below.

10. All costs and benefits are measured relative to the baseline which is the current position. Currently, there are around 20 Miscarriage of Justice cases still to be finally determined by the Court process. Assuming that all of these cases proceed, defending each case, irrespective of whether the Government is successful in contesting proceedings or not, could cost the Government £55k which includes a cost of £5k at permission stage and an additional cost of £50k for a full hearing This results in an estimated one-off cost of around £1.1m for these 20 cases to be settled. In addition, approximately 40 of the applications received per year are refused, of which around 4 applicants seek to challenge the decision. Based on the cost estimate of £55k to dispose of each case, this leads to an additional cost of £220k per year.

Base Case/ Option 0

11. This is the 'do nothing' option which would leave things as they are now. Taking no action would mean that the current situation would continue and therefore there would be no costs or benefits in addition to those which are already incurred. Because the do-nothing option is compared against itself, its costs and benefits are necessarily zero, as is its Net Present Value (NPV)[2].

12. In this option, the Government would have to continue to interpret applications on the basis of case law enshrined in both the Supreme Court judgment of May 2011, and the "expanded" definition created by the Divisional Court in January 2013. At present, some 20 judicial review challenges are before the courts. This option poses the risk that this number may increase as the "expanded" definition beds down, leading to a large drain on legal and policy resources.

Option 1

13. This option is to define a Miscarriage of Justice as a case where the applicant is shown to be innocent.

Costs

[2] The Net Present Value (NPV) shows the total net value of a project over a specific time period. The value of the costs and benefits in an NPV are adjusted to account for inflation and the fact that we generally value benefits that are provided now more than we value the same benefits provided in the future.

14. It is not anticipated that there will be any additional costs arising from this proposal.

Benefits

15. The increased transparency and certainty, resulting from a clear definition of a Miscarriage of Justice enshrined in statute, is expected to reduce the number of applications for judicial review. It is expected that there would be savings to the Government as fewer funds will be required to defend judicial review proceedings, which will be greatly reduced following the implementation of the new legislation. It is expected that instead of 1 in 10 refused cases challenging the decision, only 1 or 2[3] in 40 would challenge the decision under this proposal.

16. The new legislation will come into force on Royal Assent (expected to be during 2013/14).and is expected to reduce the number of challenges to decisions via judicial reviews from 1 in 10 refused applications to a maximum of 2 in 40 applications. Assuming the current volume of around 40 cases per year being refused, this would lead to a fall in judicial reviews from 4 per year to 2 per year. It is estimated to cost £55k to defend each case, including a cost of around £5k at permission stage. The 2 cases per year which would no longer be granted permission for a judicial hearing would still incur the cost of £5k at permission stage but would no longer incur the estimated cost of £50k for the full hearing. It is therefore estimated that this option would lead to a cost saving of around £100k per year from the year of implementation.

Other benefits

17. It is not expected that there will be any immediate reduction to the number of applications for compensation. However, over time the narrower test is likely to result in fewer unmeritorious claims, as a result of the greater clarity of the test, and the reduced risk that it will change during consideration of the application. This may lead to a reduction in any associated administrative burden.

Net impact

18. Based on current and expected volumes and associated cost estimates, this proposal is estimated to lead to a net benefit of around £100k per year, leading to an estimated 10 year Net Present Value of around £0.9m in England and Wales. These benefits would arise in the form of cost savings as the proposal would prevent costs which would otherwise have been incurred, from being incurred.

19. The new legislation may also, over time, result in fewer unmeritorious claims and a reduction in any associated administrative burden.

Key assumptions, sensitivities and risks

20. The number of applications for judicial review of the Secretary of State's decisions to refuse compensation is expected to rise considerably over the coming years if no legislative action is taken. This is because the 'tests' set by the Courts have become more nuanced, making it more difficult to assess eligibility, and making each case "arguable". Every case which is considered by the Court provides an opportunity for the creation of new case law which would change the eligibility test, and potentially require compensation to be awarded in a larger number of cases.

21. Compensation for victims of a miscarriage of justice is a vexed subject, particularly since the abolition in 2006 of the ex-gratia scheme, leaving the statutory scheme under s. 133 as the only route to claim compensation. Some MP's and pressure groups may be opposed to any limitations of the current scheme. However, there would be a reduction in the amount of tax payers' funds that are spent on litigation in a challenging economic environment. The Government also has a strong record of success in relevant Judicial Review proceedings.

22. There is an assumption that fewer applicants will seek judicial review of any decision of the Secretary of State to refuse compensation following the coming into force of the new legislation. However, there is a potential risk of an initial spike in the number of applications for judicial review and no reduction compared to the current level thereafter. That said, we would expect the Courts to apply a more robust approach in refusing permission for judicial review, meaning the Government would only be liable for the costs at permission stage (approx £5,000 plus VAT) which are significantly lower than if the case went to a full hearing (approx £50k).

[3] We have used the upper bound of 2 in 40 in our calculations in order to estimate the maximum potential cost

23. It is assumed that the number of applications for Miscarriage of Justice compensation that are accepted and refused each year remains constant. A clearer definition in statute may have the impact of reducing the number of applications accepted per year, thereby potentially reducing the amount paid out in compensation. On the other hand, fewer applications being accepted could mean more than 40 applications would be refused and therefore a potentially larger number of challenges to the decision. However, as explained above, it is expected that such challenges would not proceed past permission stage and therefore the estimate of £50k required to dispose of each judicial review case would not be incurred.

24. There are currently around 20 Miscarriage of Justice cases still to be finally determined by the Court process. These cases will be assessed under the definition against which the initial decision was made and therefore this proposal does not have an immediate impact on these cases Should the Administrative Court (or the Court of Appeal in relation to judicial reviews already heard) decide in favour of the claimants and remit the cases back to the Justice Secretary for reconsideration, the legislation (assuming it is by that time in force) would mean that compensation would only be payable if the claimant was clearly innocent.

Summary and preferred option with description of the implementation plan

25. The preferred option is to introduce legislation that defines a Miscarriage of Justice as a case where the applicant was clearly innocent.

26. If it is decided to implement this option under the Anti-social behaviour, crime and Policing Bill, then it is likely to be introduced before next Easter (2014). Once this has been implemented, the Government would have a stabilised policy against which to consider future applications for compensation. Decisions on transitional provisions have not yet been finalised.

Specific Impact Tests

Statutory equality duties

Under section 149 of the Equality Act 2010, when exercising their functions, Ministers and the Department are under a legal duty to have 'due regard' to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act 2010;
- Advance equality of opportunity between different groups (those who share a protected characteristic and those who do not); and
- Foster good relations between different groups.

Having 'due regard' needs to be considered against the nine 'protected characteristics' under the Equality Act 2010 – namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

We have considered the impact of the proposals against the statutory obligations under the Equality Act 2010. Our current assessment, based on the evidence available, is that the proposals will have no disproportionate impact on equality.

Competition Assessment

- Will the reforms:
  1. **Directly limit the number or range of suppliers?** No.
  2. **Indirectly limit the number or range of suppliers?** No
  3. **Limit the ability of suppliers to compete?** No
  4. **Reduce suppliers' incentives to compete vigorously?** No

Small Firms Impact Test

We do not expect this reform to have any significant impact on small firms.

Carbon Assessment

We do not expect this reform to have an impact on the emission of greenhouse gases.

Other Environment

We do not expect this reform to have any other environmental impacts

Health Impact Assessment

- Will your policy have a significant impact on human health by virtue of its effects on the following wider determinants of health? : Income; crime; environment; transport; housing; education; employment; agriculture; social cohesion.

- We do not anticipate a significant impact on human health.
  - Will there be a significant impact on any of the following lifestyle related variables? : Physical activity; diet; smoking, drugs or alcohol use; sexual behaviour; accidents and stress at home or work.
- We do not anticipate a significant impact on these variables

- Is there likely to be a significant demand on any of the following health and social care services? : Primary care; community services; hospital care; need for medicines; accident or emergency attendances; social services; health protection and preparedness response.

- We do not expect these reforms to have an impact on health and social care services

Human Rights

We believe the proposal is compliant with the Human Rights Act.

Justice Impact Test

Impacts on the justice system are covered in the main body of this Impact Assessment.

Rural proofing

We do not expect this reform to have an impact on the circumstances and needs of rural people and places.

Sustainable Development

We do not anticipate that the policy reform will have a negative impact on any of the following principals of sustainable development:

- Living within environmental limits;
- Ensuring a strong, healthy and just society;
- Achieving a sustainable economy;
- Promoting good governance;
- Using sound science responsibly.

- The policy should, however, have a positive though small impact on ensuring just society.

Privacy Impact Test (an MoJ Specific Impact Test)

Not applicable.

Annex 1: Post Implementation Review (PIR) Plan

- A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

Basis of the review: A review will be undertaken three years after Royal Assent is received.
Review objective: To assess what impact the new measure has had on: • The number of applications for miscarriage of justice compensation • The proportion of successful applications • The number of attempts to judicially review decisions on compensation applications • The number of judicial reviews which receive permission to proceed to a hearing • The outcomes of any such hearings
Review approach and rationale: • The Review will be based on analysis of relevant data and information
Baseline: A definition of a "miscarriage of justice" based on case law
Success criteria: • The policy proposal will be considered successful if it has resulted in fewer applications; in the same, or a smaller, number of applicants shown to be eligible; in fewer attempts to judicially review decisions and a low proportion of such attempts receiving permission to proceed.
Monitoring information arrangements: The number of applications for compensation and their outcomes are regularly monitored and the other information should be readily available.
Reasons for not planning a PIR: • N/A