Title: Reforms to Judicial Review **IA No:** MoJ 212 **Lead department or agency:** Ministry of Justice **Other departments or agencies:** None	**Impact Assessment (IA)** **Date:** 04/02/2014 **Stage:** Introduction of legislation **Source of intervention:** Domestic **Type of measure:** Primary and secondary legislation **Contact for enquiries:** general.queries@justice.gsi.gov.uk

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** (EANCB on 2009 prices)	**In scope of One-In, Two-Out?**	**Measure qualifies as**
N/A	N/A	N/A	No	N/A

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

The total number of judicial review (JR) applications has increased threefold from around 4,300 in the year 2000 to around 12,600 in 2012. The Government is concerned that a large number of these claims are unmeritorious and that many cases, including those with national economic significance, could be resolved more quickly. Limited legal aid resources should be properly targeted at those JR cases where they are needed most and not at weak cases, if the legal aid system is to command public confidence and credibility.

What are the policy objectives and the intended effects?

The policy objective is to ensure that JR cases, including those with potentially large impacts on economic development and growth, are resolved as quickly and efficiently as possible and that there is less scope for abuse of the system, such as bringing JR applications with an intention to delay lawful Government action. In addition limited legal aid resources should be properly targeted at those JR cases where they are needed most, to ensure that the legal aid system commands public confidence and credibility.

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

- Option 1: Develop a Planning Court with a separate list within the High Court of England and Wales (option 1a) and invite the Civil Procedure Rule Committee to consider introducing time scales in procedural rules (option 1b).
- Option 2: Deal with cases grounded on procedural defects, highly unlikely to have made a difference to the outcome more effectively by bringing the consideration of those arguments forward to permission more often (option 2a) and changing (option 2b) the "no difference" test (where a rectification of a claimed procedural flaw would be likely to have made 'no difference' to the original outcome).
- Option 3: Expand the circumstances under which appeals may 'leapfrog' to the Supreme Court by expanding the circumstances in which a case can leapfrog (option 3a), removing the requirement for both parties to consent (option 3b) and allowing leapfrog appeals to begin in more fora (option 3c).
- Option 4: Make payment from the legal aid fund to legal aid providers for work carried out on an application for permission for JR contingent on permission being granted, but with discretion for the Legal Aid Agency (LAA) to pay providers in certain cases which conclude prior to a permission decision where the provider has been unable to secure a costs order or agreement.

The Government is implementing all Options in order to achieve the policy objectives and intended effects.

Will the policy be reviewed? It will not be reviewed.

Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	**Micro** Yes	**< 20** Yes	**Small** Yes	**Medium** Yes	**Large** Yes
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** NA	**Non-traded:** NA	

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) the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY: _____ Date: 4 February 2014

Summary: Analysis & Evidence

Policy Option 1

Description: Develop a Planning Court with a separate list under the supervision of a specialist judge in the High Court of England and Wales (option 1a) and invite the Civil Procedure Rule Committee to consider introducing time scales in procedural rules (option 1b).

FULL ECONOMIC ASSESSMENT

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

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate	NQ		NQ	**NQ**

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

It has not been possible to fully monetise the impacts of this reform. One off transition costs for HMCTS (e.g. adapting IT systems) are negligible. There will be no increase in costs for defendants or interested parties as a result of cases being heard more quickly in a separate planning list. There are no anticipated costs for claimants as a result of cases being resolved more promptly.

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

Some claimants and third parties may lose out from quicker case resolution if they had an interest in government decisions being delayed. There may be some costs to legal services providers from reduced levels of business (secondary impact) because cases are determined more quickly.

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

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

It has not been possible to fully monetise the impacts of this reform although illustrative examples highlighted by consultation responses suggest that the potential benefits for speeding up or reducing challenges to large construction or infrastructure projects could be substantial.

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

Defendants (public bodies) would benefit from quicker case resolution and may save legal costs. Some claimants and third parties may also benefit from quicker resolution if this is in their interests. Claimants would benefit from reduced legal costs. HMCTS would benefit from reduced costs if cases are resolved more quickly. Legal services providers could devote freed-up resources to other profitable activities (secondary impact).

Key assumptions/sensitivities/risks **Discount rate (%)**

It is assumed that there would be no change in case volumes or outcomes. Cases would be dealt with more quickly in the planning court due to a realignment of judicial resource. It is assumed that less legal resource would be required to settle cases in the planning court. It is assumed that there would be no impact on other cases brought before the Administrative Court.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: n/a	**Benefits:** n/a	**Net:** n/a	No	Zero net cost

Summary: Analysis & Evidence — Policy Option 2

Description: Dealing with cases grounded on procedural defects more effectively by bringing forward (option 2a) and changing (option 2b) the "no difference" test.

FULL ECONOMIC ASSESSMENT

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

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate	NQ		NQ	**NQ**

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

It has not been possible to fully monetise the impacts of this reform.

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

Some claimants and third parties may lose out from quicker case resolution if they had an interest in government decisions being delayed. Some claimants may not get permission to judicial review and so will not receive a remedy. HMCTS may receive less fee income if cases are resolved earlier in the JR process. However, as they would also require less resource to process cases the overall impact on HMCTS is assumed to be neutral. There may be some costs to legal services providers from reduced levels of remuneration (secondary impact).
Legal aid providers: The cumulative effect of options 2 and 4 may result in additional costs to legal aid providers instructed in procedural defects cases since they would not receive payment for their work on the permission application (including in relation to the procedural defects arguments) where permission is refused (under option 4). Behavioural changes may result in legal aid providers taking on fewer weak cases lodged solely on grounds of procedural failings given that the no difference test is being made stricter and brought forward to the permission stage which could result in less income for legal aid providers.

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

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

It has not been possible to fully monetise the impacts of this reform.

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

Defendants (public bodies) would benefit from quicker case resolution and may save legal costs if cases are resolved earlier in the JR process. Some claimants and third parties may also benefit from quicker resolution if this is in their interests. Claimants would benefit from reduced legal costs. There may be some small savings to the Legal Aid Fund if some legally aided cases are resolved more quickly and require less funding from the legal aid budget. HMCTS would benefit from reduced costs if cases are resolved earlier in the JR process. As above the overall financial impact on HMCTS is neutral. Legal services providers could devote freed-up resources to other profitable activities (secondary impact).

Key assumptions/sensitivities/risks — **Discount rate (%)**

It is assumed that some cases would be resolved more promptly and more cases will be judged to have failed the "no difference" test. It is assumed that public bodies will be able to correctly identify cases that meet the new "no difference" test and as a result more cases would fail the permission stage. If they are unable to do so there may be some costs associated with greater case preparation for hearings at the early stage of the process. There is a risk that claimants will devote more resources to their cases to demonstrate that the procedural defects in question would have made a difference to the public body's decision.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: n/a	**Benefits:** n/a	**Net:** n/a	No	Zero net cost

Summary: Analysis & Evidence

Policy Option 3

Description: Expanding the circumstances under which cases may "leapfrog" to the Supreme Court. Including; expanding the legal circumstances (option 3a), changing rules around consent (option 3b) and allowing leapfrog appeals to be brought from more courts (option 3c).

FULL ECONOMIC ASSESSMENT

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

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low				
High				
Best Estimate	NQ		NQ	**NQ**

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

It has not been possible to fully monetise the impacts of this reform.

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

Some claimants and third parties may lose out from quicker case resolution if they had an interest in government decisions being delayed. HMCTS may receive less fee income if cases are resolved with fewer steps. However, as they would also require less resource to process cases the overall impact on HMCTS is assumed to be neutral. There may be some costs to legal services providers from reduced levels of business (secondary impact).

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

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

It has not been possible to fully monetise the impacts of this reform.

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

Defendants (public bodies) would benefit from quicker case resolution and may save legal costs if cases are resolved with fewer steps. Some claimants and third parties may also benefit from quicker resolution if this is in their interests. Claimants would benefit from reduced legal costs. The LAA may benefit if some legally aided cases are resolved with fewer steps and require less funding from the legal aid budget. HMCTS would benefit from reduced costs if cases are resolved with fewer steps. As above the overall financial impact on HMCTS is neutral. Legal services providers could devote freed-up resources to other profitable activities (secondary impact).

Key assumptions/sensitivities/risks **Discount rate (%)**

It is assumed that more cases would be leapfrogged under this change and that parties will be able to correctly judge which cases would ultimately appeal to the Supreme Court. If this is not the case there is a risk that cases will be more costly as they would be heard in the Supreme Court rather than the Court of Appeal.

BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:			**In scope of OITO?**	**Measure qualifies as**
Costs: n/a	**Benefits:** n/a	**Net:** n/a	No	Zero net cost

Summary: Analysis & Evidence

Policy Option 4

Description: Payment to provider contingent on permission being granted, but with discretion for the LAA to pay providers in certain cases which conclude prior to a permission decision where the provider has been unable to secure a cost order or agreement as part of a settlement.

FULL ECONOMIC ASSESSMENT

Price Base Year 12/13	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	**High:**	**Best Estimate:**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			£1.2m	
High			£3.3m	
Best Estimate	Negligible			

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

Legal aid providers: Will experience a fall in income in the range of £1m - £3m per annum. In some cases the same amount of work as now may be undertaken, but not funded by the legal aid budget. In other cases less work may be undertaken, for example if fewer applications for permission are sought. The LAA may incur costs of £0.2 - £0.3m from considering whether to award payment in cases to which the discretion applies and any appeals which follow.

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

HM Courts and Tribunals Service (HMCTS): May receive less court fee income if fewer JR applications are made. May face additional costs if providers issue JRs against LAA discretionary payment decisions. Legal aid clients may no longer obtain legal representation in cases where permission would have been refused, but these cases probably would not have secured permission had they been pursued. The LAA would face some additional costs if providers issue JRs against LAA decisions not to grant them a discretionary payment.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			£1m	
High			£3m	
Best Estimate				

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

LAA: There will be savings of £1m - £3m from no longer paying legal aid providers in cases where permission is refused and in cases which are not paid on a discretionary basis. In addition there may be savings from reduced court fee expenditure if fewer legally aided JR permission applications are made in future.

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

HMCTS: May experience reduced court costs if fewer JR permission applications are made in future.

Legal aid providers: In cases where less work is undertaken resources would be freed for other profitable activities.

Key assumptions/sensitivities/risks **Discount rate (%)**

- LAA end-point codes have been used to assess the costs and benefits of the proposals. The description of the end-point codes means there is uncertainty as to how many cases may be affected.
- There is uncertainty around the number of cases in which the LAA's discretion to pay the provider is exercised in the provider's favour.
- Overall financial impacts on HMCTS are assumed to be neutral as HMCTS operates on a cost recovery basis in the longer term.
- There is uncertainty as to how providers might respond to the change in funding for JR applications.

Costs to the LAA are based on the maximum possible number of discretionary payment applications and subsequent appeals.

- There could be a small increase in the number of cases where permission is refused as a result of option 2 (changes to procedural defects). This would have a small additional cost to providers and a small additional benefit to the LAA.

BUSINESS ASSESSMENT (Option 4)

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

Evidence Base

1. Introduction

Background

1. 1 Judicial Review (JR) is a process by which individuals, businesses and other affected parties can challenge the lawfulness of decisions or actions of the executive, including those of Ministers, local authorities, other public bodies and those exercising public functions. It is largely a judge-developed procedure and can be characterised as the rule of law in action, providing a key mechanism for individuals to hold the executive to account.

1. 2 There are three main grounds on which a decision or action may be challenged:

- Illegality: For example, the decision was not taken in accordance with the law that regulates it or goes beyond the powers of the body.
- Irrationality: For example that the decision was not taken reasonably, or that no reasonable person could have taken it.
- Procedural irregularity: For example, a failure to properly consult or to act in accordance with natural justice or the underpinning procedural rules.

1. 3 JR proceedings must be commenced by filing at Court a claim form, which sets out the matter the claimant wants the Court to decide and the remedy sought. The Court's permission is required for a claim for JR to proceed. Decisions on permission are normally considered on a review of the papers filed. Permission may be granted in full, or limited to certain grounds set out in the claim. Where permission is granted, the Court may make directions for the conduct and management of the case.

1. 4 In cases where the Court refuses permission (either in full or in part), the Court will set out the reasons and serve them on the claimant and the other parties to proceedings. The claimant may request that the decision be reconsidered at a hearing (referred to in this Impact Assessment as an "oral renewal"). The oral renewal is a full reconsideration of whether permission should be granted, supported by oral submissions. Where permission is granted at an oral renewal, the claim will continue as normal. Where it is refused, the claimant may consider whether he or she wishes to appeal to the Court of Appeal (CoA).

1. 5 Where permission is granted the Court may make directions for the conduct and management of the case, setting out time limits for example, for the filing and serving of the particulars of the claim, the defence to the claim and any evidence on which the parties wish to rely. Matters may be expedited with the Court's permission: for example, the permission and the full hearing may be "rolled up" so that both are considered at the same hearing. The Court also has a general power to extend any time limit set out in the rules where it is in the interests of justice to do so.

1. 6 JR is concerned with the lawfulness of the decisions taken. It is not the Court's role to substitute its own judgment for that of the decision maker. Where the Court concludes that a decision was not taken lawfully it may make one of a number of orders, such as a quashing order setting aside the original decision.

Legal Aid

1. 7 Legal aid is generally available for JR applications subject to means and merits tests. The legal aid scheme involves the public procurement of legal services and determines the terms and conditions of access to these services. Total legal aid fund expenditure was almost £2bn in 2012/13, with around £975m spent on criminal legal aid and around £940m spent on civil legal aid[1]. The Legal Aid Agency (LAA) is responsible for administering the legal aid scheme in England and Wales. Only a small proportion of this total legal aid expenditure relates to JR cases. Approximately £12m was spent on the 3,617 JR cases closed in 2012/13.

[1] Rounded to the nearest £5m. Source: http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf

Problem under consideration

1. 8 The Government is concerned that there has been rapid growth in the use of JR, and that it is sometimes used as a delaying tactic, particularly in planning cases. Only a small proportion of cases stand a reasonable chance of success, for example, in 2012 around 7,500 cases were considered for permission of which around 1,400 cases secured permission[2]. JR proceedings can create delays and add to the cost of public services, in some cases potentially frustrating reforms, including those that may contribute to economic growth and recovery. The specific problems that the reforms in this Impact Assessment seek to address are outlined below.

Planning

1. 9 The Government is of the view that there is scope for planning challenges to be determined more quickly. For planning cases lodged in 2011, it took on average around 100 days for a planning case to reach the permission stage from the day it was lodged (for cases which reached the permission stage) and around 375 days from lodgement to a final hearing (for cases which reached a final hearing).[3] These delays can increase costs for interested parties and generate adverse implications for cash flow and finance costs for development projects. Longer court processes may generate other costs from construction resources being left unused for periods of time or being redeployed elsewhere to other active projects (with temporary inefficiencies). They can lead to some developments being deferred indefinitely or abandoned. Delays from whatever source in implementing planning decisions can act as a brake on infrastructure and other projects and hinder economic growth and job creation.

Procedural Defects

1. 10 The Government is concerned that challenges which relate to procedural flaws in decision making processes that did not affect the outcome of the original decision could be determined more quickly and with less resource. In some cases, whilst technically successful, some of these challenges may result in no substantive change to the original decision. Consequently, the Government wishes to strengthen the Court's powers where the rectification of a claimed flaw in a decision making process would be likely to have made "no difference" to the original outcome.

1. 11 The Court has already established a "no difference" principle so that, where the Court is satisfied that the outcome would "inevitably" have been the same even if the alleged defect in a decision making process had not occurred, it can refuse the remedy sought. It is open to the defendant to argue that a purported flaw made "no difference" at any stage in the process, including in the Acknowledgement of Service (which includes a summary of the grounds for contesting the claim).

1. 12 However, under current arrangements at the permission stage the Court is unlikely in many cases to be able to properly consider "no difference" arguments because insufficient information is often provided to determine whether the flaw made any difference. This means that some cases that ultimately end up being adjudicated as having made "no difference" can proceed through the permission stage to a final hearing, and therefore take a considerable amount of time to resolve. For all cases lodged in 2011, it took on average almost 90 days for a case to reach a permission decision from the day it was lodged (for cases which reached permission stage), and it took around 340 days from the day it was lodged for a case to reach a final hearing (for cases which reached a final hearing). Extended case duration can generate additional costs and delays which may also have adverse impacts on third parties[4].

[2] See 19 December 2013 quarterly court statistics https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267508/csq-q3-jul-sep-2013.pdf

[3] See footnote 2. Data for cases lodged in 2011 is most relevant as some cases lodged in 2012 might not have concluded yet. All Administrative Court data is from this source unless separately referenced.

[4] These figures are a further breakdown of the official Court of Appeal statistics published online. The published statistics are available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267407/csq-q3-2013-main-tables.xls

Leapfrogging

1. 13 In a small number of highly significant JR cases and other types of case it becomes apparent at a relatively early stage that leave to appeal to the Supreme Court may ultimately be sought. These cases are complex, and necessarily require full consideration over a period of time. The time taken to resolve these cases may harm public confidence in the judicial system. A party may have a narrower self interest in their case not being resolved for some time when this might not be in the wider public interest. The Government considers that there may be advantages in providing for a wider range of cases (including non-JR cases) to move to the Supreme Court more quickly with fewer with fewer intermediate steps. For all JR cases between 2008 and 2013, Court of Appeal internal management information indicates that it took on average around 140 days to make a decision on whether to grant permission to appeal to the Court of Appeal the outcome of a JR (from the day this permission application was lodged with the Court of Appeal, not from the day of the JR final hearing). Of these, this internal management information indicates that those granted permission to become appeals (again on average between 2008 and 2013) took a further 160 days to be heard by the Court of Appeal. In addition, in the same period, this internal management information indicates that it took around 240 days for the remaining, substantive appeals to be heard by the Court of Appeal (i.e. those appeals that did not need a permission to appeal stage in the Court of Appeal).

1. 14 It is currently possible for cases to "leapfrog" the Court of Appeal (moving directly from the court of first instance to the Supreme Court) where there is a point of law of general public importance and the Court is bound by precedent. The relevant point must have been considered fully by the Court at first instance. In addition, a leapfrog appeal currently requires consent of both the claimant and defendant, which may reduce the volume of such appeals (e.g. if the claimant is motivated by delay). The current circumstances and conditions are considered to be too narrow and to prevent some cases from "leapfrogging" the Court of Appeal and being adjudicated in the Supreme Court. This may result in additional delays and costs to claimants, defendants and third parties that could be avoided if cases were resolved more quickly with less resource.

Legal Aid

1. 15 Legal aid is currently available for all stages of a JR application (subject to means and merits tests), including for work on cases that are not granted permission to proceed to a full hearing. The consultation proposed transferring the financial risk of the application to the provider in order to provide a greater incentive to give careful consideration to the strength of the case before applying for permission for JR.

1. 16 The original proposal, set out in the Legal Aid transformation document *Transforming Legal Aid: Delivering a More Credible and Efficient System*[5] (pages 30-33) proposed only paying providers for work on an application for permission for judicial review where permission is granted to proceed to a full hearing. MoJ listened to concerns raised by a number of respondents who argued that the original proposal would also unfairly affect meritorious cases where permission is not granted because the case concludes in the claimant's favour prior to consideration by the court. As a result, the Government has put forward a revised proposal to provide the LAA with the discretion to pay the provider in certain cases which conclude prior to a permission decision without a costs order or agreement. The Government has proposed a set of factors for the LAA to apply when considering whether or not to exercise this discretion in the provider's favour in individual cases.

Policy objectives and options under consideration

1. 17 The policy objective is to ensure that the volume of weak JRs brought is reduced and that JR cases, including those with the potential impacts on economic growth and recovery, are resolved more quickly and efficiently. This should ensure that the right balance is struck between reducing the burdens on public services, boosting economic growth and protecting access to justice and the rule of law. The Government also wishes to ensure that there is less scope for abuse of the system, such as bringing JR applications with an intention to delay lawful Government action. In addition the Government considers that limited legal aid resources should be properly targeted at

[5] Available on consultation page of MoJ website www.justice.gov.uk

those JR cases where they are needed most, including to ensure that the legal aid system commands public confidence and credibility.

Option 1: Planning

1. 18 Planning JRs are considered in the Administrative Court, which is part of the Queen's Bench Division. In July 2013, the President of the Queen's Bench Division nominated a specialist Planning Liaison Judge to review planning cases and to ensure that all major infrastructure cases are heard by a specialist High Court Judge, sitting in London, the Regions and Wales. Also in July 2013, the President of the Queen's Bench Division introduced new procedures within the Administrative Court to identify planning cases as early as possible and to prioritise their management and progress in line with new targets and shorter deadlines, i.e. a planning fast track was introduced.

1. 19 Under Option 1, to further build on the improvements implemented in July 2013[6], the Government proposes to establish a Planning Court with a separate list under the supervision of a specialist judge within the Queens Bench Division of the High Court of England and Wales. The Planning Court would continue to deal with JRs and statutory appeals on all matters of Nationally Significant Infrastructure Projects, planning and environmental matters. The Government also intends to invite the Civil Procedure Rule Committee to consider formalising the targets previously set out in the planning fast track in the Civil Procedure Rules (CPR). The changes to the CPR will take at least 6 months to develop and implement. Option 1 will further reduce the delay in the consideration of planning challenges and ensure that cases are heard by specialist High Court judges or deputies.

Option 2: Procedural Defects

1. 20 There are two options proposed for "no difference" arguments: allowing them to be determined earlier in the process more often and providing for a different threshold.

- **Option 2a – Bring forward the consideration and allow a more thorough testing at permission:** Under this option the "no difference" arguments can be fully made and tested at the permission stage more often. In some cases there may be a need for the Court to be provided with more factual material. There will not be a positive duty on the judiciary to consider in every application whether the alleged flaw in a decision making process complained of could have made a difference. This would be a consideration only where the defendant makes the assertion in the Acknowledgement of Service that the flaw could not have made any difference and where there are no other arguable grounds.
- **Option 2b – A different threshold**: The Government will legislate to replace the need for "inevitability" with a "highly likely" threshold. This would mean that, where it was reasonably clear that the alleged flaw in a decision making process would not make a difference, but it was not inevitable that it could not have, the Court could refuse permission and/or a remedy. The Court would consider and apply the new test. Under this option, where there is still real doubt as to whether the result would have remained the same, the Court would be able to grant permission or to provide a remedy in favour of the claimant.

Option 3: Leapfrogging

1. 21 The Government will amend the existing rules about when a leapfrog may be made:

- **Option 3a – Extending the relevant circumstances**: Extend the circumstances to include cases which are of national importance or which raise significant issues (for example the deportation of a person who is a risk to national security, a nationally significant infrastructure project or a case the outcome of which affects a large number of people). Whilst there would still be the need for the point of law to be one of general importance the case could leapfrog if it had one of the additional implications.

[6] During the consultation events anecdotal evidence suggested that there has been a reduction in the time taken to consider permission for planning challenges resulting from those changes, however it is too early to assess the impact on time taken to final hearings. MOJ also conducted a qualitative survey of claimant solicitors, claimant counsel and defendant solicitors who have been involved in a planning Judicial Review since July 2013. Responses suggested that there has been an improvement in the time taken to decide permission during planning cases although respondents felt that there were still too few specialist planning judges available.

- **Option 3b – Consent**: Abolish the need for all parties to consent to a leapfrog taking place. The judiciary would retain their current role in deciding whether to grant requests to leapfrog.
- **Option 3c – Extending the courts and tribunals in which a leapfrog appeal can be initiated**: In addition to High Court and Divisional Courts of England and Wales leapfrogging will extend to include the Upper Tribunal in England and Wales and Northern Ireland, the Employment Appeals Tribunal and the Special Immigration Appeals Commission.

Option 4: Legal Aid

1. 22 The Government considers that limited legal aid resources should be properly targeted at those JR cases where they are needed most, if the legal aid system is to command public confidence and credibility.

1. 23 The policy objective is to give a greater incentive to providers to give careful consideration to the strength of the case before applying for permission in JR cases. This is to be achieved by only paying providers were permission is granted by the court, or, in a case which ends before a permission decision, where the LAA exercises its discretion in favour of the provider.

1. 24 Having listened to the consultation responses which argued that the proposed discretionary criteria did not provide sufficient flexibility to cover certain cases which respondents argued were meritorious and ought to be paid, the Government has adjusted the discretionary criteria.

Economic rationale for intervention

1. 25 The economic rationale for intervention relates to improved efficiency. There would be efficiency gains if JR cases, including those that are the most important, are resolved more quickly and with fewer resources whilst achieving the same outcomes.

1. 26 The proposed reforms might also generate wider economic benefits, including those applying to all bodies affected by a JR. Reduced delays and uncertainties in the implementation of some government decisions might benefit infrastructure projects and others which may boost economic growth.

Main affected groups

1. 27 The proposals are likely to affect the following groups:

a. Claimants, including civil legal aid claimants, at the High Court in England and Wales and in some cases in the Upper Tribunal – individuals, businesses and third sector organisations.

b. Defendants at the High Court in England and Wales and in some cases in the Upper Tribunal – public sector organisations/bodies.

c. Her Majesty's Courts and Tribunals Service (HMCTS) – administers the Administrative Court (which forms part of the High Court of Justice) in England and Wales as well as other courts and tribunals.

d. Legal Aid Agency (LAA). The LAA is responsible for managing the legal aid fund. Claimants who are eligible for legal aid have their legal costs met by the Legal Aid Fund.

e. Legal services providers including civil legal aid providers.

f. Third parties – business and individuals.

2. Costs and benefits

2. 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 on society might be from implementing these proposals. The costs and benefits of each proposal are compared to the do nothing option.

Key data sources

2. 2 The assessment of costs and benefits in this Impact Assessment is based on the following key sources of evidence:

- Detailed court data published in Administrative Court statistics. Court data relates to the volume and duration of JR cases, and can be split by the JR subject matter (in accordance with court codes) and by JR type (i.e. criminal, immigration/asylum and civil). Court data indicates how many cases reach which key stage of the JR court process (permission, oral renewal and final hearing). Court data does not centrally record the number of cases which were brought based on procedural defects.
- Internal management information provided by the Treasury Solicitor's Department. The Treasury Solicitor's Department defends JRs on behalf of central Government Departments (but not JRs defended by local authorities and other public bodies such as regulators), apart from HM Revenue and Customs. The Department for Health (DH) and Department for Work and Pensions (DWP) litigation team has just joined the Treasury Solicitors' Department. The Treasury Solicitor's Department does not hold a central database of the legal costs associated with each JR. Based on their internal management information (not extending to DH/DWP cases), the Treasury Solicitors Department has been able to provide illustrative figures of the legal costs of defending JRs.
- The Legal Aid Agency (LAA) centrally records internal data on JR applications funded by legal aid. This includes the average legal aid spend per case funded by legal aid, and the volume of JR cases securing legal aid.
- LAA data and Administrative Court data have been combined to derive the illustrative assumption that in around 30% of all cases the claimant might be funded by legal aid. In these cases payments to the claimants legal team or costs to the defendant or the winning claimant would be made to/by the legal aid fund. The figure of around 30% was derived by taking the number of legally aided JR closed cases in 2012/13 (provided by LAA data) and comparing this to the total volume of JRs lodged in 2012 (provided by Administrative Court statistics). These two data sets are not entirely comparable hence this figure of 30% should be regarded as an assumption.
- Where data is not centrally recorded or where illustrative estimates are unavailable from internal management information, information might be available from court case files MoJ undertook an internal case file review of around 210 JR cases based on a representative sample. This provides further information on the number of cases that were brought based upon procedural defects.
- Further evidence was sought from solicitors, Counsel and defendants with experience of the new JR planning fast track process. Views were sought on the impacts of the new planning fast track and whether any further improvements could be made.
- Illustrative examples were provided during the consultation of the costs imposed by planning cases on developers and potentially on the wider economy.

Option 0 – Base case (do nothing)

Description

2. 3 Under the do nothing base case the proposals highlighted in Options 1-4 would not be implemented. The do nothing is compared to itself and therefore the costs and benefits are necessarily zero, as is its Net Present Value (NPV).

2. 4 A number of existing changes to the JR process have recently been made and are included in the base case for the purposes of this Impact Assessment. These changes include:

- The Government has already implemented changes to the listing of cases in the Administrative Court to deliver reductions in the time taken for JRs and for statutory challenges in planning and infrastructure cases to be determined. The changes to listing include firstly identifying planning related challenges and JRs as early as possible and to

prioritise their management and progress in line with new targets and shorter deadlines laid down by direction of the President of the Queen's Bench Division. Secondly these ongoing changes to listing include to ensuring that these cases are referred to and managed by specialist planning judges where possible.

- In July 2013 the Government implemented a package of JR proposals[7] including changes to; time limits in planning cases, oral renewals fees, progression for cases judged as being "totally without merit".

2. 5 For Option 4 at present all JR cases funded by legal aid receive payment for the permission application stage of their case. If the do nothing option was pursued this would continue and providers would be paid for the work on all permission applications regardless of the outcome. As this option is compared against itself, its costs and benefits are necessarily zero, as is its Net Present Value (NPV).

Option 1 – Develop a Planning Court with a separate list under the supervision of a specialist judge in the High Court of England and Wales and invite the Civil Procedure Rule Committee to consider introducing time scales in procedural rules.

Description

2. 6 Option 1 will establish a Planning Court with a separate list under the supervision of a specialist judge within the Queens Bench Division of the High Court of England and Wales. The Government will also invite the Civil Procedure Rule Committee to consider formalising the targets previously set out in the planning fast track in the Civil Procedure Rules.

2. 7 Data from the Administrative Court indicates that around 150 to 200 "town and country planning" JRs were lodged per year between 2007 and 2012. This data indicates that for cases lodged in 2012 it took 110 days on average for an initial permission decision to be taken on a planning JR case (not including oral renewals). Administrative Court data indicates that for planning JRs lodged in 2011, it took 374 days on average to reach a final hearing decision from the day the case was lodged (for cases reaching a final hearing).[8]

2. 8 As well as JR challenges, Administrative Court data indicates that there were around 150 additional Statutory Challenge applications in 2012 relating to planning, of which 12 were allowed and 48 dismissed at a final hearing.[9] Indicative internal management information from the Administrative Court shows that these challenges against s.288 and s.289 of the Town and Country Planning Act lodged between June 2012 and May 2013 took on average around 65 weeks and 86 weeks for each of the section challenges respectively to reach a final hearing from the day they were lodged (for cases reaching a final hearing).[10] These Statutory Challenges would also be subject to the reforms.

2. 9 The base case captures the impact of applying the planning fast track reforms which came into effect in July 2013. Internal management information from the Administrative Court indicates that the planning fast track reforms seem to be reducing case durations, both from lodging to a permission decision and from lodging to a final hearing decision.

2. 10 The main impact of allocating statutory appeals and JRs to a separate planning list is expected to be quicker case outcomes. This is because specialist judges and support staff who are experts in the planning system would be involved and may be able to identify the relevant issues more readily and deal with cases promptly. Given the often complex and highly technical legal issues of both fact and law, it is accepted by the judiciary and by legal representatives that judges without specialist experience can take longer to make an equivalent decision on a case.

[7] https://consult.justice.gov.uk/digital-communications/judicial-review-reform
[8] For cases lodged in 2012, some cases are yet to reach a final hearing.
[9] These figures are a further breakdown of already published data from the Administrative Court, which is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267408/additional-court-tables-2012.xls
[10] These waiting times exclude time stood out (waiting time due to defendant or claimant and not the court) and are calculated as from lodged date to the date of the final hearing decision - they do not include any earlier hearings that were adjourned or where no order was made. These figures are a further breakdown of already published data from the Administrative Court, which is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207807/court-stats-q1-ad-tables.xls

Benefits of Option 1

Benefits to claimants (including individuals, businesses, NGOs, charities, pressure groups)

2. 11 It has not been possible to monetise the benefits to claimants. Some claimants might benefit if a decision on their application is reached more quickly in future. This would apply to cases where claimants win their case or where the case is settled in the claimant's favour outside of court more quickly, and hence where the claimant secures a positive outcome sooner. Claimants may save costs if less legal resource is needed to resolve claims more quickly.

Benefits to defendants (public bodies)

2. 12 Public bodies seeking to implement planning decisions would benefit from the quicker resolution of planning cases. This would allow them to implement their decisions more quickly in cases where they are successful. The may also gain from quicker resolution in cases they lose, as this may enable alternative solutions to planning issues to be pursued more quickly than would otherwise be the case. Public bodies may save costs if less legal resource is needed in dealing with challenges which are resolved more quickly in future.

Benefits to HMCTS

2. 13 There would be cost savings to HMCTS if the same volume of planning cases was resolved with equivalent outcomes (including same rates of appeal) but with fewer HMCTS resources required per case. In the short and medium terms the resources freed up may be used to address waiting times and case durations in the court system, to the benefit of court users, rather than being realised as cashable savings. HMCTS operates on a full cost recovery basis in the longer run.

Benefits to the Legal Aid Agency (LAA)

2. 14 The LAA would only benefit if some legally aided cases are resolved more quickly and require less legal resource as a result of this change. The planning cases affected by these reforms are assumed not to fall within the scope of legal aid hence there should be no impacts on the LAA.

Benefits to other bodies (including individuals, businesses, NGOs, charities, pressure groups)

2. 15 Other bodies directly affected by a JR or statutory challenge may gain directly from the quicker implementation of planning related public decisions, or from less uncertainty about their implementation.

2. 16 The proposal may enable planning cases to be resolved more quickly due to more efficient listing and specialist judges. There is also the potential for all types of cases heard in the Administrative Court to be resolved more quickly as fewer applications may free up court resources to process remaining cases more efficiently. This may generate benefits for all those individuals and businesses that would gain from quicker implementation of public decisions.

2. 17 Information provided by public bodies subject to JRs and statutory challenges indicates that the benefits to business from reduced delays in implementing planning decisions may be significant in individual cases. Delays and uncertainties in proceeding with planning projects may generate cash flow and other finance costs. Delays may generate resource costs from temporarily redeploying resources to other projects. Legal costs might be incurred by businesses which are third parties to a case. There may also be costs in bearing and managing the uncertainties and risks associated with possible JR delays and statutory challenge delays. These benefits to third parties have not been monetised as they vary from considerably between projects, but they could be particularly significant for larger infrastructure, regeneration or other construction projects.

2. 18 Consultation responses highlighted a number of cases where planning JRs had delayed development projects with the effect of increasing costs for developers and delaying the economic benefits including the creation of new jobs.

Wider Economic Benefits

2. 19 There could be wider economic benefits if planning projects and policies are implemented more quickly. In particular quicker realisation of project benefits could lead to wider benefits for economic growth. Whilst these cannot be quantified the potential savings and economic gains could be very significant depending upon the project. Consultation responses highlighted a number of planning projects that were delayed by unsuccessful JRs.

2. 20 One consultation response related to airport expansions at Bristol and Southend which were subject to unsuccessful JRs. In the case of Bristol International Airport planning permission was granted in February 2011. A JR was lodged in May 2011 and permission was rejected in June 2012. An unsuccessful oral renewal was heard in October 2011. The project was delayed by around 8 months. The 8 month interruption is likely to have caused wider economic losses from delays to realisation of benefits from the project, including the creation of new jobs and lost economic activity.

2. 21 The expansion of Southend Airport was subject to a JR that was ultimately unsuccessful. Planning permission was granted in April 2010. A JR was lodged in July 2010 and was refused permission in February 2011. The claimant was unsuccessful at oral renewal in April 2011 (49 weeks after planning permission was granted). The claimant renewed the application to the Court of Appeal on papers which was refused in June 2011. A hearing at the Court of Appeal was unsuccessful in July 2011. The total delay was around 15 months.

2. 22 Other consultation responses provided examples of delays affecting housing, supermarkets and shopping centres.

Costs of Option 1

Transitional costs

2. 23 There may be one-off familiarisation and adjustment costs to claimants, defendants and HMCTS from establishing a separate planning list. These are not expected to be significant.

Costs to claimants (including individuals, businesses, NGOs, charities, pressure groups)

2. 24 Some claimants may lose out from cases being resolved more quickly under Option 1 if they would have benefited from delays to resolving a JR or statutory challenge. This would include claimants who ultimately are unsuccessful in their challenge but would gain from delaying the implementation of public bodies' decisions.

Costs to defendants (public bodies)

2. 25 No ongoing costs to defendants are anticipated.

Costs to HMCTS

2. 26 The creation of the separate planning list may require some one-off upfront investment to enable a greater range of cases to be heard. This may include the adaptation of IT systems and administrative processes. These costs are not expected to be significant. As explained above, HMCTS operates on a full cost recovery basis in the longer run.

Costs to legal services providers

2. 27 There may be some costs to legal services providers from reduced levels of business if cases, on average, settle more quickly and require less legal input following this change. This would free up these resources to be devoted to other profitable activities. Impacts on legal services providers are secondary impacts.

Costs to other bodies (including individuals, businesses, NGOs, charities, pressure groups)

2. 28 The proposal may enable planning cases to be resolved more quickly due to more efficient listing and specialist judges. There is also the potential for all types of cases heard in the Administrative

Court to be resolved more quickly as fewer applications may free up court resources to process remaining cases more efficiently. This may impose costs on all those individuals and businesses that would lose out from quicker implementation of public decisions.

Assumptions and risks for Option 1

2. 29 It is assumed under Option 1 that there would be no changes in case volumes and to case outcomes, including no change to appeal rates. It is assumed that the transferring of cases would simply result in the planning cases affected being resolved more promptly.

2. 30 It is assumed that the redeployment of existing judicial resource, more in accordance with the specialist skills of judges appropriate for different cases, would not generate any adverse implications for cases arising in non-planning areas.

2. 31 Any shortage of specialist judges with relevant experience of planning law may impact the speed with which cases can be allocated and heard.

2. 32 It is assumed that less legal resource would be required to present and defend cases due to the use of specialist planning judges who will be experts in planning law. Less legal resource may also be required due to shorter case duration.

2. 33 It is assumed that court fees and overall court fee income will not change as a result of these reforms and will remain the same for all cases affected. It is assumed that overall court costs will fall as a result of these reforms, and that the resources freed will be allocated to reducing court case durations and waiting times, to the benefit of court users.

2. 34 It is assumed that case durations and waiting times for other cases in the Administrative Court (i.e. not cases involving statutory planning changes or planning JRs) will remain the same following these reforms.

One-in-two-out assessment for Option 1

2. 35 The proposals in this Impact Assessment are out of scope of the One In Two Out rule as the reforms do not relate to regulation.

Option 2 – Procedural defects

Description

2. 36 There are two elements to Option 2. Under Option 2a, “no difference” arguments could be heard at the permission stage rather than later in the JR process at the request of the defendant in their Acknowledgement of Service letter. Option 2b would, in addition, lower the threshold for the likelihood of the defect in question affecting the outcome of a decision. Under this option cases could be refused permission, or the Court could refuse to grant a remedy, where it is judged that it is “highly likely” that the defect would not have altered the decision rather than “inevitable”.

2. 37 MoJ’s internal review of JR case files suggested that around 15% of JR cases included a procedural defect as one of the grounds for the JR. The case file review suggests that around 2% of all JR cases lodged were brought solely on grounds that a procedural defect applied to the decision being challenged. In 2012 around 12,600 JRs were lodged. This suggests that around 250-1,900 cases (2%-15%) may be impacted by the changes to the procedural defects test. MoJ expects that the impact is likely to be closer to the 250 estimate given that many of the cases include grounds other than procedural defects.

2. 38 The main impact of this option is expected to be that cases that are judged to be grounded on minor procedural flaws would be resolved more quickly (at the permission stage rather than a final hearing) and, as a result, this would require fewer resources for claimants and defendants.

Benefits of Option 2

Benefits to claimants (including individuals, businesses, NGOs, charities, pressure groups)

2. 39 Claimants would benefit from reduced legal costs if cases are resolved at the permission stage rather than later in the JR process.

Benefits to defendants (public bodies)

2. 40 Defendants would benefit if cases were resolved at the permission stage rather than later in the JR process. This is because defendants would require fewer resources to defend cases. Defendants would also be able to implement government decisions more quickly.

Benefits to HMCTS

2. 41 The quicker resolution of some cases would benefit HMCTS as fewer resources would be required to deal with the same volume of JR applications. In the short and medium terms the resources freed up may be used to address waiting times and case durations in the court system, to the benefit of court users, rather than being realised as cashable savings. HMCTS operates on a full cost recovery basis in the longer run.

Benefits to the Legal Aid Agency (LAA)

2. 42 The LAA may benefit if some legally aided cases are now resolved more quickly and require less funding from the legal aid budget as a result of this change. If the illustrative assumption that around 30% of JRs might be legally aided[11] is applied, this would equate to around 75 of the 250 cases relating solely to procedural defects, although it is not known whether procedural defects cases are more or less likely to be funded by legal aid than the overall number of JRs.

2. 43 The combined affects of option 4 and option 2 may result in further savings to the LAA if option 2 results in an increase in the number of cases refused permission, since option 4 proposes to pay legal aid to providers only in cases where permission is granted or, in a pre-permission case, where the LAA's discretionary funding criteria are met. The combined impact of the two options should also encourage legal aid providers to consider more carefully the merits of issuing a JR and it is possible that as a result fewer weaker JRs might be lodged.

Benefits to other bodies (including individuals, businesses, NGOs, charities, pressure groups)

2. 44 Some other bodies directly affected by a JR may stand to gain from the quicker implementation of public decisions, or from less uncertainty about their implementation. Under option 2b it is possible that some other bodies may also gain as a result of the Court in some cases no longer providing remedies in favour of the claimant. This would depend upon the nature of the remedy and how this affected the third party's interests. There is the potential for all JR cases to be resolved more quickly, not just cases that are directly affected by Option 2, as quicker resolution of cases concerning minor procedural defects may free up court resources to process other cases more quickly.

Wider economic benefits

2. 45 There could be wider economic benefits if projects and policies are implemented more quickly and if these generate wider benefits for economic growth and recovery.

Costs of Option 2

Transitional costs

2. 46 There may be some one-off transitional costs to claimants, defendants and HMCTS. These are expected to be negligible. There may be some initial satellite litigation to determine how the new test works.

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[11] LAA data on cases closed in 2012/13 suggests that in around 30% of all cases the claimant is funded by legal aid. In these cases payments to/by the winning claimant would be made to/by the legal aid fund. The figure of around 30% is derived from taking the number of legally aided JR closed cases in 2012/13 and comparing this to the total volume of JRs lodged in 2012. The latter figure is provided by Administrative Court statistics.

Costs to claimants (including individuals, businesses, NGOs, charities, pressure groups)

2. 47 Claimants who stand to benefit from delays to public decisions would lose out under Option 2a if their cases are dismissed earlier in the JR process than they otherwise would have been. This would include claimants who are ultimately unsuccessful but would have gained by delaying the implementation of government decisions.

2. 48 Some claimants whose cases might previously have resulted in a remedy from the court would also lose out if they are no longer awarded a remedy under Option 2b. These would be cases where it is judged that the procedural flaw would have stood a slim chance of changing the original decision by the public body; specifically, it would be those cases where it is judged that it is more than "highly likely" but less than "inevitable" that the flaw would have resulted in no change in the final decision. Given the high threshold that "high likely" still represents it is expected that this would occur only in a small number of cases.

Costs to Defendants (public bodies)

2. 49 No ongoing costs are anticipated for defendants.

Costs to HMCTS

2. 50 HMCTS may receive less overall fee income if some cases are settled at an earlier stage of the JR process following this change, in particular if fewer final hearings take place. HMCTS operates on a full cost recovery basis in the long run and the overall financial impact on HMCTS of these reforms is expected to be neutral (because the reduction in total fee income from some cases being resolved without a final hearing would be balanced by the saving in HMCTS resources from providing fewer hearings).

Costs to legal services providers

2. 51 When combined with the effects of option four (legal aid permission payment proposal) there may be small additional costs to legal aid providers as a result of fewer cases being granted permission as a result of the change to the procedural defects test. There may also be costs to legal aid providers as a result of behavioural changes. Given the stricter test for procedural defects fewer legal aid providers may be willing to take on at risk legal aid judicial reviews lodged solely on grounds of a procedural defect. This would result in less income for these legal aid providers. Although the government believes that this will be mitigated by the fact that legal aid providers may consider more carefully the merits of lodging JR. It is possible that fewer weaker JRs might be lodged, especially when the combined impacts of option 2 and option 4 are considered.

2. 52 There may be some costs to legal aid providers from reduced levels of business if some cases settle more quickly and require less legal input following this change. This would free up their resources to be devoted to other profitable activities. Impacts on legal services providers are secondary impacts.

Costs to other bodies (including individuals, businesses, NGOs, charities, pressure groups)

2. 53 Other bodies directly affected by a JR may lose out if cases are resolved more quickly and if delay would be in their interests. Under option 2b it is possible that some other bodies may also lose as a result of the Court in some cases no longer providing remedies in favour of the claimant. This would depend upon the nature of the remedy and how this affected the other bodies' interests. There is the potential for all JR cases to be resolved more quickly, not just cases that are directly affected by Option 2, as quicker resolution of cases concerning minor procedural defects may free up court resources to process other cases more quickly. This may generate costs for bodies which value delay.

Assumptions and risks for Option 2

2. 54 It is assumed that under option 2a the same number of cases would be lodged but some cases would be resolved more quickly than would otherwise have been the case. This would apply to cases that would previously have passed the permission test and but where the procedural flaws complained of would be found to have made "no difference" to the decision at the substantive hearing, as this conclusion could now be reached at the permission stage more often. Under option 2b it is assumed that more cases would be judged as having potentially "no difference" to the final public decision. These additional cases would be those where the probability that the procedural flaw would have made "no difference" to the public body's decision is higher than "highly likely" but less than "inevitable". It is assumed that these cases (and those in which it was inevitable that there would have been no difference) could be settled earlier in the process than previously as a result of option 2. It is assumed that the outcomes of these cases might differ, in favour of defendants, if the Court provided fewer remedies in future which would have favoured the claimant.

2. 55 It is assumed that public bodies will correctly be able to identify cases that would have been "highly likely" to have made no difference in their Acknowledgement of Service letters. If public bodies do not correctly identify these cases, some cases that would previously have been refused permission will require greater resources overall if they require an oral hearing at the permission stage to determine the "no difference" principle instead of being adjudicated on the papers as they currently are.

2. 56 Following these changes claimants may devote more resources to their challenges in order to demonstrate that the procedural flaws in question would have made a substantive impact on the public body's decision. This is because claimants would now face a higher bar following the change in the "no difference" test. If this is the case defendants in turn may devote more resources in defence of the case.

2. 57 It is assumed that court fees and overall court fee income will not change as a result of these reforms and will remain the same for all cases affected. It is assumed that overall court costs per case will fall as a result of these reforms, as some cases will be resolved more quickly in future, and that the resources freed will be allocated to reducing court case durations and waiting times, to the benefit of court users.

2. 58 The cumulative impact of option 2 and option 4 should incentivise providers to take a more considered approach and therefore no longer weaker cases.

One-in-two-out assessment for Option 2

2. 59 The proposals in this Impact Assessment are out of scope of the One In Two Out rule as the reforms do not relate to regulation.

Option 3 – Leapfrogging

Description

2. 60 There are three elements to option 3:

- Option 3a – Extending the relevant circumstances.
- Option 3b – Consent.
- Option 3c – Extending the court and tribunal bodies from which a leapfrog appeal may be brought.

2. 61 All three elements of option 3 would work to increase the number of cases that leapfrog the Court of Appeal and proceed directly to the Supreme Court. This option would apply to all civil cases and not just JR cases.

2. 62 Little information is available on the extent of leapfrogging under the current arrangements, although this reform would only affect a small number of cases that make onwards appeals from the eligible courts. Court statistics show that on average between 2007 and 2012 there were around 1,300 appeals filed at the civil division of the Court of Appeal per year. It appears that only a small proportion of these cases go on to appeal to at the Supreme Court; between the Supreme

Court opening in 2009 and 2012, it has had a total caseload of 221 cases from England and Wales, with around 70 of these being for the latest year, 2012.[12]

2. 63 Indicative management information from the Court of Appeal also provides some information on the timeliness of JR appeals (rather than all civil cases) and indicates that between June 2008 and May 2013 on average, the Court of Appeal made a decision on applications for leave to appeal to the Court of Appeal in around 140 days.[13]

2. 64 As these figures illustrate, this change is likely to affect only a small number of cases, however, these cases tend to be particularly important or complex and, therefore, there are potentially significant benefits to their quicker resolution which is expected to be the main impact of option 3.

Benefits of Option 3

Benefits to claimants (including individuals, businesses, NGOs, charities, pressure groups)

2. 65 Some claimants might benefit if a decision on their case is reached more quickly in future and if reduced delay was in their interests. This may apply to cases where claimants win their case or the case is settled in the claimant's favour outside of court more quickly and hence where the claimant secures a positive outcome sooner. Claimants would benefit from reduced legal costs if cases were resolved with the same outcomes but after going through fewer court stages, i.e. one appeal stage not two appeal stages.

Benefits to defendants (public bodies)

2. 66 Defendants would be able to implement government decisions more quickly in cases where they win. Defendants may also gain from quicker resolution in cases which they lose if this enables an alternative solution to the issue at hand to be pursued more quickly than would otherwise be the case. Defendants would benefit from reduced legal costs if cases were resolved with the same outcomes but after going through fewer court stages, i.e. one appeal stage not two appeal stages.

Benefits to HMCTS

2. 67 Fewer HMCTS resources would be required to deal with civil appeals at the Court of Appeal. In the short and medium terms the resources freed up may be used to address waiting times and case durations in the court system, to the benefit of court users, rather than being realised as cashable savings. HMCTS operates on a full cost recovery basis in the longer run.

Benefits to the Legal Aid Agency (LAA)

2. 68 The LAA may benefit if some legally aided cases are now resolved more quickly and require less funding from the legal aid budget as a result of this change.

Benefits to other bodies (including individuals, businesses, NGOs, charities, pressure groups)

2. 69 Some individuals and businesses who are directly affected by a JR stand to gain from the quicker implementation of public decisions, or less uncertainty about their implementation. There is the potential for all cases that appeal to superior courts to be resolved more quickly, not just those that leapfrog the Court of Appeal. This is because leapfrogging may free up court resources to process other cases more quickly. This will depend on the allocation of resources across the court system following this change.

Wider economic benefits

2. 70 There could be wider economic benefits if projects and policies are implemented more quickly and if these generate wider benefits for economic growth and recovery.

[12] Figures on the caseloads at the Court of Appeal and Supreme Court are available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207807/court-stats-q1-ad-tables.xls

[13] These figures are a further breakdown of the already published data from the Court of Appeal, which is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207807/court-stats-q1-ad-tables.xls

Costs of Option 3

Transitional costs

2. 71 There may be some one-off transitional costs to claimants, defendants and HMCTS. These are expected to be negligible. There might be some initial satellite litigation to determine how the new arrangements work.

Costs to claimants (including individuals, businesses, NGOs, charities, pressure groups)

2. 72 Claimants who stand to benefit from delays to public decisions may lose out under option 3 if their appeals are resolved more quickly than they otherwise would have been.

Defendants (public bodies)

2. 73 No ongoing costs are anticipated for defendants.

Costs to HMCTS

2. 74 HMCTS may receive less overall fee income if some cases leapfrog the Court of Appeal following this change. HMCTS operates on a full cost recovery basis in the long run and the overall financial impact on HMCTS of these reforms is expected to be neutral (because the reduction in total fee income from some cases leapfrogging the Court of Appeal would be balanced by the saving in HMCTS resources from providing fewer Court of Appeal hearings).

Costs to legal services providers

2. 75 There may be some costs to legal services providers from reduced levels of business if some cases settle more quickly and require less legal input following this change. This would free up resources to be devoted to other profitable activities. Impacts on legal services providers are secondary impacts.

Costs to other bodies (including individuals, businesses, NGOs, charities, pressure groups)

2. 76 Other bodies directly affected by a JR may lose out if cases are resolved more quickly and if delay would be in their interests. There is the potential for all cases that appeal to superior courts to be resolved more quickly, not just those that leapfrog the Court of Appeal. This is because leapfrogging may free up court resources to process other cases more quickly. This will depend on the allocation of resources across the court system following this change. This may generate costs for bodies which value delay.

Assumptions and risks for Option 3

2. 77 It is assumed under option 3 that more civil cases that appeal to superior courts would be leapfrogged to the Supreme Court. It is also assumed that these cases would be resolved more quickly as a result of leapfrogging. The volume of JR appeals is assumed to remain the same.

2. 78 It is assumed that parties are able to correctly judge which cases would ultimately have appealed to the Supreme Court so that only cases that would otherwise have appealed to the Supreme Court following a Court of Appeal judgement would leapfrog. It is therefore assumed that participants would save the resources used to argue cases in the Court of Appeal. If parties are unable to correctly identify these cases that some cases would be heard in the Supreme Court that would previously not have reached this stage; this may require greater resources than if these cases had been settled in an inferior court.

2. 79 It is assumed that the same final judgement and case outcomes would be made for cases that leapfrog under option 3 and no additional resources would be required for participants making their case directly in Supreme Court. Cases may take longer in the Supreme Court if lines of argument are less well rehearsed because of the omission of earlier hearings at the Court of Appeal.

2. 80 It is assumed that, in the medium term, the resources available in the Court of Appeal and Supreme Court will adjust to reflect new workloads following this change. If this does not occur, backlogs or spare capacity may arise in the court system.

One-in-two-out assessment for Option 3

2. 81 The proposals in this Impact Assessment are out of scope of the One In Two Out rule as the reforms do not relate to regulation.

Option 4 – Payment to provider for work carried out on an application for permission for Judicial Review contingent on permission being granted; with a discretion to permit the LAA to pay providers in certain cases which conclude before a permission decision

Description

2. 82 This option proposes that providers should only be paid for work carried out on an application for permission (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission appeal to the Court of Appeal), if permission is granted by the Court or, in a case which concludes prior to permission, where the LAA exercises discretion in the provider's favour. Legal aid would still be available for pre-proceedings work, and reasonable disbursements such as expert fees and court fees (but not Counsel's fees) which arise in preparing the permission application will be paid. In addition if an initial permission application is not successful but permission is subsequently secured, e.g. at an oral renewal, then the legal aid provider would be paid for all work including that relating to the initial permission application.

Summary of key data

2. 83 The civil legal aid reforms have been modelled against a flat baseline of 2012/13 closed cases. As this data is taken from a live administrative system there have been changes since the consultation IA and therefore the closed case data was updated on November 19th 2013. Borderline cases have also been removed from this analysis as following the Legal Aid Transformation changes these cases will no longer receive legal aid funding and should therefore not be included in the baseline.

2. 84 The data used in this Impact Assessment is drawn from the LAA and includes JR work undertaken at the pre-action stage before court proceedings have been issued. The accuracy of this data is dependent upon how case outcomes have been recorded by legal aid providers. These volumes are not directly comparable to the Administrative Court data on the overall volumes of JR cases where court proceedings have been issued (i.e. cases that are formally lodged at the Administrative Court).

2. 85 Table 1 presents the data drawn from the LAA showing the number of JR cases that received legal aid funding in 2012/13. The data is split by LAA end-point codes. Legal aid providers are asked to select one of codes E-J when recording the outcome of a JR certificate but LAA records show that providers have also been selecting A-D (normally only for non JR cases). For this reason all JR certificates recorded against end-point codes A-J have been considered in this Impact Assessment.

Table 1: LAA Judicial Review end-point code data

End-point Code	Description	2012/13 Cases
A	No proceedings issued	595
B	Proceedings issued, no final hearing	312
C	Determined at final hearing	147
D	Determined on appeal	8
E	No proceedings have been issued or where a case is withdrawn or settled before the court makes an initial decision whether or not to grant permission	1420
F	Permission not granted, concluded at first application stage (usually papers)	537
G	Permission not granted, concluded after renewed application	214
H	Permission granted, no final hearing took place	279
I	Permission granted, determined at final hearing	74
J	Permission granted, determined on appeal	31
N/K	No End-point 1 code submitted	231

2. 86 The data in table 1 provides the following information about the number of cases affected by the proposal:

- In 2012/13 there were 3,617[14] JR cases which received legal aid funding (end-point codes A-J);
- In 2012/13 539 cases had permission granted and would continue to receive funding under the proposal (end-point code C, D, H, I&J);
- In 2012/13 no proceedings issued in 595 cases. These cases would not be affected by the proposal (end-point code A);
- In 2012/13 permission was refused in 751 cases. These cases would no longer receive legal aid funding under the proposal (end-point codes F&G);

2. 87 Due to the descriptions in the end-point codes and how case outcomes have been recorded by providers there is some uncertainty in respect of two of the end-point codes:

- In 2012/13 there were 312 cases (end-point B) where proceedings issued but there was no final hearing[15]. It is not known whether permission was granted in these cases and therefore whether they would be affected by the proposals. It is possible that a proportion of these cases could receive a discretionary payment from the LAA, but this is uncertain since it is not known at what point these cases ended.
- In 2012/13 there were 1,420 cases (end-point E) where no proceedings were issued or where a case was issued but withdrawn or settled before it was considered by the Court. A proportion of cases where proceedings were issued and then withdrawn or settled would be affected by the proposal but there is uncertainty as to the number because of the way in which they have been recorded. We expect that a proportion of these cases would receive a discretionary payment from the LAA, but we cannot say with certainty how many. It is also likely that some of these cases will not have issued proceedings and will therefore not be affected by the proposals.

[14] The 3,633 figure refers to cases which received Legal Representation and does not include cases which received Legal Help. We are unable to determine how many Legal Help cases involved giving advice on a (potential) judicial review. This also excludes cases lacking any code (N/K)(111 in 2011/12 and 232 in 2012/13).

[15] There is also a possibility that this figure could include some cases in which applications for interim relief are made, but the permission application is not ultimately lodged. Such cases would not be affected by our proposal.

2. 88 We are unable to establish the exact cost of preparing permission applications; however the LAA have advised that the default emergency certificate limit is £1,350 per case. This has been reduced by 10%, from £1,500, to account for previous legal aid changes[16]. This has been used as the estimated cost to the provider for each case for which legal aid is no longer paid out rather than the exact cost of a case as recorded by the LAA. This is because it is not possible to separate out from LAA data the cost of work on the permission application from other work that would still be funded, such as pre-proceedings work.

2. 89 The LAA holds data on the final cost of a case, net of disbursements, but as this does not separate out work done at each stage of the case it is not possible to use this to estimate the benefit to the LAA of no longer paying legal aid in cases where permission is refused. However, this data can be used to provide a check against whether £1,350 is a reasonable estimate of the cost of work done on the permission stage of a case.

2. 90 Table 2 provides data on the mean, median, maximum and minimum cost of legally aided JR cases, with and without disbursements that could be affected by the proposals as recorded in the LAA administrative data. The median has been given, rather than just the mean, as the mean is skewed by a small number of very high cost cases.

2. 91 Table 2 shows that, while there is a wide distribution in the costs of a case, £1,350 is close to the median full cost in cases that could not longer receive funding. The table shows that £1,350 is slightly above the median cost in cases with end-point code B&E but is below the median cost in cases with end-point code F&G. This suggests £1,350 is not an unreasonable proxy for the cost of work on the permission stage of a JR application.

Table 2: Case cost information for legally aided JRs; 2012/13 closed case data

	Full cost of case			
End-point Codes	**Mean**	**Median**	**Max**	**Min**
Uncertain whether would receive payment (end-points B&E)	£2,196	£1,323	£25,713	£7
Heard and permission refused (end-points F&G)	£3,339	£1,988	£43,287	£15
	Full cost minus disbursements			
Uncertain whether would receive payment (end-points B&E)	£2,034	£1,264	£24,044	£7
Heard and permission refused (end-points F&G)	£3,121	£1,899	£31,443	£15

Note: case costs have been reduced by 10% to account for the recent legal aid reforms. This will include cases where some costs have been met by the other party.

Benefits of Option 4

Benefits to the Legal Aid Agency (LAA)

2. 92 From the 2012/13 data, we can be certain that under this proposal payment would not be made in 751 cases where permission was refused. This is a benefit to the legal aid fund, to the sum of approximately £1million per annum based on the above costs per case. The data also shows that in 2012/13 there were up to an additional 1,732 cases that could be affected by the proposals (end-point codes B&E). If payment were no longer received in all of these cases this would be an additional benefit to the LAA of approximately £2million per annum, based on the above costs per case. However, this is the upper bound benefit as it is expected that a proportion of these cases would receive a discretionary payment and there is also some uncertainty as to the outcome of these cases. This gives a benefit to the LAA in the range of £1-£3million. The split of the benefits is shown in Table 3.

Table 3: Benefit to the LAA from Judicial Review payment changes (£millions; 2012/13)

[16] This rate was cut by 10% following the introduction of the Legal Aid Reforms in 2012/13.

Case Outcome	Number	Low	High
Heard and permission refused (end-points F&G)	751	1.0	1.0
Proceedings issued, no final hearing (end-point B)	312	0.0	0.4
Concluded before a permission decision, but uncertain if issued (end-point E)	1,420	0.0	1.9
Total	**2,483**	**1**	**3**

Note: costs have been rounded to the nearest £1m.

2. 93 The LAA may also benefit from administrative cost savings if there is a reduction in the volume of legally aided Judicial Review permission applications sought**.**

2. 94 It is possible that **option 2 – procedural defects** will increase the number of legally aided cases where permission is refused. This would lead to higher savings to the LAA as it would result in a higher number of cases where legal aid is not paid for the permission stage of a case. There were 12,600 JRs lodged in 2012 and 15% (around 1,900) were brought on grounds which included a procedural defects. Around 2% (250) were brought solely on the grounds of procedural defects. Using the assumption, outlined in 2.2, that around 30% of cases relate to legal aid this implies that there could be around 75 affected cases funded by legal aid that were bought solely on procedural defects grounds in 2012/13. However, this is uncertain since it is not known whether procedural defects cases are more or less likely to receive legal aid than all JR cases. It is also not known how many of these may be refused permission and would therefore be affected by a combination of both options 2 and 4.

Benefits to defendants (public bodies)

2. 95 Defendants may gain from reduced legal costs if there is a reduction in the volume of weaker JR permission applications sought, assuming that defendants do not recover all of their legal costs in cases which they win at present.

Benefits to claimants

2. 96 At the margin it is possible that fewer weaker JR permissions might be sought from the court. This might have positive implications for the waiting times and case durations of other, meritorious JR cases. It is unclear how significant this impact might be. This might be beneficial for these other JR claimants, if they value quicker case resolution positively.

Benefits to HMCTS

2. 97 If fewer permission applications are sought from the court there might be a reduction in overall court costs. This is assumed to be comparable to the consequent reduction in total court fee income, as HMCTS operates on a full cost recovery basis in the longer term. Any HMCTS resources freed up as a result are assumed to be allocated to reducing waiting times and case durations in other court cases, including other JR cases.

Benefits to other bodies (including individuals, businesses, NGOs, charities, pressure groups)

2. 98 There are no significant anticipated benefits for other bodies.

Wider benefits

2. 99 It is expected that the introduction of the proposal where the provider is not paid for work carried out on an application for permission for JR will have the wider benefit of helping to command public confidence in the civil legal aid system.

Costs of Option 4

Costs to Legal aid providers

2. 100 Legal aid providers would experience a reduction in income from the legal aid fund in relation to cases which do not secure permission in future and for which work on the permission application is no longer funded by the LAA.

2. 101 In some cases the legal aid provider might undertake the same amount of work as now but receive less income from the LAA. In other cases the legal aid provider might undertake less work, for example if permission is not sought in future. It is assumed that the provider would still carry out pre-proceedings work on the same number of cases, as this work would not be done at risk.

2. 102 The above paragraphs show that, based on 2012/13 closed case data, providers may no longer receive payment in anywhere between 751 and 2,483 cases. This will result in a cost to providers of between £1million and £3million per annum.

2. 103 There will be some small additional costs to providers of applying for the discretionary payment if they are not successful. Where providers are successful these costs would be met by the LAA. Providers will also face costs if they ask for an internal review or judicially review any decision not to award a discretionary payment and are not successful.

2. 104 As discussed above, there could be additional costs to providers if cases bought solely on procedural defects grounds are no longer granted permission and so providers are no longer paid for this work. However, the number of cases and the cost to providers is uncertain.

Costs to claimants

2. 105 At the margin it is possible that fewer weaker JR permission applications might be made. It is unclear whether this would generate a cost to claimants, as these cases probably would not have secured permission had they been pursued.

Costs to defendants (public bodies)

2. 106 There are no anticipated costs to defendants.

Costs to HMCTS

2. 107 If fewer permission applications are made there might be a reduction in total court fee income. This is assumed to be comparable to the consequent reduction in overall court costs. HMCTS operates on a cost recovery basis in the longer term.

2. 108 If the proposal leads to an increase in Litigants in Person then this could lead to an increase in costs to HMCTS as it is likely to lead to an increase in the length of a case. However, as explained above, HMCTS operates on a full cost recovery basis in the longer term.

2. 109 There is a risk of a rise in judicial review cases if providers decide to judicially review the decision not to award a discretionary payment and any appeal is not successful. This would lead to additional costs to HMCTS, although HMCTS operates on a cost recovery basis in the longer-term.

Costs to LAA

2. 110 Removing payments for permission application in JR will lead to a small one-off increase in LAA administration costs. The LAA may need to amend its IT systems to implement this policy. Some additional training may also be required.

2. 111 There will also be ongoing costs to the LAA as it will be at the discretion of the LAA whether to award costs in cases that conclude before a permission decision. The LAA estimate this cost to be £0.15m per annum as a result of up to 1,732 cases applying for discretionary funding.

2. 112 There will be additional costs to the LAA for each internal review where the provider challenges the decision not to award them funding. This is estimated at £30 per appeal. This gives a cost in the range of £0 - £0.05m on the basis that there could be anywhere between 0 and 1,732 appeals. In addition, the LAA will incur further admin costs for the final LAA assessment after appeals have been heard. This cost is estimated at £0.05m and is assumed not to vary with the number of appeals.

2. 113 These costs do not include the cost to the LAA of defending any subsequent judicial reviews that providers decide to make as a result of a decision not to grant them a discretionary payment.

2. 114 There may also be small further additional costs to the LAA if providers bill for a greater sum as a result of the time taken to apply for the discretionary payment. This cost would only be incurred by the LAA if the provider was successful in their application.

Costs to third parties (including individuals, businesses, NGOs, charities, pressure groups)

2. 115 There are no anticipated costs to third parties.

Assumptions and risks for Option 4

2. 116 The following assumptions have been made in the estimation of the costs and benefits for the legal aid proposal.

- The provider response to the proposal is uncertain. Existing means and merits tests are not being changed as part of this proposal. Providers should be incentivised to consider cases more carefully before issuing JR proceedings. We have assumed that at the margin there may be a reduction in the number of weaker JR permissions applications, and that these probably would not have secured permission had they been pursued. We have assumed that providers would still carry out the pre-proceedings work as before, and would be paid for this work.
- Some legal aid providers may take on fewer Judicial Review cases more generally given the risk of non payment. We consider this should be mitigated by the proposed discretion of the LAA to award payment in cases that conclude before a permission decision is made by the court, particularly as the discretionary criteria have been modified following consultation to provide greater flexibility to make payment where it is reasonable to do so and therefore reduce the exposure that the provider bears.
- The civil legal aid reforms have been modelled against a flat baseline of 2012/13 closed cases. As this data is taken from a live administrative system there have been changes since the consultation IA and therefore the closed case data was updated on November 19th 2013. Borderline cases have also been removed from this analysis as following the Legal Aid Transformation changes these cases no longer receive legal aid funding and should therefore not be included in the baseline.
- The data used in this Impact Assessment is drawn from the LAA and includes JR work undertaken at the pre-action stage before court proceedings have been issued. The accuracy of this data is dependent upon how case outcomes have been recorded by legal aid providers. These volumes are not directly comparable to the Administrative Court data on the overall volumes of JR cases where court proceedings have been issued (i.e. cases that are formally lodged at the Administrative Court).
- Costs to the LAA are based on the assumption that the maximum number of cases, 1,732, apply for the discretionary payment and that anywhere between 0 and all of these cases request an internal review. The costs do not account for any providers that judicially review the decision not to award them a discretionary payment.

2. 117 The following risks apply to Option 4:

- Uncertainties in the Judicial Review legal aid data mean that the costs and benefits of this proposal are uncertain. These uncertainties have been explained in the section above.

Volumes could change in the future compared to the 2012/13 data, altering the costs and benefits presented here.

- The assumed cost of preparing a permission application is uncertain. In some circumstances it might be higher and in other circumstances in might be lower than assumed. The estimated cost to providers might therefore be higher or lower than estimated.
- Providers may refuse to take on meritorious cases where the likelihood of permission being granted is uncertain at the outset. However, we consider that this should be mitigated by the discretion for the LAA to make a discretionary payment in cases which end before a permission decision.
- We have assumed that provides still carry out pre-proceedings work, and are paid for this work, in order to assess the merits of the case. If providers refuse to take on the case at the outset, then savings to the fund would be higher than those reported in this Impact Assessment.
- The costs to the LAA of administering the discretionary payment is uncertain as this depends on the number of cases that apply for a discretionary payment and the number of providers that appeal the decision.
- Individuals may choose to address their disputes in different ways. They may represent themselves in court as litigants in person, pay for private representation or decide not to tackle the issue at all.
- There is the potential for an increase in requests for reconsideration of the permission application at an oral renewal hearing, or appeals against permission renewal. This work would be at risk, but the provider would receive full payment if a subsequent oral renewal or appeal were successful. This could generate an incentive for an increased volume of oral renewals. On the other hand an unsuccessful oral renewal may leave the provider worse off than if they did not pursue the oral renewal, leading to a possible disincentive.
- There could be increased costs to HMCTS for example from an increase in oral renewals or decrease in rolled up hearings, from increased satellite litigation, or from more litigants in person. HMCTS operates on a cost recovery basis in the longer term.

Enforcement and Implementation

2. 118 It is currently anticipated that this proposal will be implemented through secondary legislation to be laid in Spring 2014.

One In Two Out

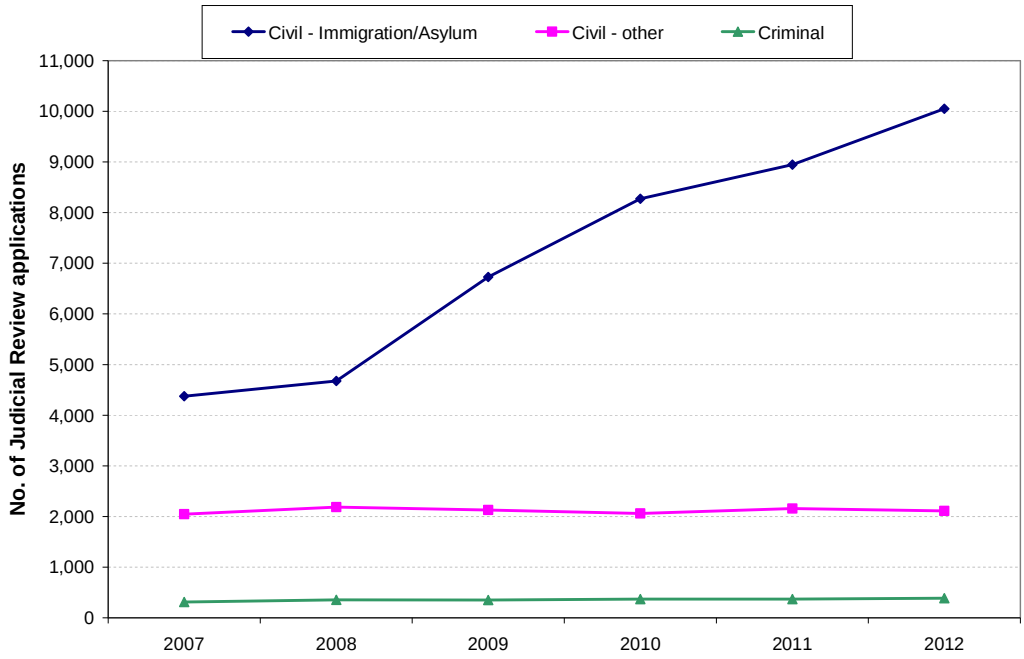
2.119 Legal Aid is out of scope of ‘One In, Two Out’ as it is classified as procurement spending.

Annex A: Judicial Review Volumes

A. 1 The number of judicial review applications has more than doubled in the past 10 years. Administrative Court data shows in 2000 there were around 4,300 applications for JR and by 2012 this had reached 12,600.[17]

A. 2 Data from the Administrative Court shows that the main driver of growth in the overall number of JR applications has been an increase in Immigration and Asylum (I&A) applications which have more than doubled between 2007 and 2012. I&A applications made up 80% of the total applications in 2012. The number of criminal and other civil JR applications has also increased over the period but at a slower rate as shown in Chart 1 below.

Chart 1: Number of Applications for permission for judicial review by case type (2007 to 2012)[18]



A. 3 The Administrative Court data suggests that the majority of applications that reach a permission decision are refused. Around 12,600 cases were lodged in 2012, of which around 7,500 were considered for permission and around 1,400 were granted permission to proceed (either at first stage or after an oral renewal).

A. 4 However, the data also shows that a large proportion of JR applications are withdrawn before a permission decision is made. For cases lodged in 2012, over 40% of all applications were withdrawn before permission. Although the reasons for withdrawal are not recorded, there is some evidence that

17 Data on Judicial Reviews is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267407/csq-q3-2013-main-tables.xls

18 18 The category of less than 1% of total JRs is unknown and is not shown on this chart

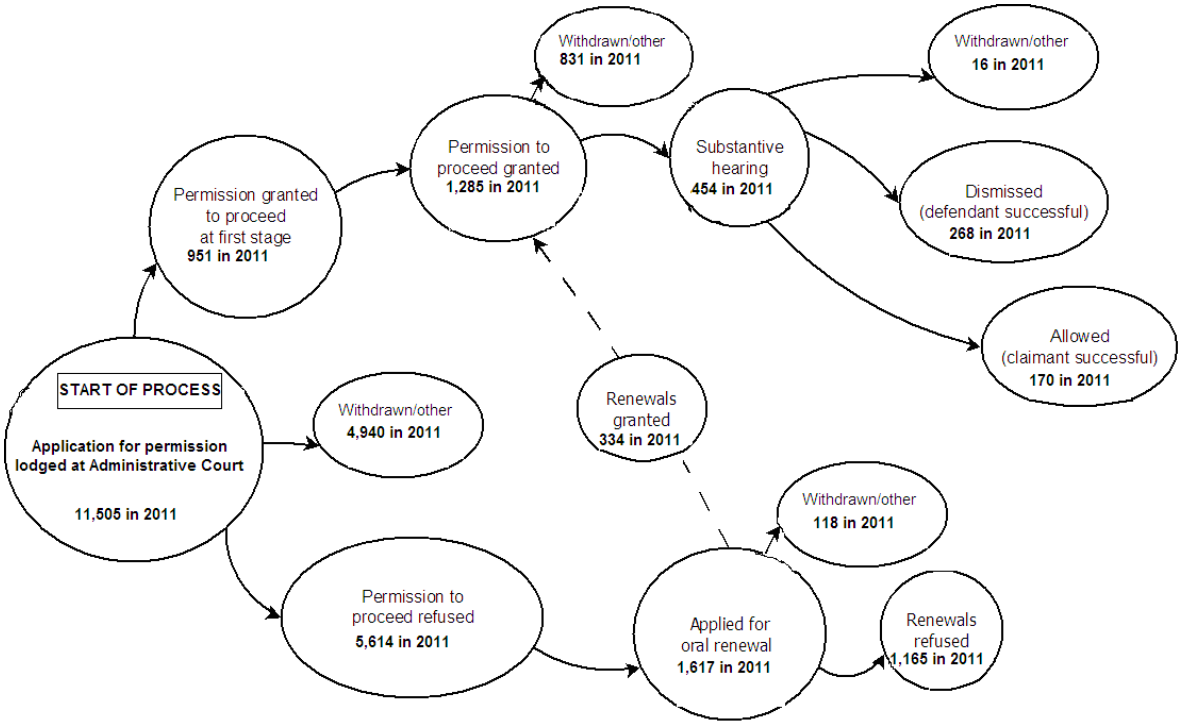
suggests that many of these cases may be settled on terms favourable to the claimant. A 2009 study by Bondy and Sunkin suggested that around 85% of non-I&A cases that are withdrawn at some point in the JR process are settled on terms favourable to the claimant.[19] It is not known whether this finding still pertains and whether similar outcomes occur in I&A JR cases although it is probable that many cases that withdraw settle on terms favourable to the claimant.

A. 5 For illustrative purposes only, if around 85% (the Bondy and Sunkin figure above) of non-I&A cases withdrawn before permission were settled on terms favourable to the claimant, then of all 2,500 non-I&A applications in 2012, around 50% may initially be regarded as unmeritorious, in the sense of either being granted permission (either initially or after an oral renewal), or being settled upfront on terms favourable for the claimant.

A. 6 For cases lodged in 2012 around 2,000 oral renewals were requested and permission to proceed was granted in around 400 of these cases. The remaining 1,600 cases were either refused permission or were withdrawn before the oral renewal decision was made.

A. 7 The diagram below provides a high level overview of case progression for JR applications. This relates to cases lodged in 2011. (Data has not been used for cases lodged in 2012 as many of these might not have reached a final hearing yet. 2011 data therefore provides a more accurate picture of case progression from start to finish).

JR volumes and case progression for cases lodged at the Administrative Court in 2011 (starting from "application" at left hand side)



Note: The large majority of cases in the withdrawn/other categories are withdrawn. Outcomes categorised as "other" includes adjourned, discontinued, no order, referred to CoA and resubmit.

19 Bondy, V., & Sunkin, M. (2009).The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing.

A. 8 As a result of the large number of withdrawals and the high permission and oral renewal refusal rate, only a small proportion of JR applications reach a final hearing. For cases lodged between 2007 and 2011[20], there were around 430 final hearings per year. Outcomes at the final hearing tend to be more balanced than at the permission stage; around 43% of adjudicated decisions at the final hearings were made in favour of the claimant for cases lodged between 2007 and 2011.

A. 9 As the data illustrates there are a large and growing number of JR applications, many of which are not successful, which provides the backdrop for the proposals considered in this Impact Assessment. In particular the current situation has the following implications.

A. 10 Firstly, unsuccessful JR applications can cause delays to the implementation of projects. For cases lodged in 2012 it took, on average, around 95 days for a JR application to reach permission stage and a further 100 days for an oral renewal decision to be made. Overall, for applications lodged in 2011 which reached a final hearing, it took on average around 340 days for these cases to reach a final hearing from the day they were lodged.

A. 11 JRs generate costs to the public sector from defending claims. Treasury Solicitors' initial illustrative assumption is that legal costs for a public sector defendant might range between £8,000 and £25,000 for a non-I&A case depending on how far the case progresses although they may be higher or lower in individual cases. For I&A cases, public sector legal costs tend to be lower - Treasury Solicitors' initial illustrative assumptions suggest they might range from £1,500 to £10,000 depending on case progression. In addition to Treasury Solicitor legal costs, public sector organisations incur additional staff costs associated with defending the case.

A. 12 Costs to third parties arise from JRs in some cases. In infrastructure cases, for example, delay to implementing planning decisions may extend project delivery times, with implications for cash flow costs and for finance costs. Delay may increase project costs if resources have to be reallocated elsewhere temporarily. These additional costs and uncertainties might be reflected in the final price paid for the project output in question and/or may be reflected in initial project bids.

A. 13 Wider economic costs might arise from JRs in some cases. For example infrastructure projects and regeneration projects might support market access and economic growth.

A. 14 When making a decision to bring a JR, applicants might consider only the costs and benefits to themselves, not to other parties affected. This applies especially if claimants are not exposed to the JR costs they might place on the Government, on third parties, and on the economy more widely. This imbalance may be greater in less meritorious cases which the claimant loses. This may lead to an excessively high number of JRs.

[20] 2012 figures are not used in this comparison as some cases lodged in 2012 may not yet have progressed to a final hearing and this may therefore understate the total number hearings for this year.