

<b>Title: Reforms to Judicial Review</b>  <b>IA No:</b> MoJ 210  <b>Lead department or agency:</b> Ministry of Justice  <b>Other departments or agencies:</b> None	<b>Impact Assessment (IA)</b>		
	<b>Date:</b> 13/01/2014		
	<b>Stage:</b> Final		
	<b>Source of intervention:</b> Domestic		
	<b>Type of measure:</b> Primary legislation		
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<b>Summary: Intervention and Options</b>	<b>RPC Opinion:</b>
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Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out? Measure qualifies as
£0m	-£0.2m	-£0m	Yes   IN

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

The number of Judicial Review (JR) applications has more than doubled in the past 10 years. The Government is concerned that a large number of these claims are weak or frivolous and that financial incentives currently do not discourage claimants from bringing weak cases. Unsuccessful JRs may disproportionately frustrate and delay the implementation of government policy including infrastructure and construction projects that contribute towards economic growth.

**What are the policy objectives and the intended effects?**

The policy objective is to reduce the incidence of weak JRs and to support the quicker resolution of JRs by providing better balanced financial incentives. In this way, this should ensure that the right balance is struck between reducing the burdens on public services, and protecting access to justice and the rule of law.

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

The option considered in this Impact Assessment is outlined below:

**Option 1:** Rebalance financial incentives for claimants bringing a JR. This option has five components:

- 1a) Claimants pay defendants' costs when claimants lose oral renewal hearings more often.
- 1b) Restrict the use of Protective Costs Orders (PCOs) in non-environmental cases
- 1c) Interveners in JRs bear more of the costs stemming from their intervention
- 1d) Non-parties to JRs bear more of the costs they generate
- 1e) Greater effectiveness from the use of Wasted Cost Orders (WCOs) against legal representatives for misconduct.

The Government proposes to implement all proposals in order to meet the policy objectives.

<b>Will the policy be reviewed?</b> This policy will be reviewed. <b>If applicable, set review date:</b> Three to five years					
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.		<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)		<b>Traded:</b> NA		<b>Non-traded:</b> 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.**

Shailesh Vara

Date: 02/07/2015

Signed by the responsible Minister:



# Summary: Analysis & Evidence

# Policy Option 1

Description: Improving financial incentives for claimants

## FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m) £0m		
			Low:	High:	Best Estimate: £0m

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate	NQ		£3.4m	£31.5m

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

Self-financed claimants may pay in the region of around £1.3m from covering defendants' oral renewal costs and in the region of around £0.1m from securing fewer PCOs. Defendants may pay in the region of around £0.9m from covering claimants' oral renewal costs (including for legally aided claimants). The Legal Aid Agency may pay in the region of around £0.5m from covering defendants' oral renewal costs. Interveners may pay in the region of around £0.2m from covering the legal costs of other parties. Non-parties may pay in the region of around £0.4m from covering more defendants' legal costs.

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

Legal services providers may lose out from the WCO reforms. Claimants and other bodies that benefit from delay/uncertainty/changes to government decisions would lose out if there were fewer JRs or if JRs were resolved more quickly. If so legal services providers may experience reduced levels of JR business.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate	NQ		£3.4m	£31.5m

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

Self-financed claimants may gain in the region of around £0.8m from the oral renewal reforms, and in the region of around £0.1m from the reforms affecting interveners. Defendants may gain in the region of around £1.8m from the oral renewal reforms, in the region of around £0.1m from the PCO reforms, in the region of around £0.1m from the reforms affecting interveners, and in the region of around £0.4m from the reforms affecting non-parties. The Legal Aid Agency may gain in the region of around £0.1m from the oral renewal reforms and may gain a negligible sum from the reforms affecting interveners.

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

Defendants would gain from any reduction in JR volumes and uncertainties and/or from quicker JR case resolution, including by saving legal costs. Claimants would save legal costs from bringing fewer weak JRs and/or from withdrawing sooner. Bodies affected by JRs including businesses would gain from reduced delays and less uncertainty relating to the implementation of public decisions. There may be wider economic benefits if major infrastructure projects are able to progress more quickly. Legal services providers may devote freed up resources from fewer JRs to other profitable activity.

<b>Key assumptions/sensitivities/risks</b>	<b>Discount rate (%)</b>	3.5
<ul style="list-style-type: none"> <li>- It has been assumed that some JRs would be resolved more quickly as a direct effect of the reforms and that some other weaker JRs would no longer be lodged.</li> <li>- It has been assumed that the financial impact on HMTCS will be neutral as HMCTS operates on a cost recovery basis in the longer term.</li> <li>- The monetised impacts of the reforms relating to interveners and to non-parties reflect assumptions about the volume of JRs and the proportion of legal costs affected.</li> </ul>		

## BUSINESS ASSESSMENT (Option 1)

<b>Direct impact on business (Equivalent Annual) £m:</b>	<b>In scope of OITO?</b>	<b>Measure qualifies as</b>
Costs: £0m	Yes	IN
Benefits: NQ		
Net: £0m cost		

# Evidence Base (for summary sheets)

## 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 consult properly or to act in accordance with natural justice or with 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.
1. 7 Not all JRs which are lodged proceed to a permission hearing, to an oral renewal, and to a final hearing. Many cases are withdrawn by the claimant, including because they may have been settled in a way which was accepted by all parties.

## Problem under consideration

1. 8 The Government is concerned that there has been significant growth in the use of JR, with suggestions that this is sometimes used as a delaying tactic, and only a proportion of cases stand a reasonable prospect of success. JR proceedings can create delays and add to the costs of public services, in some cases potentially frustrating reforms, including those aimed at stimulating growth and promoting economic recovery.

## Financial measures

1. 9 Currently claimants who lodge unsuccessful cases may not be exposed to all of the costs which they generate as a result – for instance their costs liability in pursuing an oral renewal is generally limited to the defendant's costs of preparing an acknowledgment of service and will not include the costs incurred by the defendant of any preparation and representative advocacy for the hearing. As a result claimants might lodge and pursue JR claims, including seeking permission at an oral renewal, which they otherwise might not if they took account of all costs and benefits affecting all parties.
1. 10 Similar considerations apply to claimants who secure Protective Costs Orders (PCO) in non-environmental cases. These limit claimants' exposure to meeting the defendant's costs in cases the defendant wins. As a result of not being fully exposed to the defendant's costs in failed claims, claimants may lodge more JRs, or may pursue them further than they would otherwise do if they took account of all costs and benefits.
1. 11 Interveners may be interested in the issue being considered in the JR and may voluntarily intervene by filing evidence or making representations at the JR hearing. This has the potential to increase costs for the claimant or the defendant. Interveners may be less inclined to intervene voluntarily if they were more exposed to the costs their actions place on claimants and defendants.
1. 12 A JR may be taken forward by a claimant but real control of the claim will be in the hands of a 'non-party'. For example, individuals may form companies (who would bring the claim) to limit their (the individuals') financial risk (so that only the assets of these companies are at risk, not those of the individuals). The company formed may bring the litigation and may shield the 'real' claimants from financial exposure, who would be termed 'non-parties' in this situation. There is currently no provision for requiring the source of JR funding to be revealed, which may mean that costs cannot in practice be enforced against those non-parties who are behind the JR. Similarly, while it is already a principle that in considering a PCO the court should have regard to the financial means of the claimant, when applying for a PCO it is currently not mandatory for the claimant to provide details of who is funding the case and reveal information on the size of funding by non-parties.
1. 13 Legal services providers acting on behalf of claimants may, through their behaviours, generate avoidable costs and delays which are currently met by claimants and defendants. Currently Wasted Costs Orders (WCOs) may make legal services providers liable for costs of litigation where they have generated costs unnecessarily by their behaviour and where it is unreasonable for the litigant to meet these costs. The policy is to enhance WCOs effectiveness.

## Policy objectives and reforms

1. 14 The overall policy objective is to ensure that, through better financial measures, the volume of weak JRs brought is reduced, that less meritorious cases which stand little prospect of success are discouraged from being lodged, and that JR cases are resolved more quickly. This should ensure that the right balance is struck between reducing the burdens on public services, and protecting access to justice and the rule of law.

### Option 1 – Financial measures

1. 15 Generally in a court case the unsuccessful party pays the costs of the successful party. This may include costs of using legal representatives, court fees, and other costs incurred in the case such as costs of obtaining evidence from experts. The reforms outlined below look to strengthen this principle for JR cases.

#### *Option 1a – Cost orders for oral renewal hearings*

1. 16 Currently, claimants do not usually pay the full costs of defendants (public bodies) at oral renewal hearings when the defendant is successful. This may lead to an excessive number of weak and unsuccessful oral renewals which generate delays in resolving JRs. Under this reform the costs of an oral permission hearing would be recoverable by the winning party from the losing party more often, e.g. unsuccessful claimants may pay the defendant's full costs of defending the unsuccessful oral renewal application. If the claimant was successful at the oral hearing and went on to a full hearing, the cost of the oral hearing would be determined at the end of the case with the unsuccessful side generally being responsible for these costs.

#### *Option 1b – Restrict the use of Protective Costs Orders (PCOs) in non-environmental cases*

1. 17 A PCO can be awarded at any stage of the JR process and limits a losing party's (usually the claimant's) exposure to the winning party's (usually the defendant's) costs on a pre-emptive basis. Separate provisions already apply to environmental cases (in accordance with the Aarhus Convention) and the reforms relate to non-environmental cases.
1. 18 The reforms restrict PCOs in non environmental cases so that claimants will in general have less protection against meeting the defendant's costs in cases which the defendant wins.

#### *Option 1c – Cost provisions against interveners*

1. 19 Where an intervener (including a person or an organisation) with an interest in a JR chooses to intervene in the proceedings, the courts can require the unsuccessful party (claimant or defendant) to pay the costs of the intervener. This has the potential to increase the legal costs of the case to the claimant or the defendant. The reforms establish two presumptions: first that those who intervene in a judicial review case will have to pay their own costs and second that, on the application of a party, if one or more of four specified conditions has been met the intervener must pay any reasonable costs which their intervention has caused that party to incur. Neither presumption would apply where the court considered there to be exceptional circumstances which would make it inappropriate. What amounts to exceptional circumstance will be for the court to determine in the circumstances of the case at hand. Matters to which the court must have regard when determining whether there are exceptional circumstances may be set out in Rules of Court.

#### *Option 1d – Cost provisions against non-parties*

1. 20 Where, for example, claimants form a company to bring a JR (to avoid individual responsibility for costs), or an individual not party to the litigation is providing funding to a claimant, the court has limited capability to award costs against the individuals, who are known as 'non-parties' in this situation, as their identity is often not disclosed and this currently cannot be required. The reforms require the claimant for judicial review to provide information about the financing of the application with their application for judicial review. Without that information the Court or Upper Tribunal cannot grant permission. The court should have regard to this information when considering costs rules. The

intention of these reforms is to increase transparency over the funding judicial review applications and, for example, to prevent claimants forming companies to shield themselves from the adverse cost implications of their actions.

1. 21 Claimants will be required to submit information about the financing of the judicial review, including the provision of details about any non-party who has provided a financial contribution that is above a specified threshold. The level this threshold is set at will be detailed in court and tribunal rules. This reform would also support the PCO reforms as the court may decide that a PCO should not be made once the identity of non-parties is disclosed.

#### *Option 1e – Increased use of Wasted Cost Orders (WCOs) against legal representatives*

1. 22 A WCO relating to misconduct by a legal services provider or their employees may currently be made when legal services providers are judged to have generated costs on either a claimant or defendant as a result of improper or negligent conduct, including omissions. WCOs concern the situation in which a party has unnecessarily incurred costs due to the other side's conduct. Under the reforms when a WCO is made against a legal representative this would be brought to the attention of their professional regulator (such as the Solicitors Regulation Authority, SRA). This may improve incentives for legal representatives to avoid WCOs in future.

### **Economic rationale for intervention**

1. 23 The economic rationale for the policy proposals considered in this Impact Assessment is primarily based on improving economic efficiency by making claimants more exposed to the costs of JR. Under the base case, claimants and lawyers may generate external costs on the Government and on other bodies directly affected by the JR which they may not be exposed to and which they may not factor into their decision making and their behaviour. This may result in a larger number of weak cases being brought than would otherwise be the case. The reforms in this Impact Assessment aim to address this.

### **Main affected groups**

1. 24 The proposals are likely to affect the following groups:
  - a. Claimants, including at the High Court in England and Wales and in some cases in the Upper Tribunal – individuals, businesses and third sector organisations.
  - b. Defendants, including at the High Court in England and Wales and in some cases in the Upper Tribunal – primarily 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.
  - d. Legal Aid Agency (LAA). The LAA is responsible for managing the legal aid fund. Claimants who are eligible for legal aid have their fees paid for them by their legal representatives, who can reclaim the money from the LAA.
  - e. Legal services providers.
  - f. Third parties – business and individuals.

## 2. Costs and Benefits

2.1 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<sup>1</sup>. 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, final hearing, oral renewal). Court data does not centrally record the number of PCOs and WCOs granted. Court data does not centrally record whether interveners and non-parties were involved with a JR case, and does not centrally record the legal costs of each party.
- Internal management information provided by Treasury Solicitors. Treasury Solicitors are involved in defending JRs against central government Departments (apart from HM Revenue and Customs. The Department for Health (DH) and Department for Work and Pensions (DWP) litigation teams have recently joined Treasury Solicitors). Treasury Solicitors do not hold information on JRs defended by local authorities and by other public bodies such as regulators. Treasury Solicitors do not hold a central database of the legal costs associated with each JR. Based on their internal management information (not including historic information relating to DH/DWP JRs), Treasury Solicitors have been able to provide illustrative figures of the legal costs of defending JRs and on the prevalence of PCOs and WCOs.
- 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.
- Where data is not centrally recorded or where 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 a range of issues, including the prevalence of PCOs and WCOs.
- Information is also available from research conducted by other bodies but not commissioned by MoJ, which may also be based on a sample of JR cases. Such published external research has provided information on a range of issues, including the prevalence of PCOs and claimant legal costs. Specific references to other external research are provided later in this Impact Assessment.
- Further information has been provided by consultation responses. Around 300 consultation responses were received, many of which provided useful information on the possible impact of the reforms. These responses were received from a wide range of bodies, including businesses, legal services providers, pressure groups and academics. Some of this information relates to specific individual JRs and may illustrate some of the expected impacts.
- Professional judgement based on knowledge of JRs, and drawing from the views of legal advisers, court managers and the judiciary has also been applied. This Impact Assessment explains how MoJ's best estimates of the possible impacts are based upon the above data and evidence, what assumptions underpin these estimates, what caveats apply to them and what risks apply to the possible impacts.

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<sup>1</sup> <https://www.justice.gov.uk/statistics>

## Option 0: Base case (do nothing)

### Description

- 2.2 Under the “do nothing” base case existing financial incentives would remain unchanged. The do nothing option is compared to itself and therefore the costs and benefits are necessarily zero, as is its Net Present Value (NPV).
- 2.3 Separate reforms to JR were the subject of an earlier consultation and response<sup>2</sup> and have been implemented from July 2012. The impact of these reforms is included in the base case for the purposes of this Impact Assessment.

## Option 1: Improving financial measures

### Key assumptions and data

- 2.4 As explained above, data is limited in relation to the precise volume and nature of cases affected by these reforms and in relation to the precise impacts of the reforms. The following key data and illustrative assumptions have been made in order to monetise the impacts of the reforms.
- 2.5 As explained above there are five elements to Option 1, with key data and assumptions summarised below:
- Option 1a: Claimants pay defendants’ full costs when claimants lose oral renewal hearings (i.e. the losing party pays the winning party’s oral renewal legal costs). In terms of the key figures:
    - In 2012 claimants lost around 1,430 oral renewals and won around 380 oral renewals.
    - Treasury Solicitors’ initial illustrative assumptions suggest that it costs a defendant on average around £1,000 to £1,500 to prepare for and attend an oral hearing relating to immigration and asylum (which account for over 70% of renewals requested). This figure has been applied to defendant legal costs in all oral renewals.
    - Anecdotal information suggests that claimant legal costs from commercial providers can be much higher than defendants’ legal costs, i.e. costs of publicly funded providers. It has been assumed that claimants’ legal costs might on average be around £3,000 at oral renewal stage, i.e. twice the maximum of defendants’ legal costs.
    - LAA data and Administrative Court data have been combined to derive the assumption that in around 30% of all cases the claimant might be 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% was derived from 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 indicative.
    - It has been assumed that legal costs for an oral renewal for legally aided claimants are the same as the Treasury Solicitors’ costs mentioned above, i.e. that they average around £1,000 to £1,500.

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<sup>2</sup> <https://consult.justice.gov.uk/digital-communications/judicial-review-reform>



- Option 1b: Restricting the use of Protective Costs Orders (PCOs) for non-environmental cases and providing for the greater use of 'cross-capping'. In terms of the key figures:
  - The Public Law Project<sup>3</sup> suggest that it may cost a claimant between £10,000 and £20,000<sup>4</sup> to bring a relatively straightforward JR case.
  - Treasury Solicitors' initial illustrative assumption is that legal costs for defendants in JR cases they have been involved with range from £8,000 to £25,000 for non immigration and asylum cases and from £1,000 to £15,000 in immigration and asylum cases.
  - Between January 2010 and August 2013, Treasury Solicitors estimated that in JR cases they have been involved with 17 PCOs were awarded of which 3 related to non-environmental cases. Based on this it has been assumed that around 20% of PCOs might relate to non-environmental cases.
  - MoJ's internal review of JR case files suggested that PCOs are awarded in around 1% of all JR cases. They usually do not apply to immigration and asylum cases as PCOs are only granted where there is a public interest in the matter at stake. Around 1% of all non immigration and asylum cases in 2012 would equate to around 25 cases, including environmental cases. If around 20% of PCOs relate to non-environmental cases, as mentioned above, in 2012 this would equate to around 5 cases.
  - A consultation response by Bondy and Sunkin<sup>5</sup> suggested that, in relation to JR final hearings between July 2010 and February 2012, 7 cases out of 502 final hearings involved PCOs of which 3 cases (less than 1%) were non-environmental.
  - It is possible that in some cases defendants will currently offer to provide a degree of cost protection to claimants if defendants consider a PCO is likely to be awarded if applied for. If so the actual number of cases where a degree of costs protection currently applies would be higher than the number of cases where PCOs are awarded. Where costs protection has been agreed bilaterally between claimants and defendants without a PCO being awarded, the details are not recorded centrally by the Administrative Court data nor by Treasury Solicitors, and are not recorded in court files.
  - In summary it has been assumed that the reforms might lead to 5 PCOs per year no longer being granted in relation to non-environmental cases, with each of these PCOs having provided the claimant with complete costs protection. As part of the sensitivity analysis this Impact Assessment considers the impact of defendants no longer voluntarily agreeing to provide complete cost protection to claimants (in anticipation of a PCO being granted) in four times as many non-environmental JRs, i.e. in 20 non-environmental JRs. This should be regarded as an illustrative assumption.
- Option 1c: Interveners being liable for their own costs and also being liable for the additional costs their interventions generate on parties to the JR in certain circumstances. In terms of the key figures:
  - Interveners would only intervene in cases which have secured permission, and around 1,400 JR applications in 2012 secured permission. The number of JRs which involve interveners is not recorded centrally by the Administrative Court nor by Treasury Solicitors, and was not captured by MoJ's review of JR court case files. In order to monetise the impact of the reforms for the purpose of providing an EANCB figure, it has been assumed, based on knowledge of JRs, that around 10% of JRs which secure permission might involve interveners. This would equate to around 140 cases in 2012. This should be regarded as an illustrative assumption and may be fewer depending on the number of interveners who judges consider had met the conditions set out within the provisions. The exercise of the discretion of the judge not to order costs in 'exceptional circumstances' could reduce the number of cases per year to fewer than 140, which might cause a slight reduction of this figure.

<sup>3</sup> <http://www.publiclawproject.org.uk/documents/FundJRNoLegalAid.pdf>

<sup>4</sup> <http://www.publiclawproject.org.uk/documents/FundJRNoLegalAid.pdf>

<sup>5</sup> <http://ukconstitutionallaw.org/2013/10/25/var-da-bondy-and-maurice-sunkin-how-many-jrs-are-too-many-an-evidence-based-response-to-judicial-review-proposals-for-further-reform/>

- Some consultation responses indicated that interveners already tend to cover their own legal costs. In the absence of evidence to the contrary, it has been assumed that this applies in all cases.
  - Treasury Solicitors and the Administrative Court do not hold a central record of the average costs which interveners generate for claimants or for defendants as a result of their intervention, and which interveners might be liable to pay in future as a result of the reforms. This was also not captured by MoJ's review of JR court case files. In order to monetise the impact of the reforms for the purpose of providing an EANCB figure, it has been assumed, based on knowledge of JRs, that interveners might be liable to meet on average around 5% of total legal costs.
  - Typical legal costs of bringing and defending a JR are mentioned above (Option 1b). In addition it appears that the costs of bringing a JR for legally aided claimants is lower than the costs for privately funded claimants. In particular data from the LAA suggests that the average (mean) legal costs of bringing a JR for legally aided claimants is around £3,000<sup>67</sup>.
- Option 1d: Greater transparency being provided about the identity of non-parties, thereby enabling costs to be awarded against non-parties more often and/or enabling more costs to be awarded against non-parties. In terms of the key figures:
    - MoJ's internal review of JR case files suggested that claimants were asked to pay the defendant's legal costs in around 20% of JR cases which were lodged. The reform applies almost exclusively to non immigration and asylum cases, of which around 2,530 were lodged in 2012. 20% of this would equate to around 500 cases in 2012.
    - Treasury Solicitors and the Administrative Court do not hold a central record of the number of JR cases which the policy would apply to, e.g. JR cases where claimants have become non-parties by forming a company to bring their JR or where individuals not a party to the challenge have provided funding to a claimant. This was also not captured by MoJ's review of JR court case files. In order to monetise the impact of the reforms for the purpose of providing an EANCB figure, it has been assumed, based on knowledge of JRs, that the reforms might enable costs to be awarded in favour of defendants in around 5% more of these 500 cases, i.e. in around 25 cases. This should be regarded as an illustrative assumption.
  - Option 1e: Increased use of Wasted Costs Orders (WCOs) against legal representatives for misconduct. In terms of the key figures:
    - Between March 2011 and June 2013, Treasury Solicitors' internal management information suggests that around 50 WCOs were obtained, and that these related solely to immigration and asylum JRs. In those cases where information is available, these WCOs currently range from around £140 to around £3,000, with an average of around £400 per case.
    - Under the reforms when a WCO is made against a legal representative this would be brought to the attention of their professional regulator (such as the Solicitors Regulation Authority, SRA). This may improve incentives for legal representatives to avoid WCOs in future.
    - Legal representatives subject to a WCO would be regarded as being 'non-compliant'. Impacts on 'non-compliant' bodies do not feature in the EANCB figure. An assumption has not been made about how the number of WCOs might change in future as a result of the reforms, nor about how the size of WCOs might change.

<sup>6</sup> £3,000 is the average cost of a case, for cases closed in 2012/13 accounting for recent legal aid changes.

<sup>7</sup> LAA 2012/13 closed case admin data ad hoc stats notice

## Benefits of Option 1

### *Benefits to claimants*

- 2.6 Under Options 1a, 1b, 1c and 1d some JR claims may no longer be lodged in future or may be resolved more quickly in future (e.g. without making an oral renewal). Reducing the volume of unmeritorious JRs and reducing JR case duration are the primary objectives of the reforms, and are the key impacts which the reforms seek to deliver. It is unclear to what extent the volume of JRs might fall, or how many JRs might be withdrawn earlier.
- 2.7 Claimants who no longer bring a JR or whose JR is resolved more quickly as a result of these reforms would save legal resources. The savings to claimants would depend upon how far the JRs which are no longer brought would have proceeded, upon how much legal work might be avoided by JRs being resolved more quickly, and by how many JRs are affected by these impacts. Because these behavioural effects are not known with certainty, and because it has not been possible to devise sensible assumptions in relation to them, the associated impacts have not been monetised in aggregate. For the purposes of the EANCB calculation these impacts are considered to be indirect effects of the reforms, in accordance with the definition of indirect impacts provided in the July 2013 Better Regulation Framework Manual. As explained above, the costs of bringing a JR vary depending on the specifics of the case but figures from the Public Law Project suggest that it may cost claimants between £10,000 and £20,000<sup>8</sup> to bring a relatively straightforward case.
- 2.8 In achieving the key impacts of reducing unmeritorious JRs and reducing JR case duration, the reforms alter the degree of cost exposure applying to those involved in JRs. As a result a further set of direct costs and benefits apply. These are set out below.
- 2.9 Under Option 1a claimants may benefit if defendants are required to pay claimants' oral renewal legal costs in cases where the claimant is successful. For cases lodged in 2012 around 380 claimants were successful at the oral renewal stage. As explained above, we may assume that claimant costs at the oral renewal stage are around £3,000 per case. This would imply a maximum benefit to claimants of around £1.1m if all claimants were privately funded. As explained above we might assume that around 30% of claimants are funded by legal aid. The benefits of Option 1a for these claimants would flow to the legal aid fund. In which case the total benefit to claimants themselves, i.e. to self-financed claimants, would be in the region of £0.8m.
- 2.10 Under Option 1b claimants would secure fewer PCOs. This would generate no direct benefits for claimants.
- 2.11 Under Option 1c claimants may benefit if interveners pay the additional costs which their interventions place on claimants. As explained above, in order to monetise the impact of the reforms for the purpose of providing an EANCB figure it has been assumed that interveners might be liable for 5% of total legal costs in around 140 cases per year. If, as explained above, self-financed claimants' legal costs are between around £10,000 and £20,000 and if around 30% of claimants are funded by legal aid then the total benefit to self-financed claimants would be between around £50,000 to around £100,000, with a mid point in the region of around £0.1m (to the nearest £0.1m). The exercise of judicial discretion not to order costs in 'exceptional circumstances' could reduce the number of cases per year to fewer than 140, which might cause a slight reduction of this figure.
- 2.12 Under Option 1d claimants, in the form of non-parties, would be more liable to meet defendants' costs. This reform would not generate benefits for claimants.
- 2.13 Under Option 1e, we have not made an assumption about how the number and amount of WCOs might change as a result of the reforms. The reforms may improve incentives for legal representatives to avoid WCOs in future. Claimants may gain if the reforms lead to legal providers engaging in less of the sort of wasteful activity which might result in a WCO being awarded.
- 2.14 In total the estimated mid-point monetised benefits for self-financed claimants of Option 1 are in the region of around £0.9m, subject to the assumptions applied.

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<sup>8</sup> <http://www.publiclawproject.org.uk/documents/FundJRNoLegalAid.pdf>

## *Benefits to defendants (public bodies)*

- 2.15 Under Options 1a, 1b, 1c and 1d some JR claims may no longer be lodged in future, or may be withdrawn earlier in future (e.g. without making an oral renewal) in the defendant's favour. Reducing the volume of unmeritorious JRs and reducing JR case duration are the primary objectives of the reforms, and are the key impacts which the reforms seek to deliver. It is unclear to what extent the volume of JRs might fall or how many JRs might be withdrawn earlier.
- 2.16 Defendants would save resources if they no longer need to defend a JR in the future or if JRs are withdrawn earlier in future. The savings to defendants would depend upon how far the JRs which are no longer brought would have proceeded, upon how sooner JRs might be resolved, and upon how many JRs are affected by these impacts. Because these behavioural effects are not known with certainty, and because it has not been possible to devise sensible assumptions in relation to them, the associated impacts have not been monetised in aggregate. For the purposes of the EANCB calculation these impacts are considered to be indirect effects of the reforms, in accordance with the definition of direct impacts in the July 2013 Better Regulation Framework Manual. As explained above, Treasury Solicitors' initial illustrative assumption is that legal costs for defendants in JR cases range from £8,000 to £25,000 for non immigration and asylum cases and from £1,000 to £15,000 in immigration and asylum cases.
- 2.17 There could also be benefits to defendants from reduced delays and uncertainties relating to the implementation of their decisions, including if these delays and uncertainties generate wider costs for public bodies. As above, these impacts are considered to be indirect effects of the reforms, in accordance with the definition of direct impacts in the July 2013 Better Regulation Framework Manual.
- 2.18 In achieving the key impacts of reducing unmeritorious JRs and reducing JR case duration, the reforms alter the degree of cost exposure applying to those involved in JRs. As a result a further set of direct costs and benefits apply. These are set out below.
- 2.19 Under Option 1a defendants (public bodies) would be able to recover their legal costs when they are successful at oral renewal stage. In 2012 defendants were successful in around 1,430 oral renewals. As explained above, we may assume that defendant legal costs are on average around £1,000 to £1,500 for an oral renewal, generating a total benefit of around £1.4m to £2.1m, with a mid point in the region of around £1.8m.
- 2.20 Under Option 1b defendants would gain from fewer PCOs. As explained above, in our central analysis we may assume that claimants no longer receive cost protection in around 5 JRs per year, these being cases where defendants would otherwise have secured their costs from claimants. If defendants' legal costs for all types of JR fall within the range of around £1,000 to around £25,000, then the total benefit for defendants would be between around £5,000 to around £125,000, with a mid point in the region of around £0.1m (to the nearest £0.1m).
- 2.21 Under Option 1c defendants may benefit if interveners pay the additional costs which their interventions place on defendants. As explained above, in order to monetise the impact of the reforms for the purpose of providing an EANCB figure it has been assumed that interveners might be liable for 5% of total legal costs in around 140 cases per year (depending on the exercise of judicial discretion not to order costs in 'exceptional circumstances'). If, as explained above, defendants' legal costs are between around £1,000 and £25,000 then the total benefit to defendants would be between around £5,000 to around £175,000, with a mid point in the region of around £0.1m (to the nearest £0.1m).
- 2.22 Under Option 1d non-parties would be more liable to meet defendants' costs. As explained above, in order to monetise the impact of the reforms for the purpose of providing an EANCB figure it has been assumed that costs would be awarded in favour of defendants in around 25 more cases per year. If, as explained above, defendant's legal costs are between around £8,000 and £25,000 (as these reforms are not likely to apply to immigration and asylum cases), the benefit to defendants would be between around £200,000 and around £625,000, with a mid point in the region of around £0.4m.

- 2.23 Under Option 1e, we have not made an assumption about how the number and amount of WCOs might change as a result of the reforms. The reforms may improve incentives for legal representatives to avoid WCOs in future. Defendants may gain if the reforms lead to legal providers engaging in less of the sort of wasteful activity which might result in a WCO being awarded.
- 2.24 In total the estimated mid-point monetised benefits for defendants of Option 1 are in the region of around £2.4m, subject to the assumptions applied.

#### *Benefits to HMCTS*

- 2.25 A reduction in the volume of cases would benefit HMCTS as fewer resources would be required to deal with JR applications. In the short and medium terms the resources freed up may be used to address backlogs elsewhere in the court system rather than being realised as cashable savings. HMCTS operates on a full cost recovery basis over the longer term and any reduction in volumes would also be associated with a reduction in fee income (and this is highlighted in the costs section). For the purposes of this Impact Assessment at this stage it is assumed that the overall financial impact on HMCTS would be neutral.

#### *Benefits to Legal Aid Agency*

- 2.26 Some claimants may be funded by the legal aid budget. There is unlikely to be any impact on the number of JRs brought by legally aided claimants as they are not exposed to the costs of bringing a JR. There are therefore unlikely to be any legal aid savings as a result of reduced JR volumes.
- 2.27 Under Option 1a the legal aid fund may benefit if defendants pay legally aided claimants' oral renewal legal costs in cases where the legally aided claimant is successful. As explained above these benefits might apply to around 30% of the 380 oral renewals won by claimants. It has been assumed that legally aided claimant costs may be the same as those of Treasury Solicitors, i.e. from around £1,000 to around £1,500 for an oral renewal. If so the total benefit for the legal aid fund would be between around £115,000 to around £170,000 with a mid point i.e. in the region of around £0.1m (to the nearest £0.1m).
- 2.28 Under Option 1c the legal aid fund may benefit if interveners pay the additional costs which their interventions place on claimants. As explained above, in order to monetise the impact of the reforms for the purpose of providing an EANCB figure it has been assumed that interveners might be liable for 5% of total legal costs in around 140 cases per year (depending on the exercise of judicial discretion not to order costs in 'exceptional circumstances'). If, as explained above, legally aided claimants' legal costs are around £3,000 per case and if around 30% of cases are funded by legal aid then the total benefit to the legal aid fund may be around £5,000, i.e. a negligible amount.
- 2.29 In total the estimated mid-point monetised benefits for the legal aid fund of Option 1 might be in the region of around £0.1m subject to the assumptions applied.

#### *Benefits to other parties directly affected by JRs (including businesses)*

- 2.30 Some businesses and individuals who are affected by the JR, but who are not the claimant, stand to gain from the quicker implementation of public decisions, or less uncertainty about their implementation, and would benefit if fewer JRs were brought following this change. There is the potential for all JR cases to be resolved more quickly, not just projects which are no longer subject to JR, as fewer overall JR applications may free up court resources to process other JR cases more quickly.

- 2.31 Information provided by public bodies party to JRs indicates that the benefits to business from reduced JR-related delays in implementing government decisions may be significant. Delays in proceeding with projects may generate cash flow and other finance costs. Delays may generate resource costs from temporarily redeploying resources to other projects and also from resources standing idle. 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-related delays. These costs would be avoided if the volume of JRs fell as a result of these reforms.
- 2.32 These benefits to business have not been monetised in aggregate as they vary from project to project, but they could be particularly significant for larger infrastructure, regeneration or other construction projects. Some examples are provided below to give an indication of the scale of possible impacts in these larger projects. Where the reforms do not lead to JRs no longer being pursued in relation to major projects, but instead lead to JRs being resolved more quickly, the business benefits may still be considerable given the scale of sums involved.
- 2.33 One consultation response highlighted the example of the Surrey Quays Shopping Centre extension in East London. In March 2012 planning permission was granted for a 10,600 square metre extension to the Surrey Quays Shopping Centre in East London. The £38m project was expected to create an additional 500 jobs. A JR was lodged in June 2012 by a sole local resident. Permission was refused in January 2013 and an unsuccessful oral renewal was heard in June 2013. The JR delayed the project by 15 months. Legal costs for the developer were around £80,000 and significant additional costs to businesses were generated by the uncertainty caused by the legal action including delays to renting out potential retail space, potentially lower rental values and lost business activity during the 15 month delay.
- 2.34 Another consultation response related to three airport expansions (Bristol, Southend and Stansted) 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 2012. The project was delayed by around 8 months. The expansion was estimated to create around 3,700 jobs, to affect 3,500 local businesses and to increase passenger numbers by around 4 million per annum by 2020. The consultation response suggested that delays caused by the JR might have been responsible for in the region of £150m in lost economic benefit.<sup>9</sup> The expansion of Southend Airport was also subject to a JR that was ultimately unsuccessful and which delayed the development by over a year. The consultation response suggested that delays caused by the JR might have been responsible for in the region of £100m in lost economic benefit.<sup>10</sup>
- 2.35 Another consultation response from a business indicated that the costs of delay for example in relation to building and opening a new supermarket might be significant, as a major modern supermarket might generate turnover of the order of around £30m to £40m per year. Five examples were provided where supermarket developments were delayed by JRs which were ultimately unsuccessful, with delays ranging between 6 to 26 months. Whilst a major modern supermarket might displace other local retail activity, it is arguable that some additional net business benefits would be generated, and that business costs would be associated with a delay in realising these benefits.

#### *Wider Economic Benefit*

- 2.36 There could be wider economic gains if infrastructure and other projects and policies are implemented more quickly and if these generate wider benefits for economic growth and recovery. As explained above we are unable to monetise the aggregate benefits but the reforms may generate significant wider benefits for the economy if they reduce JR-related delays to infrastructure and other projects. Even if delays were reduced in relation to only one or two such projects the potential business and economic benefits could be substantial.

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<sup>9</sup> [http://www.tymconsult.com/casestudy\\_Bristol-International-Airport-\\_27.php](http://www.tymconsult.com/casestudy_Bristol-International-Airport-_27.php)

<sup>10</sup> [www.saen.org.uk/.../JAAP\\_issues\\_and\\_options\\_summary\\_consultation\\_response.pdf](http://www.saen.org.uk/.../JAAP_issues_and_options_summary_consultation_response.pdf)

## Costs of Option 1

### *Transitional costs*

- 2.37 There may be one-off familiarisation and adjustment costs to claimants, defendants and HMCTS. These are expected to be negligible. There might also be some initial satellite litigation to determine how the new provisions will work.

### *Costs to claimants*

- 2.38 If claimants stand to gain from delay or uncertainty in the implementation of public decisions they may lose this benefit if they no longer lodge a JR in future or if they withdraw at an earlier stage (e.g. prior to making an oral renewal) including if this is in favour of the defendant. It is unclear to what extent the volume of JRs might fall as a result of this behavioural response, or how many might be withdrawn earlier. It has not been possible to monetise the aggregate value to claimants of delaying the implementation of public decisions, although this might be assumed to be at least as large as the cost to claimants of pursuing a JR (otherwise a JR would not be pursued in the first instance). For the purposes of the EANCB calculation these impacts are considered to be indirect effects of the reforms, in accordance with the definition of direct impacts in the July 2013 Better Regulation Framework Manual.
- 2.39 In achieving the key impacts of reducing unmeritorious JRs and reducing JR case duration, the reforms alter the degree of cost exposure applying to those involved in JRs. As a result a further set of direct costs and benefits apply. These are set out below.
- 2.40 Under Option 1a claimants would pay defendants' legal costs when defendants are successful at oral renewal stage. In 2012 defendants were successful in around 1,430 oral renewals. As explained above we may assume that oral renewal costs for a defendant are on average around £1,000 to £1,500. These figures imply that the cost to claimants may be between around £1.4m and £2.1m with a mid point in the region of around £1.8m. This cost would only apply to claimants who are not legally aided. As explained above, around 70% of claimants might be self-financed. In which case the mid point cost to self-financed claimants might be in the region of around £1.3m.
- 2.41 Under Option 1b claimants might be worse off as a result of securing less protection from PCOs. As explained in the benefits section of this Impact Assessment, in order to monetise the impact of the reforms for the purpose of providing an EANCB figure a number of illustrative assumptions. Subject to these assumptions the benefit to defendants from this reform, and hence the cost to claimants, might be in the region of around £0.1m (to the nearest £0.1m).
- 2.42 Under Option 1c there would be no costs to claimants. The costs of Option 1c all apply to interveners.
- 2.43 Under Option 1d there would be no costs to claimants. The costs of Option 1d apply to non-parties.
- 2.44 Under Option 1e there would be no costs to claimants from more WCOs. The costs of Option 1e all apply to legal services providers.
- 2.45 In summary the total estimated monetised costs to self-financed claimants of Option 1 might be in the region of around £1.3m, subject to the assumptions applied.

### *Costs to defendants (public bodies)*

- 2.46 Under Option 1a defendants may face additional costs if they are required to pay claimants' costs at oral renewal in cases where the claimant is successful. For cases lodged in 2012 around 380 claimants were successful at the oral renewal stage. As explained above we may assume that average claimant legal costs at the oral renewal stage are around £3,000 per case for self-financed claimants, and are around £1,000 to around £1,500 for legally aided claimants. If 70% of claimants are self-financed and if 30% are legally aided the total costs to defendants would be around £800,000 in relation to for self-financed claimants and between around £115,000 to around

£170,000 in relation to legally aided claimants, generating total mid-point costs in the region of around £0.9m.

- 2.47 Under Option 1b defendants are assumed not to incur any costs as a result of restricting PCOs.
- 2.48 Under Option 1c there would be no costs to defendants. The costs of Option 1c will all apply to interveners.
- 2.49 Under Option 1d there would be no costs to defendants. The costs of Option 1d all apply non-parties.
- 2.50 Under Option 1e there would be no costs to defendants from more WCOs. The costs of Option 1e all apply to legal services providers.
- 2.51 In total the estimated mid-point monetised costs for defendants of Option 1 might be in the region of around £0.9m subject to the assumptions applied.

#### *Costs to HMCTS*

- 2.52 HMCTS would receive less fee income if there are fewer JR applications. As stated previously, the overall financial impact on HMCTS is expected to be neutral because they operate on a full cost recovery basis and would also require fewer resources to deal with applications if volumes decreased.

#### *Costs to interveners*

- 2.53 As explained in the benefits section of this Impact Assessment, in order to monetise the impact of the reforms for the purpose of providing an EANCB figure a number of illustrative assumptions have been made. Subject to these assumptions, the total cost to interveners of the reforms may be between around £60,000 to around £280,000, with a mid point in the region of around £0.2m subject to the assumptions applied.

#### *Costs to non-parties*

- 2.54 As explained in the benefits section of this Impact Assessment, in order to monetise the impact of the reforms for the purpose of providing an EANCB figure a number of illustrative assumptions have been made. Subject to these assumptions, the total cost to non-parties of the reforms may be between around £200,000 to around £625,000, with a mid point in the region of around £0.4m, subject to the assumptions applied.

#### *Costs to legal services providers*

- 2.55 Under the reforms legal services providers may experience reduced levels of business from any reduction in the volume of JRs, or from JRs being withdrawn earlier in the process (such as before an oral renewal is made). This would be a secondary impact of the reforms. As a result resources would be freed up for other profitable activities.
- 2.56 Under Option 1e, we have not made an assumption about how the number and amount of WCOs might change as a result of the reforms. The reforms may improve incentives for legal representatives to avoid WCOs in future. If legal representatives incurred any costs as a result of this these would be regarded as costs which apply to non-compliant businesses.



## *Costs to Legal Aid Agency*

- 2.57 If some claimants affected by the proposals secure legal aid then the Legal Aid Agency may incur costs instead of claimants themselves doing so.
- 2.58 Under Option 1a claimants would pay defendants' legal costs when defendants are successful at oral renewal stage. In 2012 defendants were successful in around 1,430 oral renewals. As explained above we may assume that oral renewal costs for defendants are on average around £1,000 to £1,500. If applied to all JRs these figures imply that the cost to claimants would be around between £1.4m and £2.1m with a mid point in the region of around £1.8m. This figure relates to all claimants. As explained above, around 30% of claimants might be financed by the legal aid fund. In which case the cost to the legal aid fund might be between £430,000 and £640,000, with a mid point in the region of around £0.5m, subject to the assumptions applied.

## *Costs to other parties directly affected by JRs (including businesses)*

- 2.59 As explained, the intended key effect of the reforms is to reduce the number of unmeritorious JRs and to reduce JR case durations. If this outcome is achieved then there would be significant benefits for business overall, as explained in the benefits section. Within these overall benefits it is possible that some individual businesses might lose out.
- 2.60 In particular one example raised by the consultation was that of a supermarket which secured planning permission to develop a new store only for this planning decision to be subject to an unmeritorious JR by a rival supermarket. In this instance it was suggested that the purpose of the JR for the claimant supermarket was to generate business costs for their competitor by delaying their new store. In this situation whilst resolving the JR more quickly would enable the new store to open sooner, with beneficial economic impacts and beneficial business impacts for the store concerned, this enhanced speed of the JR process might not be favoured by the rival (claimant) supermarket.

## **Risks for Option 1**

- 2.61 Overall, it has been assumed that the proposals may reduce the volume of JR applications to some extent, and/or may lead to some cases being withdrawn earlier in the process (for example prior to making an oral renewal) and that the number of successful permission applications would remain the same. This would result in the same JR case outcomes.
- 2.62 Under Options 1a there is a potential risk that some meritorious claims might be discouraged due to the possible higher claimant exposure to defendant costs if the defendant is successful at oral renewal. In 2012, around 300 applications were granted permission at the oral renewal stage after being refused permission initially. Only a subset of these might be discouraged. These might be cases where the likelihood of securing permission is lower and less clear. Furthermore only a proportion of cases which secure permission at oral renewal are subsequently resolved in favour of the claimant.
- 2.63 There is a similar possibility under Options 1b and 1d as claimants may be exposed to higher costs when pursuing a JR claim.
- 2.64 The above monetised impacts are based on current JR case volumes. The figures might be lower if, as suggested above, the total volume of JR claims falls as a result of the proposals, and/or if JR claims are withdrawn at an earlier stage in future such as before an oral renewal is made.
- 2.65 As explained above, under Option 1b defendants would gain from fewer PCOs and claimants would lose by the same amount. In our central analysis we assume that claimants no longer receive cost protection in around 5 JRs per year. As explained above it is possible that following the restrictions on PCOs, defendants may no longer voluntarily agree to provide cost protection to claimants (in anticipation of a PCO being granted) in as many cases as they do now. In terms of sensitivity analysis we might assume that claimants no longer benefit from costs protection in 20 cases instead of 5 cases. If so, subject to the same assumptions applies in the central analysis,

the reform would benefit defendants by between around £20,000 to around £500,000, with a mid point in the region of around £0.3m. An equivalent cost would apply to claimants.

### One-in-two-out (OITO) assessment for Option 1

- 2.66 The above assessment of costs and benefits explains that the total mid-point monetised benefits to self-financed claimants are in the region of around £0.9m and the total mid-point monetised costs to self-financed claimants are in the region of around £1.3m. The net total monetised costs to self-financed claimants are in the region of around £0.4m (£440,000 to the nearest £10,000, subject to the assumptions applied).
- 2.67 In addition the above assessment explains that, for the purpose of providing an EANCB figure, we may consider that the total mid-point net monetised cost to interveners is in the region of around £0.2m (£170,000 to the nearest £10,000), and the total mid-point net monetised cost to the cost to non-parties is in the region of around £0.4m (£410,000 to the nearest £10,000).
- 2.68 The total mid-point net monetised cost to claimants, interveners and non-parties combined is in the region of around £1m (£1,020,000 to the nearest £10,000).
- 2.69 Information from internal Administrative Court management suggests that the number of businesses affected may be relatively small. Of the 11,400 cases lodged in 2011, around 230 applications seem to have been brought by businesses and a further 60 seem to have been brought by third sector organisations (NGOs, charities and pressure groups, including professional organisations such as Trade Unions).<sup>11</sup> These 290 cases equate to around 2.5% of all JRs lodged.
- 2.70 Applying this 2.5% proportion to the total mid-point net monetised cost to claimants, interveners and non-parties combined (£1,020,000 to the nearest £10,000) suggests that the net ongoing annual costs to claimants, interveners and non-parties which are businesses and third sector organisations may be around £26,000.
- 2.71 The impact of the WCO reforms does not feature in the OITO assessment as WCOs relate to non-compliant activity.
- 2.72 In relation to unmonetised OITO benefits, some businesses which are affected by a JR would benefit from reduced delays in implementing public decisions, and from less uncertainty and risk of possible delay. For example infrastructure and construction projects might be delayed by JRs which challenge a planning permission decision by a local authority. The reforms could lead to quicker resolution of these JRs once they have been launched. This would generate a tangible benefit for the projects concerned as they could commence sooner. Given the significant scale of some of these projects, even a marginal increase in the speed of JR resolution in relation a small number of such projects is likely to outweigh the costs of around £26,000 identified above.
- 2.73 Paragraph 1.9.32 of the July 2013 Better Regulation Framework Manual defines a direct impact as “an impact that can be identified as resulting directly from the implementation of the measure”, and explains that subsequent effects that occur as a result of the direct impacts, including behaviour change, are indirect. For the purposes of the EANCB calculation in accordance with this definition the benefits to business of a reduced volume of JRs and of quicker resolution of JRs have been classified as indirect benefits. As a result the EANCB figure is a cost of around £23,000, i.e. £0 (to the nearest £50,000).
- 2.74 Overall, it is considered that the gains to business from reduced delays in the implementation of public body decisions, especially those relating to planning, major infrastructure, regeneration and construction projects, are likely to exceed the monetised costs to business and third sector organisations. However because these benefits are not captured by the EANCB calculation the reforms have been assessed as an IN.

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<sup>11</sup> The figures on claimants are based on a high level review of the Administrative Court data – any findings should be treated as largely indicative.

## **Annex A: Small & Micro Business Test**

- A.1 The costs and benefits of these reforms on businesses have been outlined in the main body of this Impact Assessment. The reforms will apply to any claimants and lawyers bringing a JR under certain circumstance and this could include businesses regardless of size. The extent to which small businesses (up to 49 employees) and micro businesses (up to 10 employees) might be affected differentially by the reforms was explored during the consultation period. In light of this the proposed mitigating actions were reviewed.
- A.2 An internet search of legal companies providing advice on Judicial Review suggests that a range of businesses of various sizes provide legal services in this area. There are around 10,000 legal firms in England and Wales and 85% of these are small firms with 4 or less partners.<sup>12</sup> However, the Top 200 companies in terms of turnover employ over two-fifths of all solicitors in private practice and generate two-thirds of total fee income suggesting that although there are a large number of small firms, the market is quite concentrated with larger firms accounting for a considerable share of the legal service market.<sup>13</sup>
- A.3 There are two ways that small and micro businesses might be affected. First, if a small or micro business is a legal representative of a claimant. Secondly, if the small or micro businesses are the claimant themselves.

### **Small and micro businesses as legal representatives**

- A.4 Small and micro businesses might experience a reduction in JR-related business from a reduction in JRs lodged and/or from JRs being withdrawn earlier in the process. There is no clear evidence that small and micro businesses would be affected differentially compared to other legal services providers from any reduction in JR business.
- A.5 Small and micro businesses might respond to this impact by allocating resources freed from less JR activity to other profitable activities. There is no clear evidence that small and micro businesses in general are less able to adjust to changing patterns of business demand compared to other legal services providers.
- A.6 Mitigating actions should help support small and micro businesses to adjust to any reallocation of their resources between different areas of business. These actions include providing a suitably long transitional period and providing clear information about the precise nature of the reforms and how they might work in practice well in advance of their implementation.
- A.7 In addition and more specifically, the earlier proposals relating to WCOs have now been amended. At consultation stage it was suggested that there might be more WCOs in future, and that the average size of WCOs might be greater. The revised proposal involves regulators (such as the SRA) being informed that a WCO has been made, with no assumption now being made about the increased number and scale of WCOs. This reform would apply costs to non-compliant legal representatives which act in the wrong way. The revised reform is considered to be a more proportionate and constructive response to the issue at stake, and may reduce some costs which otherwise might have applied to small and micro businesses..

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<sup>12</sup> UK Legal Services Market Report from IRN Research

<sup>13</sup> <http://www.lawsociety.org.uk/representation/research-trends/market-assessment-2012/>

## Small and micro businesses as claimants

- A.8 The proposals on PCOs, non-parties and interveners may impose costs on businesses, which may include small businesses and organisations. This may extend to businesses being put off from bringing cases or intervening, or challenging public bodies' decisions less strongly. However, information from internal Administrative Court management suggests that the number of potential small businesses affected will be relatively small - of the 11,500 cases lodged in 2011, around 230 applications seem to have been brought by businesses and a further 60 seem to have been brought by charities, pressure groups and professional organisations (such as Trade Unions).<sup>14</sup> It is not known what proportion of the 290 cases were brought by small businesses/organisations but even if all 290 cases were this remains a very small share of the 4.8 million small businesses in the UK.<sup>15</sup>
- A.9 The proposal on oral renewal cost recovery will mean that small businesses may at the margin decide no longer to request a renewal or the small business will be liable for the defendant renewal costs. This will however only affect small businesses at the oral renewal stage of the process, which is a relatively small number of businesses – of the estimated 290 cases that seem to have been brought by businesses/organisations in 2011, only 90 requested an oral renewal. Again, it is not known what proportion of the 90 cases were brought by small businesses but they will be able to decide after being refused permission on papers whether to continue their case, and hence whether to assume this exposure to costs (and defendant legal costs for an oral renewal are assumed to be between £1,000 and £1,500) . Finally, small businesses will only be liable for costs if the claimant is unsuccessful - of the 90 renewals requested by small businesses and organisations, only 40 renewal applications were refused permission.
- A.10 In addition the Government is no longer pursuing the restrictions on 'standing' (i.e. on who may bring a JR claim) which featured in the consultation. The 'standing' reforms would have generated costs for claimants, including costs for small and micro businesses, as explained in the consultation stage Impact Assessment. The revision to the reforms should therefore be beneficial for small and micro businesses.
- A.11 Overall we have no reason to believe that small businesses would be affected significantly by the reforms, and we do not consider that they would be disproportionately affected. Guidance and information should be produced to help mitigate the impacts on small and micro businesses. Changes to the policy proposals themselves as a result of consultation should also be beneficial for small and micro businesses.

## Other mitigations

- A.12 Under all the proposals, small businesses/organisations that stand to gain from the quicker implementation of public bodies' decisions, or less uncertainty about their implementation, would benefit if fewer JRs are brought following this change. These benefits to small businesses may relate to quicker resolution of planning decisions where they are contractors for the project's delivery.

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<sup>14</sup> The figures on claimants are based on a high level review of the Administrative Court data – any findings should be treated as largely indicative.

<sup>15</sup> <http://www.bis.gov.uk/assets/biscore/statistics/docs/b/12-92-bpe-2012-stats-release.pdf>