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| Title: Transforming Legal Aid: Scope, Eligibility and Merits (Civil Legal Aid) IA No: MoJ194 Lead department or agency: Ministry of Justice Other departments or agencies: | Impact Assessment (IA) | |
| | Date: 09/04/2013 | |
| | Stage: Enactment | |
| | Source of intervention: Domestic | |
| | Type of measure: Secondary legislation | |
| Contact for enquiries: Joe Parsons Joe.Parsons@justice.gsi.gov.uk | | |
| Summary: Intervention and Options | | RPC Opinion: RPC Opinion Status |

| 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, Measure qualifies as One-Out? |
| £m | £m | £m | No |
| | | | NA |

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

We are concerned that limited public resources should be targeted at those civil cases which justify it and those people who need it, otherwise this undermines public confidence in the legal aid scheme. The scheme should be as fair on taxpayers as on legal aid applicants. We do not believe it is right for the taxpayer to pick up the bill for civil cases that have less than a 50% chance of success, or for judicial review claims which the Courts find are not arguable and are not granted permission. We are also clear that someone should have a strong connection with the UK in order to benefit from civil legal aid.

The Government is responsible for the terms and conditions of access to legal services funded by the legal aid budget; hence government intervention is necessary in order to make any changes.

What are the policy objectives and the intended effects?

The intention is to ensure public confidence in the legal aid scheme by targeting limited public resources at those cases which justify it and those people who need it.

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

The following options, in addition to 'do nothing', have been assessed against a base case of 'no change':

Option 1: Introduction of a residency test based on lawful residence at the time of application for civil legal aid and a period of 12 months lawful residence which can have been at any time in the past.

Option 2: Making payment to providers for work carried out on an application for permission for judicial review contingent on permission being granted.

Option 3: Removal of the current provisions which allow certain cases with borderline prospects of success to be funded.

| | | | | | |
|---|--|------------------------|--------------------------|------------------------|-------------------------|
| Will the policy be reviewed? We will monitor the impacts of the policy. If applicable, set review date: | | | | | |
| 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/No | < 20 Yes/No | Small Yes/No | Medium Yes/No |
| What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent) | | Traded: | | Non-traded: | |

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister:  Date: 09/04/2013

Summary: Analysis & Evidence

Policy Option 1

Description: Introduction of a residency test based on lawful residence at the time of the application and a period of 12 months lawful residence which can have been at any time in the past.

FULL ECONOMIC ASSESSMENT

| Price Base Year NA | PV Base Year NA | Time Period Years NA | Net Benefit (Present Value (PV)) (£m) | | |
|-----------------------|--------------------|-------------------------|---------------------------------------|----------------|------------------|
| | | | Low: Optional | High: Optional | Best Estimate: - |

| COSTS (£m) | Total Transition (Constant Price) Years | Average Annual (excl. Transition) (Constant Price) | Total Cost (Present Value) |
|---------------|--|---|-------------------------------|
| Low | - | - | - |
| High | - | - | - |
| Best Estimate | Negligible | N/Q | N/Q |

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

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

Legal aid claimants: the number of individuals eligible to claim legal aid will reduce as eligibility is now restricted by a residency test.

Civil Legal Aid providers: there is likely to be a fall in demand for their services. Providers would also need to collect evidence that clients meet the residency test and retain copies of this evidence on file for audit purposes.

Legal Aid Agency (LAA) Administration: the LAA could face an increase in costs due to auditing providers' assessments of eligibility.

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

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

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

Legal Aid Fund: a reduction in legal aid volumes and expenditure from imposing residency restrictions on civil legal aid.

LAA Administration: might realise small administrative savings if the number of cases the LAA are required to deal with is reduced.

Wider benefits: It is expected that there will be an increase in public confidence in the legal aid system resulting from the introduction of a lawful residency test.

Key assumptions/sensitivities/risks

Claiming asylum might be seen as the only route to claiming legal aid for some applicants and thus may increase the volume of legal aid applications for asylum cases. However, we consider this risk is low, as it is unlikely that, for example, illegal visa overstayers would wish to bring themselves to the attention of the authorities in this way. We will keep the operation of the asylum seeker exception to the residence test under review, and if it appears to be being abused, we will consider bringing forward secondary legislation to revise the exception.

BUSINESS ASSESSMENT (Option 1)

| | | | | |
|---|--------------|---------|-------------------|----------------------|
| Direct impact on business (Equivalent Annual) £m: | | | In scope of OIOO? | Measure qualifies as |
| Costs: NA | Benefits: NA | Net: NA | No | NA |

Summary: Analysis & Evidence

Policy Option 2

Description: Payment to provider for work carried out on an application for permission for judicial review contingent on permission being granted

FULL ECONOMIC ASSESSMENT

| Price Base Year 11/12 | PV Base Year NA | Time Period Years NA | Net Benefit (Present Value (PV)) (£m) | | |
|-----------------------|-----------------|----------------------|---------------------------------------|----------------|----------------|
| | | | Low: Optional | High: Optional | Best Estimate: |

| COSTS (£m) | Total Transition (Constant Price) Years | Average Annual (excl. Transition) (Constant Price) | Total Cost (Present Value) |
|---------------|---|--|----------------------------|
| Low | - | - | - |
| High | - | - | - |
| Best Estimate | Negligible | £1m | £1m |

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

Legal Aid providers: likely to experience a fall in income of approximately £1m per annum from not receiving payments for cases where permission is not granted.

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

LAA Administration: may experience a small one-off increase in administration costs to cover any amendments to financial systems and training.

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

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

Legal Aid Fund: The saving to the Legal Aid Fund is expected to be approximately £1m per annum in steady-state.

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

Key assumptions/sensitivities/risks

Discount rate (%)

- There is a risk that providers may refuse to take on judicial review cases because the financial risk of the permission application may in the future rest with them. However, these are likely to be cases that would not be considered by the Court to be arguable in any case.
- There is also a risk that Her Majesty's Courts and Tribunals Service (HMCTS) could face an increase in requests for reconsideration of the permission application at a hearing, or onward permission appeals to the Court of Appeal where permission has been refused.

BUSINESS ASSESSMENT (Option 2)

| | | | | |
|---|--------------|---------|-------------------|----------------------|
| Direct impact on business (Equivalent Annual) £m: | | | In scope of OIOO? | Measure qualifies as |
| Costs: NA | Benefits: NA | Net: NA | No | NA |

Summary: Analysis & Evidence

Policy Option 3

Description: Removal of the current provisions which allows certain cases with borderline prospects of success to be funded

FULL ECONOMIC ASSESSMENT

| Price Base Year 11/12 | PV Base Year NA | Time Period Years NA | Net Benefit (Present Value (PV)) (£m) | | |
|-----------------------|-----------------|----------------------|---------------------------------------|----------------|---------------------------|
| | | | Low: Optional | High: Optional | Best Estimate: Negligible |

| COSTS (£m) | Total Transition (Constant Price) Years | Average Annual (excl. Transition) (Constant Price) | Total Cost (Present Value) |
|---------------|---|--|----------------------------|
| Low | Optional | Optional | Optional |
| High | Optional | Optional | Optional |
| Best Estimate | Negligible | £1m | Optional |

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

Civil legal aid claimants: claimants are expected to receive around £1m per annum less in legal aid for approximately 100 borderline cases.

Civil Legal Aid providers: providers are likely to experience a fall in demand for their services.

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

LAA: administration cost may increase if the merits test is tightened to remove borderline costs. There might also be additional one-off costs from changes to The Civil Legal Aid (Merits Criteria) Regulations 2013. There are also likely to be ongoing costs primarily due to a potential increase in requests for review to the LAA and appeals to the Independent Funding Adjudicator.

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

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

Legal Aid Fund: removing borderline cases is estimated to reduce the volume of civil legal aid cases by approximately 100 and save the legal aid fund approximately £1m per annum.

Wider benefits: it is expected that there will be an increase in public confidence in the legal aid system resulting from the removal of borderline cases from receiving civil legal aid.

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

LAA: if there is a reduction in the number of cases the LAA are required to deal with then they might realise small administration savings in the long run.

Key assumptions/sensitivities/risks

Discount rate (%)

- Applicants no longer eligible are assumed not to receive legal aid funding through other routes.
- Civil legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution (e.g. resolve the issue themselves or pay privately to resolve the issue).

BUSINESS ASSESSMENT (Option 3)

| | | | | |
|---|--------------|---------|-------------------|----------------------|
| Direct impact on business (Equivalent Annual) £m: | | | In scope of OIOO? | Measure qualifies as |
| Costs: NA | Benefits: NA | Net: NA | No | NA |

Evidence Base (for summary sheets)

Introduction

Background

1. This Impact Assessment (IA) accompanies the Ministry of Justice's (MoJ's) consultation on "*Transforming Legal Aid: Delivering a More Credible and Efficient System*". The associated consultation document was published on 9 April 2013 and can be found at: www.justice.gov.uk
2. The legal aid scheme involves the public procurement of legal services and determines the terms and conditions of access to these services. Legal aid fund expenditure was just over £2bn in 2011/12, approximately 25% of the Ministry of Justice's (MoJ) net resource budget. Approximately £1.1bn was spent on criminal legal aid and the remaining £0.9bn was spent on civil legal aid. The Legal Aid Agency (LAA) is responsible for administering the legal aid scheme in England and Wales.
3. The proposed fee reforms in this IA relate to those outlined in the consultation paper. They are summarised below.

Policy Objectives

4. The main policy objective and intended effect is to improve public confidence in the civil legal aid. In reviewing every area of expenditure to achieve savings to reduce the fiscal deficit, the Government is concerned to ensure that limited public resources are targeted at those cases which justify it and those people who need it. We do not believe it is right for the taxpayer to pick up the bill for civil cases that have less than a 50% chance of success, or for judicial review claims which the Courts find are not arguable and are not granted permission. We are also clear that someone should have a strong connection with the UK in order to benefit from civil legal aid.

Policy

5. The policy proposals considered in this Impact Assessment are as follows:
 - (i) Introduction of a lawful residence test to address the concern that people who do not have a strong connection to this country may nevertheless be able to benefit from the civil legal aid scheme.
 - (ii) Restriction of legal aid payments so that providers are only paid for work on a judicial review permission application (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward appeal to the Court of Appeal) if they are successful in obtaining permission from the court.
 - (iii) Tightening of the civil legal merits test by removing the provisions that allow cases assessed as having "borderline" prospects of success to be funded.

Main Affected Groups

6. The following key groups are likely to be affected by the proposals:
 - Civil legal aid claimants
 - Civil legal aid providers
 - The LAA, which is responsible for administering legal aid.
 - HMCTS

Costs & Benefits

7. 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. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However there are some important aspects that cannot always sensibly be monetised.
8. All savings figures have been rounded to the nearest £1m. All volume changes have been rounded to the nearest 100 cases.

Assumptions

9. The following assumptions have been made in the estimation of the costs and benefits:
 - (i) We assume individuals who no longer receive legal aid will now adopt a range of approaches to resolve issues. They may choose to represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all.
 - (ii) We have assumed that there are no other behavioural changes (e.g. in provider behaviour).
 - (iii) The resource used in non-legally aided dispute resolution is assumed to remain the same as the resource currently used.
 - (iv) Civil legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution.
 - (v) Applicants no longer eligible are assumed not to receive legal aid funding through other routes.
 - (vi) The civil legal aid remuneration reforms have been modelled against a flat baseline of 2011/12 closed cases and costs and adjust for reforms announced in the past but yet to be fully reflected in the data (e.g. the changes introduced through the Legal Aid, Sentencing and Punishment of Offenders Act 2012).

Option 0: Do Nothing

10. Civil legal aid is limited to proceedings taking place in England and Wales. There are no nationality restrictions on accessing civil legal aid. If the 'do nothing' option were pursued then all cases in England and Wales currently entitled to funding through civil legal aid would continue to be funded by legal aid regardless of the applicant's residency status.
11. At present all Judicial Review cases funded by legal aid receive payment for the permission application stage of their case. In the do nothing option this would continue and providers would be paid for the work on permission applications that are unsuccessful.
12. At present cases must generally have at least a 50% chance of success to receive legal aid funding. There is currently a provision in certain scenarios which allows cases with "borderline" prospects of success to be funded. If the 'do nothing' option were pursued then borderline cases, which meet the current exceptions, would continue to attract funding.
13. As this option is compared against itself, its costs and benefits are necessarily zero, as is its Net Present Value (NPV).

Option 1: Introduce a Lawful Residence Test in Civil Legal Aid

Description

14. This option proposes a residency test based on lawful residence in the UK, Crown Dependencies or British Overseas Territories at the time an application for civil legal aid is made and a period of 12 months lawful residence which can have been at any time in the past.

Costs

Civil legal aid claimants

15. The LAA do not currently record the residency status of a client and therefore the data is not available to estimate the impact on the volume of cases this policy affects. However, we expect that there will be a reduction in the number of individuals eligible to claim civil legal aid.
16. The specific evidence requirements have not yet been decided upon. However, individuals who do not already have evidence of UK nationality may have to pay a fee for a copy of their birth certificate or other documentation if they do not have easy access to them. Claimants may also experience a delay in their cases whilst documentation is sought.

Legal Aid Providers

17. Civil legal aid providers are likely to face a fall in demand for their services. However, the precise impact on the provider is dependent upon the behavioural response of the client. This is discussed further in the 'risks and uncertainties' section.
18. There are also one-off familiarisation costs associated with a change in policy. Providers may face increased costs in assessing whether or not a case qualifies for legal aid and in retaining evidence on file for audit purposes.

LAA Administration Costs

19. The one-off costs from the proposed change have not been estimated. However we expect them to be negligible. These costs in the main will be one-off costs relating primarily to amending IT systems to take account of the new arrangements.
20. There are also likely to be small ongoing costs. These costs in the main will be costs relating primarily to auditing providers' residency assessments and appeals against merits decisions.

Benefits

Legal Aid Fund

21. There is likely to be a reduction in legal aid volumes and expenditure from imposing residency restrictions on civil legal aid. However, the LAA do not currently record the residency status of a client and therefore the data is not available to estimate the impact on the value or volume of cases this policy affects.

LAA Administration

22. If there is a reduction in the number of cases the LAA are required to deal with then they might realise small administrative savings in the long run.

Wider benefits

23. It is expected that there will be an increase in public confidence in the legal aid system resulting from the introduction of a lawful residency test.

Risks and uncertainties

24. The precise behavioural response of the client is uncertain. Individuals who no longer receive civil legal aid may choose to address their disputes in different ways. They may represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all.
25. The resource used in alternative dispute resolutions is uncertain. The resources used to resolve the dispute may change. However this will depend upon the behavioural responses of clients to the policy change which are not known.
26. The client outcomes from alternative dispute resolution are uncertain. Client outcomes may change. However, this will depend upon the behavioural responses of clients to the policy change which are not known.
27. There may be a risk of an increase in the volume of legal aid applications in cases claiming asylum as it might be the only route to claiming legal aid for some applicants. However, we consider this risk is low, as it is unlikely that, for example, illegal visa overstayers would wish to bring themselves to the attention of the authorities in this way. We will keep the operation of the asylum seeker exception to the residence test under review, and if it appears to be being abused, we will consider bringing forward secondary legislation to revise the exception.
28. If individuals who are now no longer eligible for legal aid as a result of the residency test opt not to pursue their dispute, there will be a decrease in civil cases going to court/tribunals. This may lead to savings to HMCTS expenditure. However this is unquantifiable as behavioural response of the client is unknown

Enforcement and implementation

29. Subject to the outcome of the consultation, it is currently anticipated that this proposal will be implemented through secondary legislation to be laid in Autumn 2013.

Option 2 – Payment to provider for work carried out on an application for permission for judicial review contingent on permission being granted

Description

30. 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. Legal aid would still be available for pre-proceedings work, and reasonable disbursements such as expert fees and court fees which arise in preparing the permission application will be paid.

Costs

Legal Aid Providers

31. Based on LAA 2011-12 data there were approximately 800 cases where the permission was not granted in Judicial Review (JR) cases. We are unable to establish the cost of preparing permission applications, however the LAA have advised that the default emergency certificate limit is £1350 per case. We therefore estimate that civil legal aid providers will receive approximately £1m per annum less in legal aid funding in respect of such cases. However, this might be higher if they refuse to take on these cases.

LAA Administration Costs

32. Removing payments for permission application in JR cases might lead to a small one-off increase in LAA administration costs. The LAA may need to amend financial systems to allow for payment to be made once permission is granted. Some additional training may also be required.

Benefits

Legal Aid Fund

33. LAA 2011/12 closed case administrative data has been used to estimate the benefit of this policy. We estimate that there will be a saving of approximately £1million per annum as a result of approximately 800 fewer cases being funded as a result of this proposal.

Wider benefits

34. It is expected that there will be an increase in public confidence in the legal aid system resulting from not paying the provider for work carried out on an application for permission for judicial review unless permission is granted.

Risks and uncertainties

35. The provider response to the proposal is uncertain. There is a risk that they may refuse to take on (i) cases which the court is less likely to allow to proceed; or (ii) judicial review cases more generally. We do not consider that legal aid should be used to fund weak cases which are found by the court to be unarguable, however, some providers may choose to continue to take on these cases and bear the financial risk of not gaining permission. We think that the risk of providers refusing to take on judicial review cases more generally will be mitigated by providers carefully assessing the risk of permission being granted and therefore no longer taking forward weaker cases only.
36. If this risk were to materialise, individuals may choose to address their disputes in different ways. They may represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all.
37. The resource used in alternative dispute resolutions is uncertain. The resources used to resolve the dispute may change. However this will depend upon the behavioural responses of clients to the policy change which are not known.
38. The client outcomes from alternative dispute resolution are uncertain. Client outcomes may change. However, this will depend upon the behavioural responses of clients to the policy change which are not known.
39. If there is a fall in the volume of cases applying for permission then the LAA and HMCTS might see some savings. As the provider will need to make an assessment of whether the application is arguable and therefore permission should be applied for, there may be a fall in permission applications made. This may reduce the number of cases the LAA might need to process and reduce the number of hours required in court for these cases with an associated saving for HMCTS. However this is unquantifiable as behavioural response of the client/provider is unknown.
40. On the other hand there is the potential for an increase in requests for reconsideration of the permission application at a hearing, or onward permission appeals to the Court of Appeal where permission has been refused so there could be an impact on HMCTS from reconsidering the applications/holding the hearings. However this is unquantifiable as behavioural response of the client/provider is unknown.
41. The assumed cost of preparing a permission application is uncertain. In some circumstances it might be higher and in other circumstances it might be lower than assumed. The estimated cost to providers might therefore be higher or lower than estimated.

Enforcement and implementation

42. Subject to the outcome of the consultation, it is currently anticipated that this proposal will be implemented through secondary legislation to be laid in Autumn 2013.

Option 3: Removing legal aid for borderline cases

Description

43. This option proposes tightening the merits test in civil cases to remove funding from cases with borderline prospects of success.

Costs

Civil legal aid claimants

44. Civil legal aid claimants will no longer receive legal aid for approximately 100 borderline cases at a cost of approximately £1m per annum. This is based on 2011/12 LAA (closed case) administrative data.

Legal Aid Providers

45. Civil legal aid providers are likely to experience a fall in demand for their services. However, the precise impact on the provider is dependent upon the behavioural response of the client. This is discussed further in the 'risks and uncertainties' section.

46. There are also likely to be small familiarisation costs associated with a change in policy. Providers may face a small increase in costs in assessing whether or a not a case qualifies for legal aid.

LAA Administration Costs

47. The one-off costs from the proposed change have not been estimated. However we expect them to be negligible. These costs in the main will be one-off costs relating primarily to amending IT systems to take account of the new arrangements.

48. There are also likely to be small ongoing costs. These costs in the main will be costs relating primarily to a potential increase in requests for review to the LAA and appeals to the Independent Funding Adjudicator.

Benefits

Legal Aid Fund

49. LAA 2011/12 closed case administrative data has been used to estimate the benefit of this policy. Removing borderline cases is estimated to reduce the volume of civil legal aid cases by approximately 100 and save the legal aid fund approximately £1m.

LAA Administration

50. If there is a reduction in the number of cases the LAA are required to deal with, then they might realise small administration savings in the long run.

Wider benefits

51. It is expected that there will be an increase in public confidence in the legal aid system resulting from the removal of borderline cases from receiving civil legal aid.

Risks and Uncertainties

52. The precise behavioural response of the client is uncertain. Individuals who no longer receive civil legal aid may choose to address their disputes in different ways. They may represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all.
53. The resource used in alternative dispute resolutions is uncertain. The resources used to resolve the dispute may change. However this will depend upon the behavioural responses of clients to the policy change which are not known.
54. The client outcomes from alternative dispute resolution are uncertain. Client outcomes may change. However, this will depend upon the behavioural responses of clients to the policy change which are not known.
55. If individuals who are now no longer eligible for legal aid as a result of the tightening of the merits test opt not to pursue their dispute, there will be a decrease in civil cases going to court/tribunals. This may lead to savings to HMCTS expenditure. However this is unquantifiable as behavioural response of the client is unknown.
56. There may be limited costs to the LAA through a potential increase in investigative representation grants, to allow the provider to gather the necessary information to correctly assess the merits of a case.
57. Providers may change their behaviour in terms of their assessment on the merits of a case.

Enforcement and implementation

58. Subject to the outcome of the consultation, it is currently anticipated that this proposal will be implemented through secondary legislation to be laid in Autumn 2013.