

## DRAFT FOR CONSULTATION

### **Human Rights Act Impact Assessment Proforma**

This proforma will help you to articulate any human rights issues in the policy/proposal you are working on. It is necessary for you to have read the OFMDFM guidance on human rights entitled “Get in on the Act; a practical guide to the Human Rights Act for public authorities in Northern Ireland”<sup>1</sup> before completing this proforma.

If the policy/proposal is relevant to some rights but does not interfere with or limit them, your assessment must be signed off by a Senior Responsible Officer (Grade 7, equivalent or above). If you find that it does interfere with or limit one or more of the Convention rights, and your senior Responsible Officer agrees, you must seek legal advice, even if it is considered that the interference or limitation is justified.

This proforma is available at [www.ofmdfmi.gov.uk/human-rights](http://www.ofmdfmi.gov.uk/human-rights) If you fill in the form electronically, there is no restriction as to the amount you can type in each box. Your answers in the rest of this proforma will help you draft a clearer note to your legal advisor.

#### **1. Policy title and aims**

**Title:** Review of Recovery of Defence Costs Orders

#### **Objective(s):**

The Recovery of Defence Costs Orders (RDCO) scheme was commenced on 15 October 2012, through the Criminal Legal Aid (Recovery of Defence Costs Orders) Rules (Northern Ireland) 2012 (“the 2012 Rules”), as a means of recovering such part of the cost of legal aid incurred under a criminal legal aid certificate for the defence of a convicted individual in the Crown Court, as was reasonable in all the circumstances of the case, including the financial resources of the defendant.

In its report entitled “Managing Legal Aid”, published in June 2016, the Northern Ireland Audit Office (NIAO) recommended that the Department of Justice (DoJ) “examine the existing arrangements governing [the 2012 Rules], in order to determine how they can be enhanced to achieve greater impact.” Ineffective implementation of RDCOs has also been identified as one of three significant risks which led the NIAO to certify the Legal Service Agency’s (LSA’s) financial statements for 2015/16 with a qualified audit opinion. That qualification remains in place.

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<sup>1</sup> <http://www.nicshumanrightsguide.com/uploads/files/practical-guide-to-human-rights-act.pdf>

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In response to the issues highlighted by the NIAO, the DoJ undertook to complete a review of the arrangements governing RDCOs and deliver any recommended remedial actions in 2017/18.

The objectives of the review were to:

- establish the original policy intent upon which the 2012 Rules are based;
- assess the extent to which the 2012 Rules are being implemented effectively by the LSA;
- analyse the extent to which the 2012 Rules currently allow the LSA reliably to identify and pursue cases which could usefully be subject to an order to recover defence costs;
- identify any new or revised processes, procedures or controls and/or amendments to the 2012 Rules which need to be put in place to enable the LSA reliably to identify and thoroughly investigate cases which could usefully be subject to an order to recover defence costs; and
- introduce secondary legislation to give effect to any required amendments to the 2012 Rules, if necessary.

The review found that the RDCO scheme is largely working according to the policy intention in that any Crown Court cases which come to the attention of, or are referred to, the LSA are being investigated. However, whilst the number of cases investigated per year for an RDCO by the LSA is in line with the estimates in the original business case, the projected level of recovery has not been achieved. In addition, a number of gaps or deficiencies have been identified in the original policy intent and/or how the policy has been implemented by means of the 2012 Rules:

- The absence of a reliable mechanism for identifying all cases which may reasonably be subject to an RDCO. In the absence of such a mechanism, the LSA currently attempts to identify cases through regular requests for information to prosecuting authorities and occasionally reviews cases as a result of media reports;
- The lack of a clear legislative provision or operational mechanism in place to address the other declared policy intention of the scheme –

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investigating all Crown Court cases involving acquisitive crimes (a term which is not clearly defined). The review has decided that RDCO cases should not be identified on the basis of the underlying offence (acquisitive or otherwise) as this mechanism does not focus on the key issue of the assisted person's ability to contribute to their legal aid costs;

- Cases often come to the attention of the LSA at an advanced stage, and it is therefore unable to conduct a thorough investigation of the assisted person's means before the relevant court proceedings have concluded; and
- This difficulty is further compounded by the restrictive nature of the drafting within the 2012 Rules, which prevents the LSA from applying for an RDCO after the conclusion of the relevant proceedings.

As a consequence of the findings of the review, the DoJ proposes to amend the operation of the RDCO scheme to introduce a reliable mechanism for identifying all possible Crown Court cases which may be subject to an RDCO.

In order to reliably identify assisted persons who may be eligible for an RDCO, it is proposed that the LSA should be able to review all cases for which it receives notification from the Northern Ireland Courts and Tribunals Service (NICTS) that criminal legal aid has been granted for Crown Court proceedings, and not just those cases brought to its attention as meriting investigation e.g. following a referral from the PSNI or a prosecuting authority. Before notifying the solicitor of the legal aid certificate number, the LSA will check if the assisted person is on a means-tested benefit and, if not, issue a financial means form along with the notification. This financial means form will be returned to the LSA by the assisted person in order to determine if their income or assets make them eligible for an RDCO. (Should the financial means form not be returned to the LSA then an application for an RDCO may be made.)

DoJ is also proposing that, whilst RDCOs should continue to apply only to assisted persons found guilty at the Crown Court, the 2012 Rules be amended to allow the LSA to recover the cost of legal aid throughout the lifetime of the case, if the assisted person's assets are considered sufficient to do so i.e. any legal aid expenditure incurred in connection with preliminary hearings at the

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magistrates' court, as well as the expenditure incurred during the course of the trial at the Crown Court.

In order to further improve the effectiveness of the RDCO scheme, a number of additional amendments are proposed to the 2012 Rules, including:

- introducing a statutory application form for an RDCO to be submitted by the LSA to the Crown Court;
- amending the 2012 Rules to allow the LSA to vary the amount of the RDCO administratively in circumstances where the cost of legal aid incurred under the legal aid certificate was lower than the amount ordered to be paid under the RDCO; and
- amending the 2012 Rules to allow the LSA to recover the costs of obtaining an RDCO. These costs would include the cost of engaging Counsel and any administrative cost incurred by the LSA during the course of the investigation.

As a consequence of the findings of the Review, DoJ also intends to introduce two other amending rules, in order to:

- amend and update the statement of means form submitted by applicants for criminal legal aid; and
- introduce a time-based standard fee to prepare for, and represent an assisted person at, the hearing of an application for an RDCO at the Crown Court.

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### 2. Rights which the policy/proposal engage

Go through each of the rights detailed in the table below. For each one consider whether the policy/proposal engages the right, ie. how the policy/proposal you are working on could involve the right. Explain how the right is engaged.

*Please note that the rights have been abbreviated so you should see the relevant article in the Guide referred to above for the full title and explanation of the right.*

Right	Yes/No	Explanation
Article 2 Right to life	No	
Article 3 Prohibition of torture inhuman and degrading treatment.	No	
Article 4 Prohibition of slavery and forced labour	No	
Article 5 Right to liberty	Yes	<p>Article 5 focuses on protecting individuals' freedom from unreasonable detention.</p> <p>Article 5(4) states that "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."</p> <p>Criminal legal aid provides remuneration for legal representatives to allow assisted persons to challenge the lawfulness of their detention, and therefore the RDCO Review engages this Article. However, the investigation of an assisted person for an RDCO does not impact upon their receipt of criminal legal aid during the course of the trial, and the decision to grant an RDCO is not taken until the conclusion of proceedings. Therefore, the assisted person's right to liberty is not limited or interfered with.</p>

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<b>Right</b>	<b>Yes/No</b>	<b>Explanation</b>
<p>Article 6 Right to a fair trial</p>	<p>Yes</p>	<p>Article 6 (3) (c) requires that “a person charged with a criminal offence” has the right to defend himself or herself in person or through legal assistance of his or her own choosing or, if he or she does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.</p> <p>To receive free legal assistance, the person must fulfill two conditions: (1) he or she does not have sufficient means to pay for legal assistance, and (2) the interests of justice so require. It is for domestic authorities to define the financial threshold triggering the right to free legal assistance and to apply the means test.</p> <p>Article 6 also places a number of requirements on the state in order to ensure compliance. For example, the state must ensure real and effective access to a court for citizens. In addition, an accused person must have the right to effective participation in their criminal trial.</p> <p>Whilst these aspects of Article 6 are engaged by the proposals brought forward following the review of the RDCO scheme they will not interfere with or limit the rights conferred upon assisted persons by the Article.</p> <p>Furthermore, the proposals include time-based standard fee provision for legal aid to remunerate a legal representative to prepare for, and represent an assisted person at, an RDCO application at the Crown Court, protecting the individual’s right to a fair trial.</p> <p>The investigation of an assisted person for an RDCO does not impact upon their receipt of criminal legal aid during the course of the trial, and the decision to grant an RDCO is not taken until the conclusion of proceedings. Therefore, the assisted person’s right to legal assistance is unaffected.</p>
<p>Article 7 No punishment without law</p>	<p>No</p>	

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<b>Right</b>	<b>Yes/No</b>	<b>Explanation</b>
<p>Article 8 Right to respect for private and family life</p>	<p>Yes</p>	<p>The RDCO scheme touches on this principle because equity in the assisted person's principal residence over £100,000 is an asset that can be taken into account when the judge determines whether or not to grant an RDCO. However, where the assisted person's principal residence is the family home, equity in that family home shall not be included as an asset of the assisted person.</p> <p>This approach is in line with Article 8, which protects your right to respect for your private life, your family life, your home and your correspondence (letters, telephone calls and emails, for example).</p> <p><u>The right to respect for your home does not give you a right to housing.</u> Rather, it is a right to enjoy your existing home peacefully, and therefore the exclusion of equity in the family home from the assets which can be recovered by an RDCO protects this right.</p> <p>Furthermore, there are situations when public authorities can interfere with your right to respect for private and family life, home and correspondence. This is only allowed where the authority can show that its action is lawful, necessary and proportionate in order to:</p> <ul style="list-style-type: none"> <li>• protect national security</li> <li>• protect public safety</li> <li>• protect the economy</li> <li>• protect health or morals</li> <li>• prevent disorder or crime, or</li> <li>• protect the rights and freedoms of other people.</li> </ul> <p>Actions of this nature are 'proportionate' only when it is appropriate and no more than necessary to address the problem concerned.</p> <p>In the case of the RDCO scheme, it is considered proportionate to recover the cost of legal aid from an assisted person in situations where his or her assets are sufficient to have incurred the costs of their legal representaton, as doing so ensures value for money for the taxpayer and protects against fraudulent claims for legal aid.</p>

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<b>Right</b>	<b>Yes/No</b>	<b>Explanation</b>
Article 9 Freedom of thought, conscience and religion	No	
Article 10 Freedom of expression	No	
Article 11 Freedom of assembly and association	No	
Article 12 Right to marry and found a family	No	
Article 14 Prohibition of discrimination	No	



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<b>Right</b>	<b>Yes/No</b>	<b>Explanation</b>
<p>Protocol 1 Right to property</p>	<p>Yes</p>	<p>Similar to Article 8 above, the RDCO scheme interacts with a citizen's right to property.</p> <p>The general rule of this article is that every natural or legal person is entitled to the peaceful enjoyment of his possessions. This includes the right to property, but also shares, patents, licences, leases and welfare benefits (provided they are enjoyed by legal right, not by discretion).</p> <p>Deprivation of property is only permitted if it is:</p> <ul style="list-style-type: none"> <li>• lawful;</li> <li>• in the public interest;</li> <li>• in accordance with the general principles of international law; or</li> <li>• reasonably proportionate ("fair balance" test).</li> </ul> <p>The RDCO scheme touches on this principle because equity in the assisted person's principal residence over £100,000 is an asset that can be taken into account when the judge determines whether or not to grant an RDCO. However, where the assisted person's principal residence is the family home, equity in that family home shall not be included as an asset of the assisted person.</p> <p>Treating equity in the assisted person's principal residence over £100,000 as an asset for the purposes of an RDCO – and therefore potentially depriving an assisted person of his or her property – is considered to be proportionate as it is in the public interest that, where an individual has sufficient assets to cover the cost of their legal representation themselves, they should do so.</p>
<p>Protocol 2 Right to education</p>	<p>No</p>	
<p>Protocol 3 Right to free elections</p>	<p>No</p>	

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If you have answered yes to any of these questions, you must complete the rest of the proforma. If you have answered no to **all** of the questions, you may proceed to Question 9.

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### **3. Rights which the policy/proposal interferes with or limits**

Will the policy/proposal interfere with or limit the rights you identified as being engaged? If so, explain how the right is interfered with or engaged.

*You should note that interference could be a negative impact on a right or a failure to take positive action where this is required under the Article in question. For further guidance on which articles require positive action, please consult the Guide.*

<b>Article</b>	<b>Interfered with or limited?  Yes/No</b>	<b>What is the interference/limitation?</b>
Article 2: Right to life	No	
Article 3: Prohibition on torture, inhuman and degrading treatment	No	
Article 5: Right to liberty	No	
Article 6: Right to fair trial	No	
Article 8: Right to respect for private and family life	No	
Article 12: Right to marry and family life	No	
Article 14: Prohibition of discrimination	No	
Protocol 1 Right to property	No	

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### **4. Those affected by the interference/limitation**

Identify who could be affected by the interference or limitation, eg. sections of society or persons with certain beliefs or opinions, and explain how they could be affected.

*It will help in identifying interferences or limitations to think about all the persons who could be affected and be seen as a victim within the Human Rights Act.*

<b>Who could be affected?</b>	<b>How could they be affected?</b>
N/A	

### **5. Legal basis for interference/limitation**

Is there a law which allows you to interfere with or limit the rights identified in Question 4?

Any interference with or limitation on a Convention right must have a legal basis. You therefore need to establish whether there is a law which allows the proposed interference or limitation.

*You may need legal advice to clarify this.*

Relevant Legislation

N/A
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Alternatively, the policy/proposal may involve the creation of a new law which allows for the interference or limitation. If this is the case, please detail and explain in the box below.

N/A
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### **6. Purpose of the policy/proposal**

Even if the interference or limitation in the policy/proposal is in the law, there are further considerations which must be met. The purpose of the policy/proposal must pursue a legitimate aim or fall under one of the specific exceptions in the Article in question.

Consider each of the Articles which the policy/proposal will interfere with or limit, and for each one specify the exception or legitimate aim which allows the interference or limitation and explain why.

*If you are unsure of the exceptions or legitimate aims which are applicable for the rights interfered with or limited by the policy/proposal you are working on, you should refer to the text of the Convention and the Guide.*

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Article	Exception/Limitation	Explanation
N/A	N/A	N/A

### **7. Necessary in a Democratic Society**

Articles 8, 9, 10 and 11 specify that interferences or limitations must be necessary in a democratic society. If the policy/proposal interferes with or limits one of these rights, detail in the table below how the right is necessary in a democratic society, ie. does it fulfil a pressing social need?

*You may need to speak to the Senior Responsible Officer for clarification of this.*

Article Affected	Explain why it is necessary in a democratic society
N/A	N/A

### **8. Proportionality**

Any interference with or limitation on a Convention right must be proportionate, ie. the policy/proposal must interfere with or limit a right no more than is absolutely necessary to achieve its aims. For each article which the policy/proposal interferes with or limits, explain how the interference or limitation is proportionate.

*For further information on proportionality please consult the Guide.*

Article Affected	Explain why the interference/limitation is proportionate.
N/A	N/A

### **9. Article 14 equality issues**

Even if it does not interfere with or limit a right or freedom, could the policy/proposal result in persons being treated differently in relation to any of the Convention rights? Article 14 does not allow discrimination in the exercise of any of the other Convention rights.

*For further information on Article 14, please refer to the relevant pages in the Guide.*

Convention Article affected	How are persons treated	Is this justifiable?
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	<b>differently?</b>	
N/A		

You should now have a clearer view about the policy/proposal and the possibility of it engaging or interfering with Convention rights and freedoms.

Please ensure the proforma is also signed by your Senior Responsible Officer and if there is any possible interference or limitation refer to your legal advisor for further action and advice.

Please tick the statement that applies and sign below.

- (a) The policy/proposal does not engage any Convention rights.
- (b) The policy/proposal does engage one or more Convention rights, but does not interfere with or limit them.
- (c) The policy/proposal interferes with or limits one or more Convention rights and legal advice is being sought.

Countersign, hold copy with your policy papers and refer to your legal advisor.

Signed by Alan Weir (Official)

Date 22/01/2018 Grade DP

Signed by Mark McGuckin (Senior Responsible Officer)

Date 23/01/2018 Grade 5