

<b>Title: Litigators' Graduated Fees Scheme</b> <b>IA No: MoJ035/2016</b>  <b>Lead department or agency: Ministry of Justice (MoJ)</b> <b>Other departments or agencies: Legal Aid Agency (LAA)</b>	<b>Impact Assessment (IA)</b>	
	Date: 10/02/17	
	Stage: Development/Options	
	Source of intervention: Domestic	
	Type of measure: Secondary Legislation	
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<b>Summary: Intervention and Options</b>		<b>RPC Opinion: RPC Opinion Status</b>

**Cost of Preferred (or more likely) Option**

Total Net Present Value £m	Business Net Present Value £m	Net cost to business per year £m	In scope of One-In, Two-Out?		Measure qualifies as Qualifying provision
			Not in scope		

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

The Litigator Graduated Fee Scheme (LGFS) in the Criminal Legal Aid (Remuneration) Regulations 2013 remunerates litigators for Crown Court work. The formula that determines payment includes the number of pages of prosecution evidence (PPE) served in varying bands of up to 10,000 PPE. In recent years there has been a steep increase in cases with high levels of PPE, which has increased overall expenditure on the LGFS. This follows a Costs Judge decision that broadened the circumstances in which electronic evidence could be paid as PPE. This was not the policy intention and neither this decision nor the resultant cost was foreseen. Intervention is necessary to better scrutinise work reasonably and actually undertaken.

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

The objective is to return LGFS expenditure to 2013-14 levels in the short term, while ensuring that we pay fairly for work actually and reasonably done. In the longer term we want to work with the Law Society and other representative bodies to reform the scheme so that we measure the relative complexity of cases in a way that does not involve counting pages, but takes into account the totality of the evidence. We would like to introduce a revised and future-proof scheme by early 2018, or earlier if possible.

**What policy options have been considered, including any alternatives to regulation?**

The following options have been considered:


- Option 0 – Do nothing
- Option 1 – Reduce the threshold for remuneration of pages of prosecution evidence (PPE) to 6,000 in the LGFS

Option 1 is the preferred option as it most closely delivers the policy objectives.

**Will the policy be reviewed?** It will not be reviewed. **If applicable, set review date:** Month/Year

Does implementation go beyond minimum EU requirements?			Yes/ No / N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		Micro Yes/No	Small Yes/No	Medium Yes/No	Large Yes/No
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> 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) the benefits justify the costs.**

Signed by the responsible Minister:  Date: 10-02-17

# Summary: Analysis & Evidence

# Policy Option 1

Description: Reduce the threshold for pages of prosecution evidence (PPE) to 6,000 in the LGFS

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
15-16	15-16				n/a

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	£50,000	£26m	n/a
High	£100,000	£36m	n/a
Best Estimate			

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

- Legal aid providers conducting cases with at least 6,000 PPE would receive around £26m to £36m less for LGFS payments.
- There would be one-off implementation costs to the Legal Aid Agency of between £50,000 and £100,000 and may require additional resource to conduct the special preparation claims, currently estimated to be around 3 full time equivalent staff.

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

- There would be greater administrative costs to providers in making a special preparation claim for cases above 6,000PPE.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low		£26m	n/a
High		£36m	n/a
Best Estimate		£m	n/a

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

- Legal aid fund expenditure would reduce from current levels by around £26m to £36m.
- Legal aid clients currently contributing to their legal aid defence costs may make a lower level of contribution under the proposal.

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

None

### Key assumptions/sensitivities/risks

- It is assumed that around 20% to 80% of bills would claim special preparation under the proposed scheme
- It is assumed that the remuneration for special preparation would be for a Band B solicitor inside London, on average

### Discount rate

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

Signed by the responsible Minister:

*Ain Heald*

Date: 10-02-17

# Evidence Base (for summary sheets)

## A. Background

1. In most criminal cases heard in the Crown Court litigators providing legal aid representation are remunerated under the Litigators' Graduated Fee Scheme (LGFS) set out in the Criminal Legal Aid (Remuneration) Regulations 2013. In 2015-16, £341m was paid to litigators under the scheme, including VAT and disbursements.
2. The LGFS includes a number of proxies for complexity which determine the amounts paid to litigators in individual cases; including, the type of offence; the type of case; the number of pages of prosecution evidence (PPE) served; the number of defendants and the trial length. One of the main factors that determines the fees paid is the amount of PPE served. This factor was, at the time the regulations were implemented, considered to be an appropriate measure of the complexity of individual cases and work required to be done by litigators. In addition to the main fee, litigators may claim for special preparation if there are pages in excess of 10,000. This is paid at hourly rates based on an assessment of what would constitute a reasonable length of the time spent reading those pages, if the provider submits a successful application for additional payment. Under the current scheme the client may be required to make a contribution to their defence costs. If convicted, the amount that a client contributes is based on the case cost, disposable income and their capital.
3. The original policy intention of using PPE as a proxy for case complexity was to reflect the fact that where more written evidence (particularly witness statements and paper exhibits) is served by the prosecution, more work has to be done by defence litigators and advocates. However, the Ministry of Justice (MoJ) was always of the view that electronic evidence should fall into a different category, as it did not accurately reflect case complexity in the same way as paper evidence. From 2008 to 2012 evidence served electronically was paid at hourly rates for the time reasonably taken to view the relevant material and was not counted as PPE under the LGFS.
4. In 2012, the regulations were amended to reflect the fact that more evidence was being served digitally so that electronic evidence (that would formerly have been served on paper) would count as PPE for LGFS purposes. The intention was to maintain the status quo and that electronic material that would always have been served in electronic form previously would remain excluded from the definition of PPE.
5. However, a Costs Judge decision in R v Napper in August 2014 broadened the circumstances in which electronic evidence could be paid as PPE. Under the LGFS, every page (up to a 10,000 cap) increases the graduated fee paid. Between 2013-14 and 2015-16, there has been a 28% increase in the number of bills with PPE between 6,000 and 9,999 and a 180% increase in those bills with PPE of 10,000 or more (i.e. three times as many bills). This equates to around 41% increase in modelled expenditure on bills between 6,000 and 9,999 PPE and 158% increase in modelled expenditure on bills with PPE of 10,000 or more<sup>1</sup>.

## B. Rationale and policy objectives

6. Since 2013-14, despite caseloads falling and an 8.75% fee cut, average LGFS costs per bill have risen sharply, in part because of a decision by costs judges that expanded the range of evidence that counts as pages of prosecution evidence, particularly electronic evidence such as mobile phone records. In the longer term we want to work with the Law Society and other representative bodies to reform the scheme so that we measure the relative complexity of cases in a way that does not

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<sup>1</sup> Source: LAA Administrative Data

involve counting pages, but takes into account the totality of the evidence, whether paper or not. We would like to introduce a revised and future-proof scheme by early 2018, or earlier if possible.

7. However, in the short term the policy objective is to return expenditure to 2013-14 levels, while ensuring that we pay fairly for work actually and reasonably done.

## C. Affected Stakeholder Groups, Organisations and Sectors

8. The proposal assessed in this Impact Assessment (IA) will directly affect the following groups:
  - Service providers; specifically litigators
  - Future legal aid clients
  - The Legal Aid Agency (LAA)

## D. Description of Options Considered

9. To meet the above policy objectives, the following options are considered in this IA:

- **Option 0: Do nothing**
- **Option 1: Reduce the threshold for PPE to 6,000 in the LGFS**

*Option 0: Retain existing arrangements for the LGFS*

10. The current provisions for the LGFS are established in regulations. Should the 'do nothing' option be pursued, the existing arrangements will remain in place, and the system would operate as it does at present. However, it would fail to address all of the policy objectives outlined above.

*Option 1: Reduce the threshold for PPE to 6,000 in the LGFS*

11. We propose, subject to the outcome of the consultation exercise, reducing the 10,000 threshold for PPE and moving claims for pages in excess of 6,000 into the special preparation provisions. The special preparation scheme is designed to compensate litigators for time spent considering evidence, rather than using that evidence as a proxy for an overall assessment of adequate compensation for dealing with the case as a whole. Special preparation claims are assessed on merit, with a higher number of hours able to be authorised for reading particularly complex and/or relevant documentation, so there is a degree of flexibility available for the most complex/exceptional cases.
12. Option 1 is the preferred option as it would best meet the policy objectives outlined above.

## E. Cost and Benefit Analysis

13. This Impact Assessment (IA) identifies impacts on individuals, groups and businesses in England and Wales, with the aim of understanding what the overall impact to society might be from implementing the options considered. The costs and benefits of the policy proposal are compared to the 'do nothing' option. As this option is being compared to itself, its costs and benefits are zero, as is its associated Net Present Value (NPV).
14. IAs place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are important aspects that cannot sensibly be monetised which might include how the proposals impact differently on particular groups of society or changes in equity and fairness.

15. The estimates in this IA have been rounded: expenditure has been rounded to the nearest £1million unless stated otherwise. Volumes have been rounded to the nearest 1,000. Consequently, totals may not agree due to rounding. Note that we have generally presented figures as a range, as uncertainty over the figures remains due to our modelling assumptions.

## The current LGFS

16. To set the context for this reform proposal, the following tables outline total expenditure and volumes under the current scheme.

17. Table 1 shows the total expenditure on the LGFS by offence category during the previous three financial years on closed cases, illustrating that expenditure has increased by around £49m (17%) from £292m to £341m between 2013-14 (before R v Napper) and 2015-16 (after R v Napper). The greatest increases occurred in offence categories B and K where expenditure increased by £34m and £14m respectively. However, the fee schemes changed over this period, with a fee cut of 8.75% implemented from March 2014<sup>2</sup>. This suggests that the increase seen in expenditure would have been greater if the 8.75% fee cut had not been implemented.

**Table 1: LGFS expenditure between 2013-14 and 2015-16**

	2013-14	2014-15	2015-16
A Homicide and related grave offences	£29m	£32m	£30m
B Offences involving serious violence or damage and serious drug offences	£115m	£128m	£149m
C Lesser offences involving violence or damage, and less serious drug offences	£23m	£23m	£21m
D Serious sexual offences and offences against children	£7m	£8m	£9m
E Burglary, etc	£7m	£6m	£6m
F Other offences of dishonesty	£9m	£8m	£7m
G Other offences of dishonesty	£2m	£2m	£2m
H Miscellaneous other offences	£14m	£13m	£13m
I Offences against public justice and similar offences	£5m	£5m	£5m
J Serious Sexual Offences	£34m	£37m	£38m
K Other offences of dishonesty (high value)	£48m	£51m	£62m
<b>Total</b>	<b>£292m</b>	<b>£313m</b>	<b>£341m</b>

Source: Legal aid statistics England and Wales more detailed data: April to June 2016

18. During the same period the overall workload in the LGFS has decreased by around 2% (around 2,400 bills), as illustrated in Table 2.

**Table 2: LGFS workload (bills) between 2013-14 and 2015-16**

	2013-14	2014-15	2015-16
A Homicide and related grave offences	1,400	1,400	1,300
B Offences involving serious violence or damage and serious drug offences	28,300	29,700	28,900
C Lesser offences involving violence or damage, and less serious drug offences	18,600	19,000	17,900
D Serious sexual offences and offences against children	2,500	2,900	3,100
E Burglary, etc	10,900	11,200	9,100
F Other offences of dishonesty	8,800	8,700	7,400
G Other offences of dishonesty	1,500	1,300	1,000
H Miscellaneous other offences	29,500	29,900	28,600
I Offences against public justice and similar offences	2,000	2,100	1,900
J Serious Sexual Offences	6,800	7,900	8,500
K Other offences of dishonesty (high value)	1,600	1,600	1,700
<b>Total</b>	<b>111,900</b>	<b>115,700</b>	<b>109,500</b>

Source: Legal aid statistics England and Wales more detailed data: April to June 2016

<sup>2</sup> Note, between 1 July 2015 and 31 March 2016, an additional 8.75% fee cut was applied.

19. Combining the expenditure and workload, we can estimate average costs per bill for the LGFS over the same period, as illustrated in Table 3. Across the total caseload, average costs have increased from around £2,600 in 2013-14 to around £3,100 in 2015-16, an increase of around 19%. The largest increases have been for offence classes B (27%), I (26%) and K (21%). Offence class B makes up a substantial proportion of the overall costs of the scheme (£149m), with offence class K contributing around £62m, while offence class I has relatively small expenditure of around £5m in 2015-16.

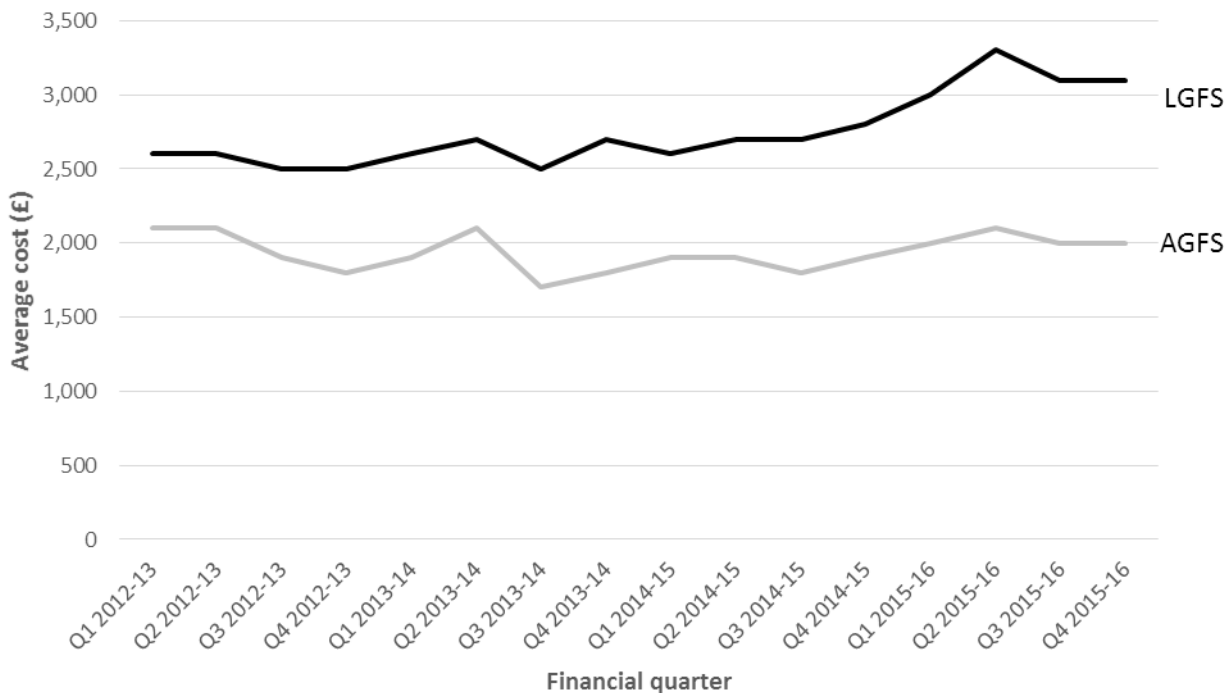
**Table 3: Average cost per bill for the LGFS between 2013-14 and 2015-16**

	2013-14	2014-15	2015-16	Percentage change between 2013-14 and 2015-16
A Homicide and related grave offences	£21,200	£22,400	£22,600	7%
B Offences involving serious violence or damage and serious drug offences	£4,100	£4,300	£5,100	27%
C Lesser offences involving violence or damage, and less serious drug offences	£1,200	£1,200	£1,200	-5%
D Serious sexual offences and offences against children	£3,000	£2,700	£2,900	-3%
E Burglary, etc	£600	£600	£700	12%
F Other offences of dishonesty	£1,000	£900	£1,000	3%
G Other offences of dishonesty	£1,600	£1,500	£1,700	8%
H Miscellaneous other offences	£500	£400	£400	-3%
I Offences against public justice and similar offences	£2,200	£2,400	£2,800	26%
J Serious Sexual Offences	£5,100	£4,700	£4,400	-13%
K Other offences of dishonesty (high value)	£29,900	£32,800	£36,000	21%
<b>Overall average</b>	<b>£2,600</b>	<b>£2,700</b>	<b>£3,100</b>	<b>19%</b>

Source: Legal aid statistics England and Wales more detailed data: April to June 2016

20. Figure 1 demonstrates the average costs per bill for the LGFS over time since 2012-13. As a comparator, the average costs per bill for the Advocate Graduated Fee scheme (AGFS) are also illustrated. The chart indicates that AGFS average costs have remained broadly constant over time, whereas the LGFS average costs have increased since 2013-14.

**Figure 1 Average costs per bill for the LGFS and AGFS by quarter since 2012-13**



Source: Legal aid statistics England and Wales more detailed data: April to June 2016

21. Further investigation of LAA administrative data suggests that there has been little change for bills with up to 5,999 PPE and an increase in the number of bills with at least 6,000 PPE (see Table 4). Around 1,000 bills had at least 6,000 PPE in 2013-14, compared to around 2,100 bills in 2015-16. This includes a 28% increase in the number of bills between 6,000 and 9,999 PPE and a 180% increase (i.e. a nearly threefold increase) in the number of bills with at least 10,000 PPE. Around 2% of all bills closed in 2015-16 had at least 6,000 PPE.
22. The expenditure on these bills has been modelled under the current fee scheme to give a consistent picture, since the actual expenditure would have been based on several different schemes. The modelled expenditure is based upon fees and excludes VAT and disbursements as paid. For bills with between 6,000 and 9,999 PPE, a 28% increase in volume corresponds to a 41% increase in modelled expenditure, and for bills with at least 10,000 PPE, a 180% increase in volume corresponds to a 158% increase in modelled expenditure.

**Table 4: Volume and modelled expenditure (excluding VAT and disbursements) on bills by PPE band between 2013-14 and 2015-16**

PPE Band	Volume of cases				Modelled expenditure			
	2013-14	2014-15	2015-16	Percentage Change from 2013-14 to 2015-16	2013-14	2014-15	2015-16	Percentage Change from 2013-14 to 2015-16
0-5,999	83,100	87,700	84,300	1%	£135m	£135m	£130m	-4%
6,000 - 9,999	500	600	700	28%	£20m	£25m	£30m	41%
10,000+	500	800	1,500	180%	£30m	£50m	£80m	158%

Note, modelled assuming all cases were on the current fee scheme (i.e. with an 8.75% fee cut from 2013-14 fees). These figures do not match the total expenditure figures published by LAA statistics, which are based on closed cases for each financial year and on several fee schemes. Modelled expenditure figures rounded to nearest £5m.

Source: LAA administrative data

23. Over the same period, the proportion of claims that successfully claimed special preparation decreased from around 45% to around 20% of all claims above 10,000 PPE. This finding is counter to the increase in volumes for bills up to 10,000 PPE.
24. On 1st April 2013, there was a change in the criteria to contract Very High Cost (Crime) Cases, which would have shifted cases estimated to last between 40 and 60 days at trial to the LGFS. Given the small volumes involved, and the time between this change and the increase seen in the LGFS, we do not believe this change substantially affected average costs to the LGFS.

### **Option 1: Reduce the threshold for pages of prosecution evidence (PPE) to 6,000 in the LGFS**

#### **Methodology**

25. To model Option 1 we apply the proposed amended scheme as set out in the consultation document. The changes involve a reduced initial fee for bills above 6,000 PPE, set at 6,000 pages.
26. Under the proposed scheme, cases over 6,000 PPE would be eligible to apply for special preparation. Currently around 20% of bills with over 10,000 pages successfully apply for special preparation. We expect this percentage would increase in future if the PPE threshold were to be reduced from 10,000 PPE to 6,000 PPE, as litigators would receive a lower initial fee. However, we do not have any evidence to suggest the scale of the increase, although we think it unlikely that every single case would claim for special preparation. Therefore, for PPE above 6,000, we assume that around 20% to 80% of bills successfully apply for special preparation.

27. In the main analysis, special preparation is assumed to be paid on average at the hourly rate set out in the remuneration regulations for a Band B solicitor in London. This assumption is varied in the sensitivity analysis.

### **Costs of Option 1**

#### *Legal aid providers*

28. It is estimated that legal aid providers submitting claims with above 6,000 PPE would receive around £26m to £36m lower fee payments under the proposal, assuming that between 20% and 80% of bills claim special preparation.

29. There would be greater administrative costs to providers in making a special preparation claim for cases above 6,000 PPE.

#### *Future legal aid clients*

30. Clients would still have access to the same criminal legal aid services as they do now.

#### *The LAA*

31. We do not expect there would be a cost to the legal aid fund. However, it is a demand led system and therefore there is an inherent risk that there may be more or less expenditure through changes in case mix.

32. The LAA have indicated that the proposal would require additional validation activity for special preparation claims, therefore they may require a small number of additional staff, currently estimated to be around 3 full time equivalent staff.

33. One-off implementation costs to the LAA have been estimated at approximately £50,000 - £100,000.

### **Benefits of Option 1**

#### *Legal aid providers*

34. There are no financial benefits for legal aid providers.

#### *Future legal aid clients*

35. Clients would still have access to the same criminal legal aid services as they do now. The proposal is expected to lead to lower legal aid fee payments to litigators. Where clients are due to make a contribution, the proposal may result in them making a lower level of contribution under the proposal. Given the available data, we have been unable to undertake detailed analysis at the individual level but we will give this further consideration following consultation responses.

#### *The LAA*

36. It is estimated that legal aid expenditure would be reduced by around £26m to £36m. However, it is a demand led system and therefore there is an inherent risk that there may be more or less expenditure through changes in case mix.

37. An additional benefit is that the LAA would better pay for work actually and reasonably undertaken.



## F. Assumptions, risks and sensitivities

### Assumptions and Risks

38. The key assumptions and risks are highlighted below. More detail on the risks are explored in the sensitivity analysis.

	<b>Assumptions</b>	<b>Risks</b>
2015-16 data	It has been assumed that the volumes and case mix in 2015-16 will continue. No changes to any inputs have been made in the main analysis (i.e. each case with the exact PPE and offence has been modelled under the proposed scheme).	<p>If there were an increase in cases with above 6,000 PPE, the fee payments to litigators and associated legal fund expenditure would increase.</p> <p>If case mix changes in future, fee payments to litigators and associated expenditure to the legal aid fund could increase or decrease.</p>
Special preparation	Whilst the absolute number of authorised special preparation claims has increased in the last three financial years, the proportion of authorised special preparation claims over 10,000 PPE has decreased to around 20%. It is thought that there would be an increase in the proportion of authorised special preparation claims with the reduction in the PPE cap cut off, but there is no evidence to suggest any increase. The main analysis assumes a range of 20% to 80% of claims over 6,000 PPE would successfully claim Special Preparation.	If the proportion of authorised special preparation claims were to increase to above 80%, the fee payments to litigators and associated legal fund expenditure would increase.
Solicitor rates for special preparation	<p>The main analysis assumes a Band B London rate set out in the remuneration regulations of £43.12 per hour to read pages of evidence.</p> <p>Sensitivity analysis assumes a Band A London rate at £50.87 per hour or a Band C outside London rate at £27.15 per hour.</p> <p>The actual fee paid to litigators is subject to an assessment of reasonableness by the determining officer in accordance with the remuneration regulations.</p>	If the actual rate paid on average were higher, the fee payments to litigators, and associated legal fund expenditure, would increase. If the actual rate paid on average were lower, the fee payments to litigators and associated legal fund expenditure would decrease.
Cases with exactly 10,000 PPE	There are a substantial number of bills that are recorded in LAA administrative data as having exactly 10,000 PPE. We believe this is due to the LAA entering 10,000 PPE, when the actual page count is higher, because bills are only paid up to 10,000 PPE. As we do not know the	If the bills currently recorded as having exactly 10,000 PPE have a substantially higher number of pages on average than those currently recorded as having more than 10,000 PPE, and this leads to higher special preparation payments, fee payments

exact number of pages, we assume that the average costs of the proposed policy for bills at 10,000 PPE are the same as the average costs for bills above 10,000 PPE.

to litigators, and associated legal fund expenditure, would increase.

## Sensitivity analysis

39. The main risk to the analysis is the wide band for special preparation. We have modelled around 20% to 80% special preparation claims under the proposed scheme resulting in uncertainty of around £10m.
40. Sensitivity analysis was conducted to explore the impact of varying the hourly rate paid under special preparation (see
41. Table 5). The main analysis assumed a Band B solicitor inside London.
42. As a lower bound, the analysis was re-estimated using a Band A solicitor rate inside London. This could decrease the savings to the LAA and corresponding costs to litigators from a range of around £26m to £36m, to a range of around £23m to £35m.
43. As an upper bound, the analysis was re-estimated using a Band C solicitor rate outside London. This could increase the savings to the LAA and corresponding costs to litigators from a range of around £26m to £36m, to a range of around £31m to £37m.
44. In summary, the sensitivity analysis suggests that the proposal is estimated to result in reduced fee payments to litigators claiming for more than 6,000 PPE, and an associated reduction in the legal aid fund expenditure, of around £23m to £37m.

**Table 5: Summary of savings to the LAA and corresponding costs to litigators by solicitor rate**

<b>Solicitor rate assumption</b>	<b>Savings to the LAA/costs to litigators: 20% special preparation rate</b>	<b>Savings to the LAA/costs to litigators: 80% special preparation rate</b>
Main analysis: Band B (in London)	£36m	£26m
Lower bound: Band A (in London)	£35m	£23m
Upper bound: Band C (outside London)	£37m	£31m

## G. Wider Impacts

45. The separate Equalities Statement gives further details on equalities impacts.

46. We have no evidence to suggest that families would be disproportionately adversely affected by the proposal.
47. As we are not proposing to restrict the litigation market, we do not consider the proposal would have an impact on legal services through the medium of Welsh.

## **H. Monitoring and evaluation**

48. The LAA and MoJ continually monitor the operation of the legal aid scheme. As this is intended to be an interim measure there are no plans for a formal evaluation exercise.