

Title: Reform the Advocates' Graduated Fee Scheme IA No: MoJ033/2016 Lead department or agency: Ministry of Justice (MoJ) Other departments or agencies: Legal Aid Agency (LAA)	Impact Assessment (IA)				
	Date: 05/01/17				
	Stage: Development/ Options				
	Source of intervention: Domestic				
	Type of measure: Secondary legislation				
	Contact for enquiries: David Stokes 020 3334 4281				
Summary: Intervention and Options					RPC Opinion: Not applicable

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year	In scope of One-In, Two-Out?	Measure qualifies as
			N/A	N/A

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

The Advocates' Graduated Fee Scheme (AGFS) is used to remunerate criminal defence advocates in the Crown Court. The current scheme was last subject to major change in 2007, and the government considers it is in need of reform. The AGFS uses proxies for complexity to determine the appropriate fee, and places a heavy reliance on factors that are increasingly unsuitable in terms of advocacy. The advent of court modernisation reforms such as the Crown Court Digital Case System are changing our justice system for the better and we need to ensure the way we remunerate advocates supports this.

What are the policy objectives and the intended effects?

We have had some guiding principles when designing these reforms, detailed in the consultation document. These include, amongst other things, cost-neutrality against 2014-15 case mix and volumes, ensuring the scheme pays for work done, and ensuring the reforms are consistent with wider reforms in the Criminal Justice System. We acknowledge that some of the principles are in conflict with each other, and have attempted to find the right balance between them. The intended effect is to deliver a scheme which delivers more appropriate remuneration for advocates, reflecting work done, whilst retaining cost neutrality.

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

The following options have been considered:

- Option 0 – Do nothing
- Option 1 – Reform the Advocates' Graduated Fee Scheme

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

Will the policy be reviewed?

We would monitor the impacts of this policy over the initial years following implementation.

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 N/A	< 20 N/A	Small N/A	Medium N/A	Large N/A		
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)					Traded: N/A		Non-traded: N/A		

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: 5 January 2017

Description: Reform the Advocates' Graduated Fee Scheme

FULL ECONOMIC ASSESSMENT

Price Base Year 2016-17	PV Base Year N/A	Time Period Years one year – steady state	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant)	Total Cost (Present Value)
Low				
High				
Best Estimate	£1m		£0m	£1m

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

- The proposed scheme has been designed to be cost neutral overall on the basis of 2014-15 data. Therefore, fee payments to advocates and overall expenditure to the legal aid fund relating to the proposed reforms are estimated to be cost neutral. The implementation cost to the LAA is currently estimated at approximately £1m (an administrative cost).
- Within each year, there are likely to be advocates that gain from the proposals and those whose fees would be lower depending on the case mix conducted. Similarly, as fees for each individual case would change, some legal aid clients would be expected to pay a greater overall level of contribution and some would make a lower overall level of contribution.

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

None

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant)	Total Benefit (Present Value)
Low				
High				
Best Estimate			£0m	£0m

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

- As above, the proposed scheme has been designed to be cost neutral overall on the basis of 2014-15 data. Therefore, fee payments to advocates and overall expenditure to the legal aid fund relating to the proposed scheme is designed to be cost neutral based on 2014-15 data.
- Within each year, there are likely to be advocates that gain from the proposals and those whose fees would be lower depending on the case mix conducted. Similarly, as fees for each individual case would change, some legal aid clients would be expected to pay a greater overall level of contribution and some would make a lower overall level of contribution.

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

The relative payments to the advocates have been designed to more appropriately reflect work done.

Key assumptions/sensitivities/risks

N/A

- Costs and benefits have been estimated using 2014-15 data. This assumes constant volumes and case mix.
- It is assumed that incentives to the fee scheme would remain the same.
- Case file reviews and matching to HMCTS data has been conducted where there is insufficient information available. Sensitivity analysis has been undertaken to estimate the impact of changes in these assumptions.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of	Measure qualifies
Costs: N/A	Benefits: N/A	Net: N/A	No	N/A

Signed by the responsible Minister: _____ Date: _____

Evidence Base

A. Background

1. The Advocates' Graduated Fee Scheme (AGFS) is used to remunerate criminal defence advocates in the Crown Court. The current scheme has been in place for around twenty years, and was last subject to significant reform in 2007, following recommendations made by Lord Carter.
2. The current scheme determines fees through a complex formula that is reliant on the advocate type, the offence, the length of trial, the number of pages of prosecution evidence and the number of prosecution witnesses amongst others. This is supplemented through additional discrete fees for other work. It also "bundles" certain hearings into the graduated brief fee, rather than paying for them individually. The bundled fee includes 2 days of trial and 5 standard appearances. Daily attendance fees are paid at a reduced rate between 40 and 60 days. There is heavy reliance on pages of prosecution evidence (PPE), which represents a significant administrative burden on advocates and administrators alike. This is becoming increasingly burdensome, given the movement towards more electronic evidence (with reforms such as the Crown Court Digital Case System), and will only become more so in the future. Under the current scheme the client may make a contribution to their defence costs. The amount that is contributed is based on the case cost and disposable income.
3. The government considers that the AGFS requires reform for a number of reasons. Since the scheme was last reformed, there have been considerable changes to the way criminal cases are run, and the way that evidence in them is served. Due to modernising reforms such as the Crown Court Digital Case System, there has been an increase in the use of electronic evidence. The current payment arrangements, whereby some of this material is "converted" into pages from electronic formats, no longer fully reflects the work required of advocates in the Crown Court.
4. The government also considers that the existing arrangements are unnecessarily complex and complicated for advocates and administrators alike. We understand that it can often be unclear to an advocate what their fee will be at the point of taking on a case, and the current arrangements compound the issue. Indeed, the current scheme can be inflexible and rigid, especially in instances when new offences are established, and they have to be incorporated in the scheme. A large miscellaneous class of offences undermines confidence in the accuracy of payments for new offence types and may not accurately reflect the actual work done by an advocate. As such, we are proposing to implement a simpler, clearer scheme for all advocates, in which a fee can be easily calculated at the outset, and which will allow for flexible adaptation to a modern Criminal Justice System.
5. Better Case Management (BCM) Reforms, being put in place as a result of Sir Brian Leveson's Review of Efficiency in Criminal Proceedings, are also transforming the way our criminal courts operate. The volume of overall Crown Court cases, and the distribution of cases between offences, have all changed since the scheme was last refreshed. These factors can and should be addressed within a new, modern fee scheme, designed to complement the BCM agenda.

B. Policy Rationale and Objectives

6. In 2015, the Bar Council published proposals for a revised AGFS. An AGFS working group consisting of representatives from the professions has been jointly developing a proposal for reform over the last few months. The results of this collaborative working are presented in full in the consultation paper.

7. The proposed reforms should deliver a clearer, less complex fee scheme for advocates, and the department alike. Remuneration under the scheme should more accurately reflect the work done. The scheme should support and promote wider reforms and support a modernised Criminal Justice System. The proposed scheme should retain the principle of cost-neutrality against 2014-15 case mix and fund spend.
8. To address these issues and in developing our proposals for AGFS reform, we have focussed on the following guiding policy objectives. These are for the proposed reforms to:
 - be cost neutral based against 2014-15 case mix and volumes;
 - minimise reliance on pages of prosecution evidence served (PPE);
 - reflect, and pay for, the actual work done;
 - support getting the right outcome in individual cases, and remove as far as possible any perverse incentives;
 - be consistent with and, where appropriate, support wider reforms - for example, the BCM programme and wider Criminal Justice System reforms; and
 - place no extra administrative burden on Her Majesty's Courts and Tribunals Service (HMCTS), the Legal Aid Agency (LAA), and practitioners than the current scheme – and, ideally, lead to a reduced burden.
9. The AGFS working group, and the government, openly acknowledges that there are tensions between some of these principles; the proposal presented aims to find the right balance between them.

C. Affected Stakeholder Groups, Organisations and Sectors

10. The proposals assessed in this Impact Assessment (IA) would directly affect the following groups:
 - Legal aid service providers; in particular solicitor advocates and barristers
 - Future legal aid clients
 - The LAA

D. Description of Options Considered

11. To meet the above policy objectives, the following two options are considered in this IA:
 - **Option 0 / 'Do nothing': Retain existing arrangements for the AGFS**
 - **Option 1: Reform the AGFS**

Option 0 / 'Do nothing': Retain existing arrangements for the AGFS

12. The current provisions for the AGFS 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: Reform the AGFS

13. Under this option the AGFS would be fundamentally reformed to address some of its existing shortcomings and ensure it is coherent with a modernised criminal justice system.
14. The total fee paid to advocates would continue to be made up of two components: the graduated fee, and any additional fixed fees. However, we propose that the graduated fee would be made up of only two key elements: the basic fee (based on offence category and banding, and category of advocate), and a daily attendance fee for each trial day after the first day (determined by case category and banding, and category of advocate).
15. The 'basic' fee would be dependent on the classification of the offence, determined by its nature and severity, and the advocate type. This fee would also include a "bundled" payment for attendance at day 1 of a trial; and standard appearances in excess of the first six standard appearances. We propose to remove the uplifts for evidence and witnesses from the graduated fee.
16. The daily attendance fee is dependent on the classification of the offence; the category of the advocate; and the number of trial days upon which the advocate attends at court (there would no longer be a reduction in the rate after 40 days).
17. We propose to pay fixed fees for other individual appearances and standard appearances (up to the first six). The level of the individual fees would continue to be dependent on the length of the appearance, the nature of the appearance, and the category of advocate.
18. Payments for guilty pleas and cracked trials would be dependent on the classification of the offence, the category of the advocate and when a guilty plea is entered. Cracked trials under the proposed scheme are defined as a case where the defendant pleads guilty, or the case collapses for another reason, following the defence's completion (and courts' acceptance) of the certificate of trial readiness but before the start of the trial. Any case in which the defendant pleads guilty, or the case collapses for another reason, before this stage of trial readiness is paid as a 'guilty plea'. The brief fee for a guilty plea would be 50% of a trial fee, and a cracked trial fee 85% of a trial fee. We are also proposing to maintain the facility for other payments under the scheme dependent on the nature of the case (i.e. an additional uplift for additional defendants/indictments, travel expenses etc.).
19. Payments would differ depending on advocate type. A QC would receive double a junior alone fee, and a leading junior would receive 50% more than a junior alone. Led juniors would be paid as junior alones.
20. Option 1 is the preferred option as it best meets the policy objectives outlined above.

E. Cost and Benefit Analysis

21. This 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 each option are compared to the 'do nothing' option. 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.

22. The estimates in this IA have been rounded: estimates below £10m have been rounded to the nearest £100,000 and those above £10m to the nearest £1m. The volume of cases has been rounded to the nearest 100. Consequently, totals may not agree due to rounding. Closed case expenditure and volumes have been used in this IA.

Option 0: Retain existing arrangements for the AGFS

23. To set the context for this reform proposal, the following tables outline total expenditure, volume and information around providers under the current scheme.

24. Table 1 shows that in 2014-15 and 2015-16, around £213m and £226m respectively was spent on the AGFS. There were around 112,900 bills in 2014-15, with a slight decrease in volumes to around 111,000 bills in 2015-16.

Table 1: Total volumes and expenditure on AGFS in 2014-15 and 2015-16

AGFS	Volumes	Expenditure (including VAT)
2014 - 15	112,900	£213m
2015 - 16	111,000	£226m

Source: Legal aid statistics England and Wales, April to June 2016

25. Table 2 illustrates the majority of providers are self-employed advocates, receiving £175m of expenditure in 2015-16, and employed advocates receive around £50m. In terms of overall AGFS expenditure, self-employed and employed advocates received around 78% and 22% of expenditure in 2015-16 from the AGFS respectively.

Table 2: Providers by advocate type 2014-15 and 2015-16

	2014-15		2015-16	
	Expenditure	Percentage	Expenditure	Percentage
Self-employed Advocates	£162m	76%	£175m	78%
Employed Advocates	£51m	24%	£50m	22%
Total	£213m	100%	£225m	100%

Note, the total expenditure in Table 2 (£225m) is less than the total in Table 1 (£226m) for 2015-16, because the annual expenditure was updated in the latest publication. The provider statistics are published annually and have not been updated since the quarterly release.

Source: Legal aid statistics England and Wales provider and area data, January to March 2016

Option 1: Reform the AGFS

Methodology

26. The Bar Council provided the MoJ with a proposed fee table and how the existing offences might be categorised under the proposed scheme. This was subsequently adjusted following discussions with

the AGFS working group. LAA management information was used to model the cost of the proposed scheme using 2014-15 data, excluding VAT. 2014-15 data has been used as the baseline, as this was the data used in all discussions with the AGFS working group throughout the year. The fees under the proposed scheme was compared to the fees under the current scheme. As 2015-16 data has been published since the discussions began, sensitivity analysis was conducted on the latest year of available data.

27. The majority of cases (94%) had information available to be categorised under the proposed scheme. For those cases that did not have the information to be categorised on a one to one basis in the proposed scheme, in particular for murder, fraud and drugs, case file reviews were undertaken. These allowed us to assign probabilities of a case falling within the new offence categorisation. Therefore, for these cases there is not a one to one mapping from the current AGFS to the proposed scheme.
28. Under the current AGFS, the first five hearings are bundled into the basic fee and so it is unknown exactly how many hearings there are from LAA administrative data. To estimate the average number of hearings, HMCTS management information was matched to the AGFS data. The data was only used where there was an exact match. The average number of standard appearances by offence and advocate type was estimated, and used in the AGFS model. 2015-16 hearings data was used to be more representative of recent policy changes such as BCM.
29. Using LAA administrative data on the components of each case, a proposed fee was estimated consisting of:
 - A brief fee based on the offence, case outcome (guilty plea, cracked trial or trial) and advocate type;
 - A daily attendance fee based on the offence, number of days and advocate type;
 - Hearing fee based on the average number of hearings found in HMCTS data if there were fewer than five hearings, or the number of hearings found in the dataset if more than five;
 - Additional fixed fees, such as committals for sentence;
 - Uplifts, including defendant and concurrent case uplifts and retrial deflators; and
 - Changes to other miscellaneous fees were also calculated, including ineffective trials and special preparation.
30. Cases were only used in the model if the proposed fee was greater than zero and the baseline fee was greater than £99. This excluded a small number of cases that may be related to corrections (fee adjustments made to previous claims) and may not be representative of full claims.
31. Table 3 illustrates the fees modelled under the current and proposed fee schemes. The modelled fees include all AGFS and miscellaneous fees where there was sufficient information to model the case under the proposed scheme, including ineffective trials and an assumption of a 50% reduction in special preparation. The proposed expenditure is around £163m (using rounded figures), equivalent to the current expenditure when rounded to the nearest £million. It was assumed that where there was insufficient information to model fees (labelled as 'un-modelled fees' in the table), they would proportionally increase or decrease at the same rate as the modelled fees. Other

miscellaneous fees were costed at around £6.2m and remain broadly equivalent. When including VAT, the total expenditure is around £213m, as referenced in the published statistics above in 2014-15.

Table 3: Breakdown of AGFS fees

	Current Expenditure	Proposed Expenditure
Modelled AGFS fees excluding VAT	£163m	£163m
'Un-modelled' AGFS fees excluding VAT	£8.5m	£8.4m
Other miscellaneous fees excluding VAT	£6.2m	£6.2m
VAT	£35m	£35m
Total expenditure including VAT	£213m	£213m

Source: LAA administrative data, 2014-15

32. The modelled fees can be disaggregated further. The main AGFS modelling included around 105,900 cases, with a cost of around £161m under the current scheme and around £162m in the proposed scheme (see
33. Table 4). In addition, an assumption was made to tighten the special preparation definition, with an associated saving of around 50% (£1.3m). Adding these figures together, gives a broadly cost neutral modelled fee scheme at around £163m.

Table 4: Breakdown of modelled fees

	Volumes	Current	Proposed	Difference
Modelled scheme	105,900	£161m	£162m	
Special preparation		£2.6m	£1.3m	
Total	105,900	£163m	£163m	0%

Source: LAA administrative data, 2014-15

34. Whilst the overall proposed scheme is estimated to be cost neutral there would be a redistribution of fees between case types, offence types and advocate types. Please see Section G for distributional analysis demonstrating the redistribution of fees by case outcome, offence type (under the current and proposed scheme) and advocate type. In addition, sensitivity analysis was conducted to test the sensitivity around certain assumptions, including the case file reviews, volumes and case mix.

Costs of Option 1

Advocates

35. The proposed AGFS has been designed to be cost neutral overall on the basis of 2014-15 data. However, within each year, there are likely to be advocates who, compared to the baseline option, would gain from the proposals and those whose fees would be lower depending on the case mix conducted. For example, advocates conducting guilty pleas and cracked trials would be likely to receive lower fees under the proposed scheme than at present. For more information, please see the distributional analysis.
36. There may be adjustment costs while advocates familiarise themselves with the proposed scheme. We have not been able to estimate these costs, but assume they would be small.

Future legal aid clients

37. Clients would still have access to the same criminal legal aid services as they do now. Overall the scheme has been designed to be cost neutral on the basis of 2014-15 data when compared with the current scheme in 2014-15, which may mean that the overall value of contributions from legal aid clients should remain the same in future on aggregate. However, as fees for each individual case would change, some clients would be expected to pay a greater overall level of contribution and some a lower overall level of contribution. 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

38. The proposed AGFS has been designed to be cost neutral overall using 2014-15 case mix and volumes, and so we do not expect there would be an impact on total expenditure of 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.
39. There would be a cost to the LAA in implementing any reformed AGFS. This would need to cover training and guidance to advocates and staff; plus system changes to ensure the right IT is in place. Implementation cost is currently estimated at approximately £1m, based on latest LAA assessments.

Benefits of Option 1

Advocates

40. The proposed AGFS has been designed to be cost neutral overall in 2014-15. Within each year, there are likely to be advocates who would gain from the proposals and those whose fees would be lower depending on the case mix conducted. For example, advocates conducting trials would be likely to gain under the proposed scheme. For more information, please see the distributional analysis.
41. The relative payments of the scheme are intended to fairly remunerate advocates for the work done, by determining fees by relative complexity, as discussed in the consultation document.

Future legal aid clients

42. Clients would still have access to the same criminal legal aid services as they do now. Overall the scheme has been designed to be cost neutral, which may mean that the overall value of contributions from clients should remain the same in future on aggregate. However, as fees for each individual case would change, some clients would be expected to pay a greater overall level of contribution and some would make a lower overall level of contribution. 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

43. The AGFS proposed scheme has been designed to be cost neutral overall using 2014-15 case mix and volumes, and so we do not expect there to be an impact on the legal aid fund, other than through changes in case mix over time.

F. Assumptions and Risks

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

	Assumptions	Risks
2014-15 data	<p>It has been assumed that the volumes and case mix in 2014-15 will continue. No changes to any inputs have been made in the main analysis (i.e. each case with the exact trial length, offence, advocate type has been modelled under the proposed scheme).</p> <p>The fee used for comparison is the actual fee paid if the case was paid under the current scheme (scheme 9) of the AGFS, or is the modelled fee if on an earlier scheme. In 2014-15 there were fewer than 1,500 cases paid on a scheme other than 9 and this falls in subsequent years.</p>	<p>In the aggregate, a change in volumes (holding case mix constant) would still result in a cost neutral scheme, i.e. if all offences increased in volume by 1%, the proposed scheme would still be cost neutral. However, it is more likely that the case mix profile of offences would increase or decrease in future, which would affect the overall expenditure.</p>
Fee scheme incentives	<p>It is implicitly assumed, when using 2014-15 data, that there are no new behavioural impacts arising from these proposals and the fee scheme incentives would remain the same.</p>	<p>The proposed fee scheme could change incentives which would affect the overall cost to the LAA and HMCTS operational costs. The extent of the change would depend on the extent that the advocate is able to influence the following factors. For instance:</p> <ul style="list-style-type: none"> - unbundling the trial days and hearings could result in an increase in trials lasting 2 days or more than 40 days, and an increase in the number of hearings. This could increase the cost of the scheme. - including payment for standard appearances after the 6th appearance in the brief fee could reduce the number of cases with more than 6 hearings. This could reduce HMCTS operational costs.
LAA offence categorisation	<p>The Crown Court Remuneration (CCR) offence description has been used to categorise cases between the schemes. This is assumed to be a true reflection of the offences listed on the indictment and claimed under the current scheme.</p>	<p>The CCR may not contain sufficient information to accurately categorise cases to the proposed scheme. This could lead to higher or lower costs than estimated under the proposed scheme, depending on the specific</p>

		offence.
Offence categorisation	Defendants are often charged with multiple offences on the same indictment and the advocate can choose the offence for which they claim. It is assumed that the offence which was chosen under the previous scheme would be the same as under the proposed scheme.	The relativity of fee payments between offences would change under the proposed scheme. This would affect cases involving multiple offences as the offence charged for under the current scheme may change under the proposed scheme.
Offence categorisation – fraud	Further information was gathered from LAA administrative data to inform the categorisation of high end fraud cases i.e. cases involving large sums of money. As above, we assume no change in the proportion of cases in each category or claiming behaviour.	Summing the total fees for high end fraud cases indicates that <i>on aggregate</i> cases within this category cost less under the proposed scheme. Therefore, an increase in high end fraud cases in future could lead to higher savings, while a decrease in high end fraud cases could lead to lower savings. It may depend on the specific case as to whether the cost in the proposed scheme is higher or lower.
Offence categorisation – drugs	Further information was gathered from a data collection exercise using the Digital Case System for drugs cases. As above, we assume no change in the proportion of cases falling into each categorisation or claiming behaviour. It is assumed that 90% of imported drugs fall into the first level drugs band, and 10% into the second level drugs band.	Summing the total fees for drugs cases indicates that <i>on aggregate</i> cases within this category cost less under the proposed scheme. Therefore, an increase in drugs cases in future could lead to higher savings, while a decrease in drugs cases could lead to lower savings. It may depend on the specific case as to whether the cost in the proposed scheme is higher or lower.
Offence categorisation – Murder and manslaughter	Further information was gathered from a data collection exercise using online articles by advocate type. As above, we assume no change in proportion in each category. A sample of cases received by the Bar Council for murder gave similar results.	Summing the total fees for murder and manslaughter cases indicates that <i>on aggregate</i> cases within this category cost less under the proposed scheme. Therefore, an increase in murder and manslaughter cases in future could lead to higher costs while a decrease in murder and manslaughter cases could lead to lower costs. It may depend on the specific case as to whether the cost in the proposed scheme is higher or lower.
Hearings	Hearing inputs are particularly sensitive to overall cost of the proposed scheme. 2015-16 hearings data has been used to	Hearings data is particularly sensitive to the overall cost of the proposed scheme and has been included in the

better reflect policy changes including BCM.

The following assumptions were made on the different types of hearings:

- Plea and Case Management Hearing and Plea and Trial Preparation Hearing (PTPH) are categorised as PTPH in the proposed scheme

- Plea and directions hearing are categorised as a Further Case Management Hearing under the proposed scheme

- The following types of hearings: mention or application, bail application, preliminary hearing, bench warrant executed, custody time limit application, are categorised as mentions in the proposed scheme.

All cases with 5 or fewer hearings (i.e. they have no additional payment for standard appearances) have on average the same number of hearings as recorded in the HMCTS data for that case and offence type (e.g. current offence A-K and trial/crack/plea).

All cases with 6 or more hearings follow the same proportion of standard appearances types (and fees) as found in the HMCTS data under the proposed scheme.

sensitivity analysis.

Under the current scheme, the first five hearings are bundled into the brief fee. Under the proposed scheme, each standard appearance would be paid separately up to six. If there is an increase in the number of hearings (up to six) in future, the proposed scheme could cost more than estimated. If there is a decrease in the number of hearings (up to six) in future, the proposed scheme could cost less than estimated.

Retrials	We assume the same proportion of retrials and cracked before retrials as the average proportion of the last 3 years (2013-14 to 2015-16).	Retrials and cracked before retrials would cost less under the proposed scheme. An increase in retrials or cracked before retrials could lead to greater savings under the proposed scheme, a decrease in retrials or cracked before retrials could lead to greater costs under the proposed scheme.
Cracked trials	Under the proposed scheme a cracked trial is a case where the case cracks following the defence's completion (and courts' acceptance) of the certificate of trial readiness but before the start of the trial. Under the current scheme, a case is defined as 'cracked' if it terminates in the final two thirds ¹ . Over 90% of cracked	There is a risk that there would be fewer guilty pleas and more cracked trials if we move to a trigger of submitting the certificate of trial readiness. This would result in a net cost to the LAA.

¹ Thirds are based upon the period of time between: 1) the date upon which the trial is fixed or placed in the warned list, and, 2) the date of the actual trial fixture or the day before the date of the start of the warned list. The time in between those two dates gets split into 3 even parts, as far is possible.

cases crack in the final third. Given the lack of data and for the purposes of modelling, it has been assumed that under the proposed scheme, the definition of a cracked trial is broadly equivalent to a crack in the final third.

Cases that are not categorised	Around 6% of cases could not be categorised, primarily because they were legacy offences without sufficient detail. We assume that under the proposed scheme they follow the same categorisation as the cases that could be classified.	Overall the proposed scheme would be cost neutral. However, each individual case may cost more or less under the proposed scheme.
Special preparation	We assume that the total expenditure on special preparation reduces by 50% due to the change in definition.	If there were an increase in cases in future, the overall expenditure would increase. Similarly if there were a decrease in cases in future, the overall expenditure would decrease.

G. Distributional analysis

45. As with any structural change in scheme design, the distribution of the total legal aid payments made to advocates would vary at the individual level from the current position. The variation from the current position would likely be as a result of case mix and how much experience the advocate has.
46. Unless indicated, this section uses the modelled fees, excluding special preparation. **For the reasons outlined above, the fees for individual cases cannot be determined precisely, therefore these figures are indicative. Note, the modelled fees cost around £1m more under the proposed scheme, however, with special preparation savings, the overall scheme would be cost neutral.**

Case outcome

47. As illustrated in table 5, 2014-15 data indicates that expenditure on trials could increase by 6% as a result of the proposed scheme, this percentage could increase or decrease depending on case mix and volumes. As trials are a large proportion of total expenditure, changes in trial volume could have a large impact on the legal aid fund.
48. As illustrated in table 5 expenditure on guilty pleas and cracked trials would reduce under the proposed scheme by 11% and 7% respectively. In addition, committals for sentence would increase under the proposed scheme by around 8%.

Table 5: Modelled expenditure by case outcome

	Volumes	Current	Proposed	Difference
Trial	20,200	£98m	£104m	6%
Cracked Trial	21,300	£28m	£26m	-7%
Guilty Plea	38,400	£27m	£24m	-11%
Retrial	600	£3.1m	£3.0m	-2%
Committal for Sentence	12,600	£2.2m	£2.4m	8%
Discontinuance	2,100	£0.7m	£0.5m	-24%
Elected cases not proceeded	3,600	£0.7m	£0.7m	2%
Breach of Crown Court Order	4,100	£0.6m	£0.6m	-3%
Cracked before retrial	200	£0.3m	£0.3m	-19%
Appeal against Conviction	1,300	£0.3m	£0.4m	63%
Appeal against Sentence	1,600	£0.2m	£0.3m	32%
<i>Total of modelled expenditure</i>	<i>105,900</i>	<i>£161m</i>	<i>£162m</i>	<i>0%</i>
Special prep (excluded from main modelling)		£2.6m	£1.3m	-50%
Total	105,900	£163m	£163m	0%

Advocate type

49. As illustrated in table 6, 2014-15 data suggests that total fee payments to employed advocates would remain broadly cost neutral, with a total expenditure of around £36m using the proposed fees. Fee payments to self-employed advocates, would increase by around £1m to around £125m using the proposed fees. Note, these figures exclude special preparation.

50. As illustrated in table 6, total expenditure on self-employed QCs would increase by around 10% under the proposed scheme. It is proposed that led juniors are paid at the same level as a junior alone under the proposed scheme. Led juniors would also gain by 3% for employed advocates and 1% for self-employed advocates. Junior alone advocates would remain broadly cost neutral for employed advocates and decrease by around £1m for self-employed advocates.

Table 6: Modelled expenditure by advocate type

	Volumes	Current	Proposed	Difference
Employed advocates				
QC	0	-	-	-
Lead Junior	0	£0.5m	£0.4m	-5%
Led Junior	300	£3.2m	£3.4m	3%
Junior alone	39,000	£33m	£33m	0%
Self-employed advocates				
QC	900	£19m	£21m	10%
Lead Junior	300	£6.9m	£6.4m	-6%
Led Junior	900	£10m	£10m	1%
Junior alone	64,500	£88m	£87m	-1%
Total	105,900	£161m	£162m	0%

Note, greyed figures indicate relatively small sample sizes and figures are less robust

Source: LAA administrative data 2014-15

Offence type using current classifications

51. As illustrated in table 7, 2014-15, data suggests that expenditure on current offence type A, could increase by 14% from around £24m to around £27m under the proposed scheme. If there were to be a change in the volume of this offence type in future this could increase or decrease total expenditure. The categorisation of offences in this category were based on a case file review and are less robust than those for other offences.
52. As illustrated in table 7, 2014-15 data suggests that the largest increase in expenditure under the proposed scheme would be for current offence D, sexual offences. The expenditure on current offence D is relatively small at around £2.8m in 2014-15 and would increase to around £3.7m (32%) under the proposed scheme. However, as noted in the sensitivity analysis below, volumes are increasing for this offence.
53. As illustrated in table 7, 2014-15 data suggests that the largest decrease in expenditure under the proposed scheme would be for current offence K, offences of dishonesty where the value is in excess of £100,000. Expenditure is estimated to decrease from around £16m to £14m under the proposed scheme. However, the categorisation of offences in this category was based on a case file review and is less robust than other offences. If there are more cases at the higher end of offence class K (i.e. above £1m in future), the expenditure in this area could increase under the proposed scheme.

Table 7: Modelled expenditure by current offence classifications

Current offence	Volumes	Current	Proposed	Difference
A Homicide and related grave offences	1,900	£24m	£27m	14%
B Offences involving serious violence or damage, and serious drug offences	28,300	£56m	£53m	-5%
C Lesser offences involving violence or damage, and less serious drug offences	15,500	£13m	£13m	1%
D Sexual offences and offences against children	2,000	£2.8m	£3.7m	32%
E Burglary etc.	9,700	£5.1m	£5.8m	15%
F Offences of dishonesty up to £30,000	7,300	£4.8m	£5.5m	15%
G Offences of dishonesty between £30,001- £100,000	1,000	£1.1m	£1.1m	-5%
H Miscellaneous other offences	28,700	£9.8m	£9.7m	-1%
I Offences against public justice and similar offences	2,100	£3.6m	£3.7m	2%
J Serious sexual offences, offences against children	7,700	£24m	£25m	5%
K Offences of dishonesty where the value is in excess of £100,000	1,800	£16m	£14m	-17%
Total	105,900	£161m	£162m	

Source: LAA administrative data 2014-15

54. *Offence type using proposed classifications* Table 8 gives an indication of redistribution resulting from a change in classification of offence type from the current to the proposed scheme. As in table 7

(using current offence classifications), expenditure on murder would increase under the proposed scheme (proposed offence 1). The volumes and expenditure are not identical under the current and proposed offence categories as there would be some offences (such as attempted murder) that are assumed to move to category 3 under the proposed scheme (see consultation document for a full list). Similarly, as above, sexual offences would be likely to cost around 9% more under the proposed scheme.

55. Dishonesty is estimated to cost less under the proposed scheme (a decrease from £26m to £23m). Dishonesty under the proposed scheme includes current offences F, G and K. Table 7 indicates that current offence classifications G and K would cost less under the proposed scheme; however, this is partly offset by an increase in current offence classification F under the proposed scheme.
56. Although expenditure on terrorism (2) and driving offences (9) are assumed to increase the most by around 78% and 46% respectively using the proposed offence classifications, please note the small number of cases and expenditure involved. Similarly, expenditure on public order offences (14) are estimated to decrease by around 27%, but there is a relatively small volume of cases and expenditure involved. These figures are less reliable given the small number of cases.

Table 8: Modelled expenditure by proposed offence classification

Proposed offence		Volumes	Current	Proposed	Difference
1	Murder/Manslaughter	1,800	£24m	£27m	15%
2	Terrorism	100	£0.4m	£0.8m	78%
3	Serious Violence	5,900	£10m	£9.8m	-2%
4	Sexual Offences (adult and child)	9,300	£25m	£27m	9%
5	Dishonesty (to include Proceeds of Crime and Money Laundering)	11,100	£26m	£23m	-13%
6	Property Damage Offences	1,300	£1.4m	£1.5m	6%
7	Offences Against the Public Interest	1,500	£2.9m	£3.1m	7%
8	Drugs Offences	14,300	£27m	£25m	-5%
9	Driving Offences	200	£0.4m	£0.5m	46%
10	Burglary & Robbery	10,900	£11m	£11m	4%
11	Firearms Offences	900	£2.2m	£2.3m	9%
12	Other offences against the person	1,500	£4.2m	£4.1m	-2%
13	Exploitation / human trafficking offences	200	£1.7m	£1.7m	-1%
14	Public Order Offences	600	£2.2m	£1.6m	-27%
15	Regulatory Offences	0	£0.0m	£0.0m	-13%
16	Standard Cases	27,400	£19m	£18m	-4%
	Other*	18,900	£3.2m	£3.6m	11%
Total		105,900	£161m	£162m	

*other includes legacy cases with only fixed fees

Note, greyed figures indicate relatively small sample sizes and figures are less robust

Source: LAA administrative data 2014-15

H. Sensitivity analysis

57. As outlined above, there were a number of assumptions made to estimate the cost of the proposed scheme. As each of these assumptions is associated with a level of risk, this sections explores the sensitivity of the modelling to the main risks associated with the proposed scheme. These are:

- Assumptions feeding into the main model – in particular case file reviews, hearings data
- Trends in volumes and case mix
- Re-estimation of the proposed scheme using 2015-16 data
- Analysis on Libra² data to test the risk of a change in offence claimed.

58. Please note, each sensitivity analysis below indicates that the proposed scheme may cost more or less than the current scheme. There will always be considerable risk when implementing a new scheme, and the individual pieces of sensitivity analysis should be considered alongside each other when evaluating the cost of the proposed scheme.

Assumptions feeding into the main model

59. As outlined above, a number of assumptions were made using case file reviews where insufficient data was available for categorisation of offences and hearings data. Although attempts were made to make sure the case file review samples were representative of all fees and that the hearings data matched the AGFS data, there is a risk that the results are not representative of the full dataset. In addition, the effect of recent policy changes across the Criminal Justice System such as BCM have yet to be fully assessed due to their recent implementation. The aim is for the total number of hearings to decrease in future, however the average number of hearings could increase as a result of more complex, lengthy trials in the Crown Court. As BCM has not yet worked its way through all cases the net impact is not yet fully known.

60. Given the lack of additional evidence, it was assumed that the key assumptions in the base case could increase or decrease by 25%. To test sensitivity of the case classification from case file reviews, we increased and decreased the proportion of cases in the highest bandings under the proposed scheme by 25% (and similarly adjusted the lowest bandings to reflect the movement of cases). The average number of hearings for cases with less than 5 hearings (by advocate and offence type) was increased or decreased by 25%. The average cost per hearing where there were more than 6 standard appearances, was also varied by 25% more or less.

61. Reducing all the assumptions by 25% led to an overall cost of the proposed scheme of around £6m lower (around 4%). Increasing all the assumptions by 25% led to an overall cost of the proposed scheme of around £5m higher (around 3%). Varying the assumptions for the hearings data had the largest impact on the model, and therefore the overall expenditure is most sensitive to these inputs. This is because the hearings data affects every single case, whereas the categorisation results from the case file reviews only affect murder, drugs and fraud cases.

Trends in volumes and case mix

62. The main analysis uses case mix and volumes from 2014-15, but these are likely to vary each year. To explore the risk around this, we have explored trends between 2014-15 and 2015-16³.

63. The volume of trials increased by 5% between 2014-15 and 2015-16. These cases would cost more under the proposed scheme (6%). If the volume of trials continue to increase at the same rate, while other case outcomes remained constant, the proposed scheme would result in a net cost to the LAA.

64. Cracked trials increased by 10% between 2014-15 and 2015-16. These cases would cost less under the proposed scheme (7%). If cracked trials continue to increase at the same rate, while other case outcomes remained constant, the proposed scheme would result in a net saving to the LAA.

² Libra is a case management system for the magistrates' court which may not have the final offences the defendant was charged with at the Crown Court.

³ Source: Legal aid statistics England and Wales, April to June 2016

However, if there were a shift in outcomes from guilty pleas to cracked trials, this would result in a net cost to the LAA.

65. Guilty pleas decreased by 9% between 2014-15 and 2015-16. These cases would cost less under the proposed scheme (11%). If guilty pleas continue to decrease at the same rate, while other case outcomes remained constant, the proposed scheme would result in a net cost to the LAA.
66. Sexual offence cases, current offences D and J, increased by 14% and 10% respectively between 2014-15 and 2015-16. These aggregate offence categories would cost more under the proposed scheme (32% and 5% respectively). If sexual offence cases continue to increase at the same rate, while other offences remained constant, the proposed scheme would result in a net cost to the LAA.
67. There has been a decrease in burglary and dishonesty up to £30,000 (current offences E and F, by 15% and 8% respectively) between 2014-15 and 2015-16. These aggregate offence categories would cost more under the proposed scheme (around 15%), If volumes continue to decrease at the same rate, while other offences remained constant, the proposed scheme would result in a net saving to the LAA.
68. There has been a decrease in dishonesty cases between £30,000 and £100,000 (current offence G) by around 12% between 2014-15 and 2015-16. These aggregate offence categories would cost less under the proposed scheme (around 5%). If volumes continue to decrease at the same rate, while other offences remained constant, the proposed scheme would result in a net cost to the LAA.

Re-estimation of the proposed reform using 2015-16 data

69. 2015-16 data was used to re-estimate the cost of the proposed scheme. Using 2015-16 data the proposed scheme was estimated to cost around 3% less than the current scheme. The decrease in the proposed scheme is partly explained from an increase in the amount spent on evidence and witness uplifts, which would not apply under the proposed scheme, and a change in case mix. Each year is likely to have a different case mix compared to other years, which would result in the proposed scheme costing more or less.

Analysis on Libra data to test the risk of a change in offence claimed

70. If a defendant has several offences on one indictment, it is assumed that the advocate will claim for the most expensive offence type. The re-categorisation of offence classifications from the current to the proposed scheme could result in a change of relative payments between offence categories, and as a result a change in the offence an advocate claims for. To attempt to quantify the potential risk that an advocate may claim for a different offence under the proposed scheme due to a change in relative payments, AGFS data was matched to an LAA extract of Libra data.
71. Due to the size of the model, a number of simplifications were made to this model compared to the main analysis. The Libra analysis only considered the brief fee – hearings and daily attendance fees at trials were not included. Only the first 20 offences for each case (99% of offences) were used in this analysis. The most expensive offence from the first 20 offences was used in the analysis to re-estimate the cost of the proposed scheme.
72. This analysis suggested that under the proposed scheme, the total expenditure could cost around 7% more than estimated in the main model, should claiming behaviour change. The actual impact could be higher or lower, given the assumptions used in this analysis. Each year is likely to have a different case mix compared to other years, which would result in the proposed scheme costing more or less.

I. Wider Impacts

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

74. In order to gain a better understanding of the impact of the scheme, the MoJ shared data with an academic nominated by the Bar Council, who linked the data to Bar Council data. The following tables are a result of his analysis and have not been verified by MoJ analysts. **For the reasons outlined above, the fees for individual cases cannot be determined precisely, therefore these figures are indicative.**

75. Table 9 gives an illustration of the types of cases barristers conduct by gender, ethnicity and experience. The figures suggest that:

- males are more likely to conduct guilty pleas and cracked trials than females
- BAME barristers are more likely to conduct trials than White British barristers
- barristers with 11-30 years of call are more likely to conduct guilty pleas than other barristers.

Table 9: Guilty pleas, cracked trials and trials as a percentage of cases undertaken by barristers, by gender, ethnicity and experience

Male	Guilty plea	33%
	Trial	23%
	Cracked trial	23%
Female	Guilty plea	30%
	Trial	24%
	Cracked trial	21%
BAME	Guilty plea	30%
	Trial	27%
	Cracked trial	22%
White British	Guilty plea	33%
	Trial	22%
	Cracked trial	23%
0-10 years of call	Guilty plea	30%
	Trial	18%
	Cracked trial	17%
11-20 years of call	Guilty plea	33%
	Trial	22%
	Cracked trial	23%
21-30 years of call	Guilty plea	33%
	Trial	24%
	Cracked trial	25%
31+ years of call	Guilty plea	30%
	Trial	28%
	Cracked trial	23%

Note, figures do not sum to 100% as there are other types of case outcomes

Source: Bar Council analysis, using Bar Council and LAA administrative data 2014-15

76. Table 10 gives an illustration of the changes to fees of barristers under the proposed scheme by gender, ethnicity and years of call. White British males with 11-30 years of call would receive around 3% less under the proposed scheme, and BAME barristers with 11-20 years of call around 3% less. White British males with 31 years or more years of call would gain the most with around 5% increase, while BAME males with similar experience would lose around 1%.
77. The majority of females gain under the proposed scheme, with White British females with at least 31 years of call gaining the most at around 6%. Females with less than 10 years of call would gain around 4% and 3% for White British and BAME respectively. However, BAME females with 21 to 30 years and 31 years plus lose around 2% and 1% respectively.
78. Regression analysis conducted suggests that these results are not statistically significant. They align with the proportion of barristers conducting trials and guilty pleas as illustrated in Table 9. Overall there is no evidence that scheme is favouring some groups over others to any substantial degree.

Table 10: The impact of the proposed scheme as a percentage increase or decrease of fees of barristers with different experience and ethnicity

Gender	Ethnicity	Year of call	Impact of the proposed fee scheme as a percentage increase or decrease of fees
Male	White British	0-10 years	0%
		11-20 years	-3%
		21-30 years	-3%
		31+ years	5%
	BAME	0-10 years	1%
		11-20 years	-3%
		21-30 years	-1%
		31+ years	-1%
Female	White British	0-10 years	4%
		11-20 years	1%
		21-30 years	2%
		31+ years	6%
	BAME	0-10 years	3%
		11-20 years	1%
		21-30 years	-2%
		31+ years	-1%

Source: Bar Council analysis, using Bar Council and LAA administrative data 2014-15

Families

79. We have no evidence to suggest that families would be disproportionately adversely affected by the proposal.

Welsh Language Impact Assessment

80. As the proposals are cost neutral and we are not proposing to restrict the advocacy market, we do not consider they would have an impact on legal services through the medium of Welsh. We will,

however, be inviting comments during the consultation with a specific question on this issue to ensure all views are considered.

J. Monitoring and Evaluation

81. The department would proactively monitor the impact of the scheme, in terms of costs, and behavioural changes, from the point of implementation. It is considered that given the length of criminal proceedings, and the time lag of any changes to work their way through the system, we expect no impacts would be witnessed for at least 18 months from the point of implementation. However, the department would proactively monitor trends and feedback from users throughout this period to determine how this reform is working in practice.