

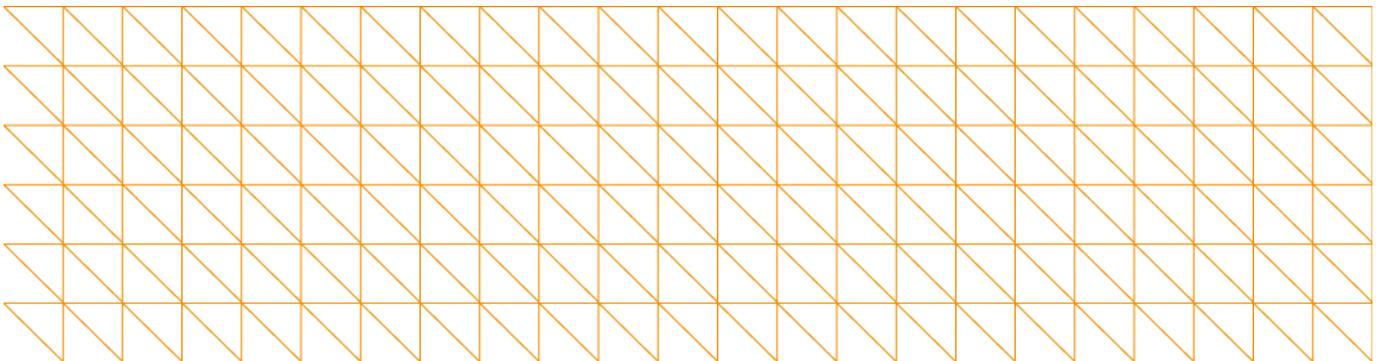


Ministry
of Justice

Court bundles – Changes to the family legal aid remuneration schemes

Response to Consultation

This response is published on 2 June 2014





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A consultation produced by the Ministry of Justice. It is also available on the Ministry of Justice website at www.justice.gov.uk

Contents

Chapter 1: Executive Summary	1
Chapter 2: Response to consultation	3
Chapter 3: Equalities Statement	5
Annex A: Summary of responses to consultation	7
Annex B: Contents of Advocate's bundle and verification process	16

Chapter 1: Executive Summary

Introduction and case for reform:

- 1.1 Practice Direction 27A (PD 27A)¹ generally applies to the majority of family hearings and prescribes, amongst other things, the content and format of the court bundle in family proceedings. Currently, there is no specified limit on the size of a court bundle in family hearings. Under the Legal Aid Family Advocacy Scheme (FAS), advocates are able to claim particular bolt-on fees in both public and private family law cases where the court bundle is 351 pages or more. Different payments are made to advocates, depending on whether the hearing is interim or final and depending on the size of the bundle. The level of remuneration to an advocate is set out in the Civil Legal Aid (Remuneration) Regulations 2013 (as amended)².
- 1.2 From 31 July 2014, provisions in PD 27A will come into force which will introduce a maximum 350 page³ limit on the size of a court bundle in family cases. The aim of this limit is to streamline procedures and focus the attention of the court on the issues to be resolved. However, this will also prevent the majority of family cases reaching the current court bundle bolt-on payment thresholds under FAS, preventing advocates from claiming the additional payments they receive now.
- 1.3 The Government recognises that the introduction of a limit on the size of a court bundle does not necessarily mean a reduction in workload or complexity for the advocate. As a result, the Government considers that consequential changes to FAS are necessary to ensure that advocates continue to receive appropriate remuneration for the work they undertake, especially in relation to more complex cases.
- 1.4 In March this year, the Government consulted on proposals to change FAS. This document reflects the responses that were received to that consultation and describes how the Government intends to proceed.

The consultation process and outcome

- 1.5 The Government consulted on two options - the introduction of the Advocate's bundle as the basis for the bundle bolt-on fee or new hearing bolt-on fees – specifically seeking views and suggestions from advocates or individuals who would be directly affected by the reduction in court bundle size.
- 1.6 The options proposed by the Government were discussed with the professional bodies representing the legal profession both prior to and during the consultation period. The Government's overall aim is, as far as possible, for any reform to be:
 - cost neutral,
 - avoid unmanageable risks to the stewardship of the legal aid fund;
 - focus remuneration on complex cases; and
 - support the aims of the Family Justice Review (FJR) reforms.

¹ http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_27a

² http://www.legislation.gov.uk/uksi/2013/422/pdfs/ukxi_20130422_en.pdf

³ http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_27a

1.7 The Government received 19 responses to the consultation, most of which were from representative bodies of the legal profession or providers of family legal aid services. The clear preference of the majority of respondents was to link the current bundle bolt-on fee payments to the Advocate's bundle, rather than the court bundle. This was suggested by respondents to the consultation as representing the most cost neutral solution for both family legal aid providers and the legal aid fund. The Government agrees with this view, subject to the introduction of appropriate controls to ensure that the content of the Advocate's bundle is limited to those served documents which are relevant and necessary to the case. The Government intends to amend FAS on this basis. The changes will come into force on 31 July.

Future work

1.8 The Government will consider what action is needed in respect of potential necessary changes to the family legal aid payment schemes that may be required as a consequence of wider procedural and other operational changes within the new Family Court. This will include reviewing the new approach to the payment of bundle bolt-on fees.

Overall impact

1.9 An impact assessment accompanies this response document. It considers the impact of linking payment of bolt-on fees to the Advocate's bundle rather than the court bundle. In making the necessary changes to FAS, the Government accepts that there could be a small administrative burden to advocates in producing the paginated list and written explanation and a small administrative cost to the legal aid fund as a result of necessary changes by the Legal Aid Agency (LAA) to contracts, guidance and business processes. However, these changes are intended to maintain the current level and volume of bundle bolt-on fee payments and are therefore expected to have either no or a minimal impact on advocates, clients and the legal aid fund.

Chapter 2: Response to consultation

- 2.1 This Chapter sets out the Government's response to the consultation paper "*Court bundles – Proposed changes to the Legal Aid Family Advocacy Scheme*".
- 2.2 A summary of the key issues raised by respondents to the consultation and the Government's response to those are set out in **Annex A**.

Bundle bolt-on payments – Proposed changes to FAS

- 2.3 The consultation paper outlined two proposed options to change FAS: retaining the current bundle bolt-on fee structure but linking payment to the size and content of the Advocate's bundle rather than the court bundle or introducing separate new hearing bolt-on fees. Both were intended to be cost neutral overall, although it was acknowledged that the proposed new hearing bolt-on fees could potentially impact on the level of remuneration received by individual advocates depending upon the mix of cases undertaken.
- 2.4 Having considered all the responses to the consultation, the Government has decided to retain the current bundle bolt-on fee structure, but link payment to the size and content of the Advocate's bundle. The Advocate's bundle will be limited to those served documents which are relevant and necessary to the case. As now, notes of contact visits may not be included in the Advocate's bundle for legal aid purposes unless the judge or person before whom proceedings are heard authorises their inclusion in the court bundle. The advocate in seeking to claim a bundle bolt-on fee payment will be required to submit, with the Advocate's Attendance Form, the agreed paginated list of documents served agreed with the other parties which they consider are relevant and necessary to the case. The advocate would also be expected to provide a written explanation of why any documents included in the paginated list of documents were relevant and necessary to the case. The agreed paginated list, along with the explanation of why documents are included, would be submitted to the court at the hearing along with the Advocate's Attendance Form for certification by the court. The court would base their certification upon the agreed paginated list of documents served but would be able to review the explanation provided if they considered it appropriate to do so.

Non- FAS

- 2.5 Although the provisions in PD 27A, which come into force on 31 July, will affect the Family Graduated Fee Scheme (FGFS), the Government has decided that it would be disproportionate to amend this scheme. Currently, the thresholds for payment of bolt-on fees for court bundles under FGFS are significantly lower than those under FAS and, with the number of cases under this scheme expected to continue to quickly fall away, the Government considers it inappropriate to change a scheme which will soon cease to exist.

Implementation

- 2.6 It is intended that the reform to FAS will be implemented through secondary legislation and associated contract amendments to coincide with the coming into force of the provisions in PD 27A on 31 July 2014.

Wider changes

- 2.7 A number of respondents suggested that the current bundle bolt-on scheme did not provide appropriate remuneration for advocates especially in more complex cases and that this problem would increase if the FJR reforms resulted in fewer and far shorter hearings. Whilst not relevant to the proposals in this response to consultation, which is limited to those changes necessary to address the change to the size of court bundles, the Government intends to consider any potential necessary changes to the family legal aid payment schemes that may be required as a consequence of wider procedural and other operational changes within the new Family Court once sufficient data is available on any significant impacts on advocates to enable any modelling necessary to effect any change required. This will include assessing the effectiveness of linking payment for bundle bolt-on fees to the Advocate's bundle. These suggestions will be considered as part of that process.

Chapter 3: Equalities Statement

- 3.1 The Government is mindful of the importance of considering the impact of changes to FAS on different groups, particularly advocates involved in family legal aid cases and their clients.
- 3.2 In accordance with its duties under the Equalities Act 2010, the Government has considered the changes necessary to FAS and its impact on advocates and their clients in order to give due regard to the need to eliminate unlawful conduct, advance equality of opportunity and foster good relations⁴.
- 3.3 Our initial analysis concluded that we did not anticipate any adverse impact or particular disadvantage as a result of the proposed options for change set out in the consultation paper – the Advocate’s bundle (Option 1) or the proposed new hearing bolt-on fees (Option 2). Views were invited from respondents to the consultation on this. Respondents did not, however, raise any concerns that were directly associated with the proposed reforms to the court bundle bolt-on payment scheme. Our earlier conclusions, therefore, continue to remain the same.
- 3.4 The Government now intends to move forward with change on the basis of the Advocate’s bundle (Option 1). We concluded previously that this option was unlikely to create equality impacts for advocates or their clients as the change proposed is intended to have minimal impact on providers and, as far as possible, be cost neutral. Payment to advocates based on the size and content of the Advocate’s bundle rather than the court bundle is merely a change in the link that enables payment to be made to the advocate. There will be no change made to the specific levels of remuneration that advocates can currently claim although there may be a small administrative burden to be borne by advocates in terms of providing additional information in support of their claim.
- 3.5 The proposed changes to FAS will apply to all people, irrespective of protected characteristics. We do not therefore consider that it gives rise to direct discrimination or discrimination arising from disability. The change to FAS is necessary because of changes to PD 27A which will limit the size of court bundles. We therefore consider that were any disparate impact to arise as a result of the introduction of the Advocate’s bundle, it would be proportionate to the legitimate aim of seeking to ensure the continued appropriate remuneration of advocates for work that is necessary, particularly in recognition of workload and the complexity surrounding a family case.⁵

⁴ Section 149 of the Equalities Act 2010 places a duty on Ministers and the Department, when exercising their functions, to have ‘due regard’ to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equalities Act 2010;
- Advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
- Foster good relations between different groups (those who share a relevant protected characteristic and those who do not).

⁵ With respect to the need to promote equality of opportunity and good relations, we consider that the proposal is unlikely to undermine the attainment of those objectives. For the most part, we do not consider changes in legal aid remuneration to be relevant to the need to advance equality of opportunity or foster good relations among the professions. The specific levels of representation within given practice areas at the Bar and solicitors’ professions are primarily the responsibility of the professions’ regulatory bodies.

- 3.6 The Government notes that some respondents to the consultation highlighted equality issues, specifically in relation to the proposed reduction in the size of a court bundle in family proceedings and the reduction in fees paid to experts. These concerns, however, do not arise out of the reform proposed in the Government's consultation document which merely seeks to ensure the continued appropriate remuneration of advocates in family proceedings in light of the introduction, by PD 27A, of a maximum limit on the size of a court bundle.

Annex A: Summary of responses to consultation

1. This Annex sets out a summary of the key points made by respondents to the Government's consultation paper "*Court bundles – Proposed Changes to the Legal Aid Family Advocacy Scheme*" and the Government's response to these.
2. The Government sought views on two proposed options to change FAS, the aim of which was to find a different mechanism that ensures continued appropriate remuneration to advocates for work that is necessary, particularly in complex cases. This mechanism would replace the current link which would mean that advocates would continue to receive appropriate remuneration by continuing to be able to qualify for bundle bolt-on payments when the maximum limit on the size of a court bundle comes into force on 31 July.

Option 1 - The Advocate's bundle

3. This sought views on retaining the current structure of bundle bolt-on fees but with payment linked to the size of the Advocate's bundle and how that could be defined/controlled to ensure cost-neutrality. The consultation asked:
 - Q1. Do you agree that retaining payment for court bundles but basing payment on the Advocate's bundle would provide an effective means of maintaining cost neutrality while appropriately remunerating complexity in the light of the proposed changes to PD 27A? Please give reasons.**
 - Q2. Are there any existing mechanisms/measures that could be used as the basis for defining the contents of the Advocate's bundle? Please explain and give reasons.**
 - Q3. Are there any new/additional mechanisms/measures that could be put in place to define the contents of the Advocate's bundle? Please explain and give reasons.**
 - Q4. Are there any existing systems/procedures that could be used to supplement the judge's consideration of the paginated and indexed list of the contents of the Advocate's bundle to ensure cost neutrality? Please explain and give reasons?**
 - Q5. Are there any new/additional systems/procedures that could be put in place to supplement the judge's consideration of the paginated and indexed list of the contents of the Advocate's bundle to ensure cost neutrality? Please explain and give reasons.**

Key issues raised

4. The majority of respondents, including the representative bodies from the legal profession, favoured this option as they argued this option most closely reflected current practice and meant that remuneration would be maintained at current levels, reducing uncertainty for both advocates and the legal aid fund. The general view was that the Advocate's bundle should consist of all documents served on the parties and that, given that only those documents set out in the relevant Practice Directions and/or ordered by the court would be served, there was little opportunity for the

number or volume of such documents to be artificially increased. In this context, Resolution noted that it would “*simply shift the payment criterion to the index of all documents served rather than whatever bundle is put before the Court on any given hearing.*” Another respondent agreed that linking payment to the documents served in the case ensured that an advocate met the Article 6 and 8 ECHR⁶ rights of their clients as it would ensure that relevant and necessary documents were able to be considered by the advocate.

5. While the Law Society supported a link to a list of documents served on the parties as being relevant and necessary to the case, they also took the view that this should be referred to as the Local Authority Bundle on the basis that it was currently the Local Authority who took the lead in preparing the bundle in public family law proceedings (which account for the bulk of all bundle bolt-on fee payments). This view was supported by the Legal Aid Practitioners Group.
6. The general view amongst respondents was that effective verification of the size and contents of the Advocate’s bundle could be provided by way of an agreed paginated list of served documents. While they agreed that, going forward, the court bundle would only consist of those documents that the court was required to read for the particular hearing, they also considered that it would still be necessary to compile a list of all documents required in the case even though the actual court bundle represented only a sub-set of those documents. In public family law proceedings⁷, they argued that this role would fall to the Local Authority as the applicant and, as now, this list would be likely to be added to as the case progressed, for example, if further relevant and necessary documents were ordered to be served by the court. As such, this list could provide the basis of an agreed list of contents for the Advocate’s bundle for legal aid purposes.
7. Whilst supporting the retention of the current bundle bolt-on framework, some individual respondents were concerned about the practical implications of effectively having two bundles – the Advocate’s bundle and the court bundle – on the basis that this could lead to confusion and potentially wasted time and costs. One individual also argued that the current restriction on the inclusion of notes of contact visits should not be carried forward into any new scheme as while they could be quite bulky documents, the advocate did need to read them.
8. Separately, the Family Law Bar Association (FLBA) argued that as the current bundle bolt-on fees under FAS were fixed they did not currently deliver effective remuneration for advocate’s in complex cases and that simply linking payment to a different basis would not address inherent disincentives for advocates within the system, in particular in complex cases where the overall impact of the FJR reforms resulted in fewer or shorter hearings.
9. Those individual respondents who disagreed with this option were generally concerned about the PD 27A provisions to limit the size of the court bundle and the added burdens this would place on advocates and the court as opposed to the proposed consequential changes to the FAS bundle bolt-on fee framework to address this. One respondent argued that the PD 27A provisions, in limiting the size of the court bundle, could breach the ECHR rights of legal aid clients by excluding documents that perhaps should be considered by the judge. Others, mainly experts,

⁶ European Convention on Human Rights. http://www.echr.coe.int/Documents/Convention_ENG.pdf

⁷ See Practice Direction 12A (the Public Law Outline (PLO) 2014), <http://www.justice.gov.uk/downloads/protecting-the-vulnerable/care-proceeding-reform/pd12a.pdf>

or those representing the interests of experts, took the view that any reduction in the size of the court bundle could impact on their ability to carry out appropriate assessments where expert opinion was required in a family case. Their particular concern was that they would no longer have sight of documents that they considered were essential on which to base their expert assessment.

Government response:

10. As set out in the consultation paper, the proposed changes to court bundle bolt-on fees are entirely consequential on the provisions of the new PD 27A which introduce a maximum limit on the size of a court bundle. These provisions come into force on 31 July. The Government's overarching principles governing any reform were set out at paragraph 2.4 of that paper and are repeated at paragraph 1.6 of this response. In this context, the Government has always recognised that a simple shift in the mechanism which determines when payment of bundle bolt-on fees should be made would be likely to have the least impact on individual advocates. However, the use of the Advocate's bundle had been initially explored as part of the consultation on consequential changes to the family fee scheme structure as a result of the planned implementation of the single Family Court⁸. At that time, following consideration of initial views from respondents on this issue, the Government took the view that there were a number of practical issues with adopting the Advocate's bundle that meant that it would be unlikely to provide a viable way forward. These included the need for both an appropriate definition to ensure that only documents that would form part of the current court bundle would be included in the Advocate's bundle and an effective verification mechanism that did not place additional burdens on the court. A key risk from the Government's perspective was that linking payment of bundle bolt-on fees to the Advocate's bundle without appropriate controls could result in an increase in costs to the legal aid fund. However, following discussions with a range of stakeholders, the Government now considers that a framework which builds on current court procedures would provide the necessary controls to mitigate this risk.

Public Family law

11. Public family law proceedings currently account for over 98% of all legal aid spend on bundle bolt-on fees. Current court procedure (as outlined in the Public Law Outline (PLO) 2014) requires the Local Authority to automatically serve parties with the evidence on which their case is based. As part of this they will provide parties with a checklist which firstly sets out all of the evidential documents (known as Checklist A documents). Secondly, the checklist also lists other documents held by the Local Authority (known as Checklist B documents). This includes records of Local Authority notes and pre-existing care plans, which are not automatically served on the basis they are not relevant and necessary in every case. While these other documents must be served if requested by a party and parties may also serve documents on the Local Authority, they are not to be filed with the court unless the court specifically directs this. They may only be included in the court bundle if they are relevant and necessary to the case.
12. There is a risk, therefore, that linking remuneration solely to a list of documents served as proposed by most respondents, could lead to documents that are not relevant and necessary to the case and which would not currently be included in the court bundle, being included in the Advocate's bundle in future. This could potentially increase legal

⁸ Supporting the introduction of the Single Family Court – Changes to the family legal aid remuneration schemes. <https://consult.justice.gov.uk/digital-communications/proposed-changes-family-legal-aid-remuneration>

aid spend as it would increase the size of the Advocate's bundle on which payment would be based. As such, the Government considers that it is essential that any remuneration linked to the Advocate's bundle would need to include appropriate controls to ensure the content would be limited to those served documents that are relevant and necessary to the case. To the extent that this may mean that an advocate may read papers for which they will not be able to claim additional remuneration, this is a feature of the current system, for example, they may read notes on contact visits which are not subsequently included in the court bundle, and is not one that will be changed either through this reform or the new provisions of PD 27A.

13. One potential solution would be to limit the Advocate's bundle to only those evidential documents (i.e. Checklist A documents) on which the Local Authority proposes to rely for its case and any additional documents ordered to be served by the court during proceedings. However, that would clearly impact on advocates in those cases where any other documents were relevant and necessary to the case. The alternative would be to adopt a less prescriptive approach and permit other documents to be included in the Advocate's bundle, subject to appropriate controls to ensure that only those that are relevant and necessary to the case are included.
14. In this context, the Government considers that a practical solution to this issue would be to require the parties to agree a paginated list setting out the served documents which the Advocate wishes to be included in the Advocate's bundle for legal aid purposes, as suggested by most respondents. However, in order to ensure that, as now, only those served documents that are relevant and necessary to the case are included, this should be supplemented by a written explanation from the advocate of why any non-Checklist A documents are relevant and necessary to the case. Given that in a public law family proceedings the basis of the list will already exist from the checklist of documents served initially by the Local Authority under the PLO 2014, and the fact that the advocate already has to explain why any non-Checklist A documents should be included in the current court bundle, the Government does not consider that this would place any particular additional burdens on advocates.
15. The Government notes the views of the representative bodies that, in public family law proceedings, the Local Authority should be responsible for the preparation of the paginated list of documents served. This would, however, place an additional burden on Local Authorities which is not directly attributable to the resolution of the case and it is therefore unclear how placing this burden on them could be justified. While it would certainly be reasonable for the list in any public family law cases to be based on the original checklist prepared by the Local Authority in compliance with PLO 2014, the Government considers that, as it would be the advocate who wished to use that information, it should be their responsibility to ensure that the paginated list is agreed with the other parties. In addition, given that they would need to provide the justification for the inclusion of any documents, they should be wholly responsible for providing the appropriate explanation of why any non-Checklist A document included on the paginated list is relevant and necessary to the case.

Private family law

16. In private family law cases there is currently no similar single Practice Direction or rule which sets out clearly which documents should be served in every case, as provisions vary depending on the type of case. However, only a very small proportion of legally aided private law family cases (around 8% of closed cases) currently receive a bundle payment. As with public family law cases, the Government

considers that there is a risk that linking the contents of the Advocate's bundle solely to documents that had been served could mean some documents not currently included in a court bundle would be included in the Advocate's bundle. To the extent that this might mean more cases would claim a bundle bolt-on payment and/or higher bolt-on fees than those being routinely claimed in those cases that currently receive them, this would mean that legal aid spend would increase. However, we consider that adopting the same approach as proposed for public family law cases – limiting the contents of the Advocate's bundle to served documents which are relevant and necessary to the case with verification by the judge or person before whom proceedings are heard on the basis of an agreed paginated list and an explanation of the relevance of the documents listed - would provide effective controls to mitigate the likelihood of this risk materialising.

Way Forward

17. The Government considers, therefore, that a single process could apply to both public and private family law cases, which would require the advocate to provide an agreed paginated list of served documents and associated written explanation of why documents were included in the Advocate's bundle to the court for certification by the judge or person before whom proceedings are heard at the hearing for which the advocate wished to claim a bundle bolt-on fee payment. To the extent that there were any immediate concerns about the contents of any documents on the list, the court would be able to consider the explanation before certifying the paginated list. The certified Advocate's Attendance Form would continue to accompany any claim made by an advocate for payment of a bolt on fee. However, the LAA would also be able to request copies of both the agreed paginated list and explanation of why documents are included before making payment. The framework that will govern this process is at **Annex B** of this document.
18. A number of individual respondents raised specific concerns about the potential impact of having to effectively maintain two sets of papers, for example, the overall case file for use by the advocate (the Advocate's bundle) and the court bundle used by the judge or person conducting the hearing. Other individual respondents, in particular those providing expert reports, expressed concern that the changes to the size and content of court bundles themselves would mean that they would not have access to all the relevant and necessary papers in a case. It is unclear why this should be the case. Parties will still need to comply with existing procedural requirements including, for example, compiling and serving all documents required under the PLO 2014. In addition, the contents of the Advocate's bundle will encompass those served documents that are included in the court bundle used by the judge during the hearing. As such the Government considers that the concerns they raise are unlikely to cause the confusion they expect.

Conclusion

19. At this stage, the Government intends to proceed with the proposal to retain the current bundle bolt-on fee scheme framework but link payment to the content and size of the Advocates bundle. In this context, the Advocate's bundle would only consist of those served documents that are relevant and necessary to the case. However, it will review this approach as part of the wider review of the family legal aid fee schemes that it is taking forward later this year.

20. As now, notes of contact visits would not be included as part of the contents of the bundle for legal aid purposes unless the judge or person conducting the hearing had specifically directed that they should form part of a court bundle.
21. Verification will be provided by way of a paginated list of the served documents, agreed by the advocate with the other parties. This would be accompanied by a written explanation from the advocate of why specified documents are relevant and necessary to the case. The advocate, in seeking to claim a bolt-on payment would submit these to the court for certification at the hearing in conjunction with the Advocate's Attendance Form. The LAA would determine any payment to be made based on the paginated list certified by the court and consideration of the explanation of documents included in the Advocate's bundle, where appropriate. Details of the process are set out at **Annex B**.
22. It is intended that the necessary changes will come into force, subject to Parliamentary approval, by way of secondary legislation and contract amendments to coincide with the implementation of changes to the size of court bundles on 31 July 2014.

Transitional provisions

23. The changes to PD 27A which introduce a maximum limit on the size of a court bundle will apply to all hearings on or after 31 July 2014, including those for cases where proceedings have already been issued. The Government's intention is that the agreed changes to the basis of bundle bolt-on fees set out in this response will be introduced at the same time, with the changes applying in respect of hearings taking place on or after 31 July. For hearings that take place before 31 July 2014, the current framework that links payment of bolt-on fees to the court bundle will continue to apply.

Option 2 – New hearing bolt-on fees

24. This sought views on replacing the current bundle bolt-on fees with new fixed hearing fees that would be payable in all cases that reach a specified hearing or hearings. The consultation asked:

Q6. Do you agree that redistributing the money currently paid through court bundle bolt-on fees into near hearing bolt-on fees payable in all cases that reach the specified hearing would provide a cost neutral way of appropriately remunerating complexity in the light of the proposed changes to PD 27A? Please give reasons.

Public Family Law

Q7. Do you agree that the proposed new fixed hearing bolt-on fees should be payable for the Issues Resolution Hearing and Final Hearing only? Please give reasons.

Q8. Do you agree that different fixed hearing bolt-on fees should be paid for Special Children Act and Other Public Law Children Act cases? Please give reasons.

Private Family Law

Q9. Do you agree that the proposed new fixed hearing bolt-on fee should be payable for the hearing at which the case concludes only? Please give reasons.

Q10. Do you agree that different fixed hearing bolt-on fees should be paid for Finance and Private Law Children Act cases? Please give reasons.

Key issues raised

25. The majority of respondents, including all of those from the representative bodies from the legal profession, did not support this option, preferring Option 1 instead. Respondents were particularly concerned that fixed fees as proposed would reduce the remuneration payable for more complex cases where more work was required, while increasing the remuneration payable in simpler cases that would not currently receive any bundle bolt-on fee payment. In this context, a number of respondents took the view that this option did not provide a cost-neutral solution as this would involve a redistribution of fees between advocates and some, in particular barristers, would experience a potentially significant reduction.
26. Although the majority of respondents did not support this option, some did address particular features of the proposed model. For example, the Law Society, supported by the Legal Aid Practitioners Group (LAPG), argued that if this option were to be pursued the proposed new fixed interim hearing fees should be payable for both the Case Management Hearing (CMH) and the Issues Resolution Hearing (IRH) where these occurred, and that the Final Hearing (FH) fee should always be paid in addition to the IRH fee, even where a case settled at the IRH. A number of other respondents argued, to different degrees, that a wider range of hearings should qualify for any new fixed hearing fees. In contrast, one expert who responded argued that limiting the new hearing fees to the IRH and FH could limit the likelihood of superfluous documentation being submitted.
27. Only a few respondents addressed the question of whether there should be separate hearing fees for Special Children Act (SCA) and Other Public Law (OPL) Children Act cases. Of those who did comment, one respondent agreed that bolt-on fees should continue to be paid but should be paid by reference to the amount of evidence filed in the case rather than a separate hearing fee. Another respondent made the point that OPL cases often do not get listed for an IRH or FH and therefore consideration would need to be given to paying the proposed new fixed fees for other hearings. Other respondents were unclear as to why OPL matters were considered to be less complex than SCA cases or why there should be any differentiation between care and other public law work.
28. The majority of respondents disagreed with the suggestion in the paper that any new fixed hearing bolt-on fees should only be payable in private law family cases for the hearing where the case concludes. Some argued that this would be restrictive and would not reflect the amount of work or effort required by the advocate, particularly if the case concluded at the finding of fact hearing or the final hearing was aborted. Other respondents contested that putting the fee solely on the final hearing would bias payment too much towards the advocate taking that hearing and would not necessarily reflect the amount of work required at an earlier stage.

29. Only a few respondents addressed the question of whether separate fixed hearing bolt-on fees should be paid for Finance and Private Law Children Act cases. Of those who did respond, some favoured separate fees for these types of cases as bolt-on fees were considered as being equally valid in these cases as for public law child care cases and it would ensure appropriate remuneration to advocates for the work undertaken in more complex cases. Others stated that the complexity of a financial bundle should warrant a higher payment in the same way that the fee payable for a Financial Dispute Resolution (FDR) hearing is higher than one dealing with children only, because it often contained a large amount of complex financial data. Another respondent suggested that in private law children cases, as there is no IRH, consideration should be given to allowing fees for any contested interim hearing. Others, who disagreed that separate fees for these cases were necessary, did so on the basis that they saw no need to change current practice and that as the work undertaken on these cases warranted the same level of preparation and consideration as others, it was better to use standardised fees which would encourage practitioners to practice across all areas, rather than specialising in one specific area.

Government response

30. As set out in the consultation paper, the proposed changes to FAS are a necessary consequence of the introduction of a maximum limit on the size of a court bundle that the new PD 27A provides for and which will come into force on 31 July 2014. The Government's overarching principles governing any reform were set out at paragraph 2.4 of that paper and repeated in paragraph 1.6 of this response. As set out in the Impact assessment (IA) accompanying this response document, the Government has always recognised that a simple shift in the mechanism which links payment of bundle bolt-on fees would be likely to have the least impact on individual advocates. The Government recognises that the introduction of new fixed hearing fees, as proposed in the consultation, could adversely impact on some individual advocates as fees under this model would be less focussed on complex cases with large volumes of documents and the current value of court bundle bolt-on fee payments would be spread over larger number of cases. However, as explained in the consultation paper, the intention would be that, overall, the same amount would be paid in the form of hearing bolt-on fees as is currently paid in court bundle fees. As such, any change would be cost neutral overall.
31. As set out in the consultation paper, in modelling this option, FAS data was used to calculate how much was currently spent on court bundle bolt-on payments for both interim hearings and final hearings and the fees set out in the paper were developed on that basis. Providing for fixed hearing bolt-on fees to be available for either a wider range of hearings and/or on a different basis to that set out in the paper would be highly likely to require a potentially significant reduction in the value of at least some of these fees.

Conclusion

32. While the Government considers that the introduction of fixed hearing bolt-on fees would be cost neutral overall, it recognises that this would no longer remunerate cases on the basis of complexity and could, therefore, adversely impact on individual advocates, particularly those who specialise in complex cases where more work is required. As set out in paragraph 19-22 of this paper it has therefore been decided to retain the current bundle bolt-on fee scheme framework at this stage but link payment to the content and size of the proposed Advocates bundle based on served documents relevant and necessary to the case.

Non-FAS cases

33. This sought views on whether equivalent changes should be made to the Family Graduated Fees Scheme (FGFS) under which a decreasing, minimal number of older family cases are still being remunerated. The consultation asked:

Q11. Do you agree that it is disproportionate to make changes to the Family Graduated Fees Scheme? Please give reasons.

Key issues raised

34. Only a few respondents addressed this question. However, of those who did the majority, including the Bar Council, the Law Society and the Legal Aid Practitioners Group took the view that in their experience only a very small proportion of family cases were still remunerated under this scheme and that the number of affected cases was reducing quickly as older family cases were disposed of by the court. As such, they agreed that it would be disproportionate to amend this scheme to take account of the changes to the size and content of court bundles being introduced on 31 July through PD 27A. However, one individual barrister did suggest that the value of the bolt-on fees payable under this scheme should receive an inflationary increase as they had remained stagnant for years.

Government response

35. As set out in the consultation, the number of affected cases fell by around 50% between March 2013 and January 2014. Since this time, it has fallen by another 30%. As a result, by the end of April 2014 FGFS cases accounted for less than 5% of all family cases and we expect this proportion to quickly fall further as older family cases continue to be disposed of. To the extent that there may still be a small number of FGFS cases after the changes to the size of a court bundle are introduced on 31 July where the bundle would have exceeded 351 pages, the Government recognises that not making changes to FGFS would potentially result in lower fees for advocates (and therefore a small saving to the legal aid fund). However, any affected cases would still be able to attract some bundle bolt-on fee payments due to the lower threshold for bundle payments under FGFS (payment is triggered where the court bundle is 176 pages or more) compared to FAS (351 pages or more). As such, any impact is expected to be minimal.

Conclusion

36. The Government agrees that it would be disproportionate to amend FGFS and therefore does not intend to make any changes to that scheme as a result of changes to the size of a court bundle being introduced on 31 July. Although it accepts that this may result in a small additional saving to the legal aid fund and a small loss to advocates who are involved in FGFS cases, given the continuing fall in cases remunerated under FGFS and the lower threshold for bundle payments under that scheme, it considers that the impact is likely to be minimal.

Annex B: Contents of Advocate’s bundle and verification process

Introduction

1. It is intended that the current bundle bolt-on fee structure, set out in the Civil Legal Aid (Remuneration) Regulations 2013 (as amended) and the Legal Aid Agency civil legal aid contracts and guidance, would be retained but payment would be linked to the Advocate’s bundle. Bolt-on fees would continue to be payable for interim and final hearings.
2. This Annex sets out the documents that would be included in the Advocate’s bundle for the purpose of claiming a bundle bolt-on fee and the subsequent verification process that advocates would need to comply with to secure payment. These would be set out in changes to the Civil Legal Aid (Remuneration) Regulations 2013 (as amended) and LAA contracts/guidance, as appropriate.

Contents of the Advocate’s bundle

3. The Advocate’s bundle would consist of those served documents relevant and necessary to the case, including a paginated list of the contents.
4. As now, notes of contact visits would not be included in the bundle for legal aid purposes unless the court has ordered that they be included in a court bundle for a specific hearing.

Verification

5. Verification on the size and content of the Advocate’s bundle for legal aid purposes would be provided by the judge or person before whom the case is heard by way of an:
 - (a) agreed paginated list of documents served in the case that the advocate would be expected to have agreed with the other parties, as appropriate that the advocate wished to be considered as part of the Advocate’s bundle for legal aid purposes; and,
 - (b) written explanation of why any documents included in that paginated list are relevant and necessary to the case. In the context of public family law, for example, this will be required when the advocate wishes to include any non-Checklist A documents.
6. The agreed paginated list, along with the explanation of why documents are included would be submitted to the court at the relevant hearing along with the Advocates Attendance Form for certification by the judge or the person before whom proceedings are heard.
7. The court would base their certification upon the agreed paginated index of documents served but would be able to review the explanation provided of why these are relevant and necessary to the case if they considered it appropriate to do so.

8. As now, advocates would send the Advocate's Attendance Form to the LAA when claiming the bolt-on payment.
9. The LAA may request copies of both the agreed paginated indexed list and the explanation of why documents are included either before or after payment is made.

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