

Title: Court bundles - Changes to the legal aid Family Advocacy Scheme IA No: MoJ009/14 Lead department or agency: Ministry of Justice Other departments or agencies:	Impact Assessment (IA)		
	Date: 19 May 2014		
	Stage: Consultation		
	Source of intervention: Domestic		
	Type of measure: Secondary Legislation		
Contact for enquiries: Kevin Westall Kevin.westall@justice.gsi.gov.uk			

Summary: Intervention and Options	RPC Opinion: RPC Opinion Status
--	--

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
£0	N/A	N/A	Out
			N/A

What is the problem under consideration? Why is government intervention necessary? The introduction of a maximum court bundle size of 350 pages means that advocates will no longer be able to claim the bolt-on fees payable under the Family Advocacy Scheme (FAS) where the court bundle is in excess of 350 pages. Under FAS, court bundle size is used as one proxy measure for complexity and the proposed restriction on bundle size would effectively remove one of the means of appropriately remunerating advocates in complex cases. As a result, changes to FAS need to be developed to ensure that family advocates continue to receive appropriate remuneration for the work that they need to undertake, particularly in complex cases. Government intervention is necessary as it is responsible for the terms of access to legal services funded by the legal aid budget and setting remuneration rates.

What are the policy objectives and the intended effects?: The Government's intention is to ensure that, overall, family advocates continue to receive appropriate remuneration under FAS for work that is necessarily done while maintaining effective control of legal aid fund spend. The key objectives in delivering change are to ensure that, as far as possible, the reforms are cost neutral, that they avoid introducing any unmanageable risks to the stewardship of the legal aid fund and, as far as possible within those parameters, focus appropriate remuneration on complex cases and support the aims of the Family Justice Review reforms.

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

Do Nothing: the "do nothing" option is the continuation of the current system where there is no change to court bundles and FAS court bundle bolt-on payments continue as now. As the President has confirmed that the limit on court bundle size will be introduced on 31 July 2014 the "do nothing" option will not apply from this date and one of the two following options will need to be taken forward:

Option 1: No changes are made to FAS when the proposed maximum court bundle size is introduced meaning that advocates would no longer receive court bundle bolt-on fees.

Option 2: Remunerate on the basis of the 'Advocate's bundle', the contents of which will be limited to those served documents that are relevant and necessary to the case. Under this option, bolt-on fees rates would remain unchanged.

The Government intends to proceed with option 2.

Will the policy be reviewed? We will monitor the impacts of the policy. **If applicable, set review date:** /Year

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 No	< 20 No	Small No	Medium No	Large No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

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

Signed by the responsible Minister

Date: _____

Summary: Analysis & Evidence

Policy Option 1

Description: Make no changes to the Family Advocate Scheme (FAS) meaning that advocates could no longer receive bundle bolt-on fees when the maximum court bundle size is introduced.

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate		£7m	

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

Legal Aid Providers: if no changes are made to FAS, then advocates would no longer be able to claim court bundle bolt-on fees worth approximately £7m per annum when the maximum court bundle size is introduced.

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

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate		£7m	

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

Legal Aid Fund: if advocates could no longer claim FAS bundle bolt-on fees this would result in a saving to the Legal Aid Fund of approximately £7m per annum.

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

Judges: Judges would no longer need to determine and certify the size of the court bundle on the Advocate's Attendance Form in order for advocates to receive the current bundle bolt-on payment. This could result in some small administrative savings.
Legal Aid Agency: would no longer need to authorise FAS court bundle bolt-on payments, resulting in small administrative savings.

Key assumptions/sensitivities/risks

Discount rate (%)

- The £7m estimated annual spend on court bundle bolt-on fees is based on data for cases started in the first year of FAS (May 2011–2012). As not all the cases started in this period have closed, some cases could go on to claim further court bundle bolt-on fees resulting in an overall higher spend on such fees.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:		

Summary: Analysis & Evidence

Policy Option 2

Description: Bundle fees would continue as now but advocates would be remunerated on the basis of the 'Advocate's bundle', the contents of which would be limited to those documents served that are relevant and necessary to the case. Verification would be provided by way of an agreed paginated indexed list of all the served documents relevant and necessary to the case, including an explanation of why documents are relevant to the case.

Price Base Year 2013	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: £0

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

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

None. Advocates would continue to be paid bolt-on fees as now and so there would be no change to the level of remuneration that advocates receive from FAS.

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

Advocates: would need to provide a paginated list, and associated explanation of why documents were included in the Advocate's bundle. The advocate would need to agree with the other parties the documents to be contained on the paginated list for legal aid purposes.

Legal Aid Agency: will incur small administrative costs in changing contracts, guidance and business processes.

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

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

None. Advocates would continue to be paid bolt-on fees as now and so there would be no change to the level of remuneration that advocates receive from the FAS.

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

Key assumptions/sensitivities/risks

Discount rate (%)

- That certifying the Advocate's bundle will not be a time consuming process for judges as they are currently required to determine and certify the court bundle. This process will be no more time consuming than that undertaken now.
- The Advocate's bundle is assumed to be equivalent to the size of the previous court bundle and so it is assumed that there will be no change in the average bundle bolt-on fee for any claim made by an advocate. There is a risk that the verification mechanism may be weaker in private law cases than in public law cases as there is currently no 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 (in public law cases an index/list of documents is put together by the Local Authority based on PLO 2014). In private law cases, this could lead to the Advocate's bundle being larger than the current court bundle, resulting in claims for higher bolt-on payments. However, this risk is considered minimal since the advocate will be required to agree with the parties the list of documents served and provide explanation as to why the documents are relevant and necessary to the case which will then be certified by the judge or person before who proceedings are heard.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:		

Evidence Base (for summary sheets)

Introduction

1. This Impact Assessment (IA) accompanies the Ministry of Justice’s (MoJ’s) consultation response on “*Court bundles - Changes to the Legal Aid Family Advocacy Scheme*”. The consultation document was published on 2 June 2014 and can be found at: <https://consult.justice.gov.uk/>.
2. The President of the Family Division has published amendments to Practice Direction 27A (PD 27A¹) which will reduce the size of a court bundle in most cases to a maximum of 350 pages. The reduction in court bundle size will come into effect on 31 July 2014. Under FAS, court bundle size is used as a proxy measure for workload and complexity with specific bolt-on fees being payable to advocates depending on the size of the court bundle. The introduction of a maximum court bundle size will prevent most cases satisfying the current criteria for a court bundle bolt-on payment, removing one of the means of appropriately remunerating advocates in complex cases. Without any accompanying changes being made to FAS, this would result in a reduction of around £7m per annum in the overall level of fees paid to family advocates.
3. Court bundle bolt-on payments vary according to the size of the court bundle and whether it is being submitted for an interim or final hearing. The current rates are set out in *Table 1*, below. Under current Legal Aid Agency (LAA) contracts, court bundle bolt-on fees may be claimed in the following circumstances:
 - **Public law family cases:** court bundle bolt-on payments may only be claimed for a maximum of two interim hearings and one final hearing. Each of the interim hearings for which court bundle bolt-on payments are claimed must either be a Case Management Hearing, an Issues Resolution Hearing or otherwise a hearing which is listed for the hearing of contested evidence.
 - **Private law family cases:** court bundle bolt-on payments may only be claimed for a maximum of one interim hearing and one final hearing. The Children and Finance aspects of the case may be treated separately. Court bundle bolt-on payments cannot be claimed in domestic abuse proceedings.²

Table 1: Current bolt-on fees payable – Court bundle payments³

Hearing Type	No of pages	Public Law	Private Law
Interim Hearing	351-700 pages	£59.40	£59.40
	Over 700 pages	£89.10	£89.10
Final Hearing	351-700 pages	£159.30	£159.30
	701-1400 pages	£239.40	£239.40
	Over 1400 pages	£318.60	£318.60

4. The introduction of a maximum limit on the size of a court bundle of 350 pages, which will be applicable in most family cases, will effectively prevent cases triggering the current court bundle payment thresholds and therefore advocates being able to claim the additional payments they receive now, particularly in complex cases. The Government recognises, however, that a reduction in court bundle size does not necessarily mean a reduction in workload or complexity for the advocate. There is, therefore, a need to revise FAS to ensure that advocates continue to receive appropriate remuneration for the work that they need to undertake following the implementation of the proposed changes to PD 27A.

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

² See paragraphs 7.151 – 7.153 of the 2013 Standard Civil Contract Specification: Category Specific Rules – Family specification <https://www.justice.gov.uk/downloads/legal-aid/civil-contracts/family-specification-february-2013.pdf>

³ See tables 1(d) and 2(e) of Schedule 3 to the Civil Legal Aid (Remuneration) Regulations 2013

Policy Objectives

5. In developing proposals to deal with the reduction in court bundle size and the consequences of this for FAS, the Government has sought to ensure that, as far as possible any reforms:
 - are cost neutral;
 - avoid introducing any unmanageable risks to the stewardship of the legal aid fund; and
 - as far as possible within those parameters, focuses appropriate remuneration on complex cases and support the aims of the Family Justice Review (FJR) reforms.

Policy

6. This IA assesses the impact of the options proposed in the consultation response “*Court bundles – Changes to the family legal aid remuneration schemes*”. The individual reforms are summarised below:

Option 1: No Changes to the FAS

7. This option would leave FAS unchanged meaning that when the maximum court bundle size of 350 pages is introduced, advocates would no longer be able to claim FAS court bundle bolt-on fees. The Government does not intend to proceed with this option since it is inconsistent with the policy objectives of ensuring cost neutrality and that advocates receive the same remuneration as now.

Option 2: Advocate’s Bundle

8. This option would retain the current court bundle bolt-on payments set out in *Table 1*, but with remuneration being linked to the Advocate’s bundle rather than the court bundle, the content of which would be limited to those served documents that are relevant and necessary to the case. In public law family cases, the paginated list of all the served documents that are relevant and necessary to the case (the content of the Advocate’s bundle) would be prepared by the advocate in agreement with the other parties. In public family law cases, this would consist of all the documents agreed as served (as specified in Checklist A of the Public Law Outline (PLO) 2014) and any other documents relevant and necessary to the case. In private law family cases, the advocate would similarly be required to produce a paginated list of served documents that are relevant and necessary to the case which had been agreed with the other parties which would form the content of the Advocate’s bundle. Verification for legal aid purposes, in both public and private law proceedings, would be provided by way of the agreed paginated list of served documents that are relevant and necessary to the case, which should include a written explanation from the advocate of why documents included in the list are relevant. The advocate, in seeking to obtain a bolt-on payment, would seek certification by the judge or person before whom proceedings are heard of this paginated list before submitting their claim for remuneration.

Main affected groups

9. The following key groups are likely to be affected by the proposals:
 - Family advocates - attending family related hearings on behalf of legal aid clients;
 - the LAA, who are responsible for administering FAS;
 - Judges, who currently sign the Advocate’s Attendance Form confirming the size of a court bundle;
 - Local authorities, who currently produce the Court bundle in public law family cases, and will prepare the paginated list referencing all the served documents that are relevant and necessary to the case which will form the content of the Advocate’s bundle; and
 - the Government who administer the legal aid fund.

Costs and benefits

10. This IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales, with the aim of understanding the overall impact on society from implementing the proposed reforms to FAS. The costs and benefits of each reform have been compared with the “*do nothing*” option. The IA places strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are some aspects that cannot always be monetised.
11. This IA considers the impact of the reforms proposed in isolation.

Methodology and Assumptions

Analysis of Current Bundle Spend

12. The current court bundle bolt-on spend of £7m per annum has been calculated using LAA administrative data on FAS expenditure on cases opened between 9 May 2011 and 8 May 2012, with spend tracked up to December 2013. As the FAS only started in May 2011, it is not possible to use data on cases closed in a particular year as this would not capture the longer, more complex cases. The analysis is therefore based on a cohort of 12 months of data which is tracked for up to two and a half years to cover all bills submitted in this time frame.
13. For Special Children’s Act (SCA) cases, LAA data is only available on cases that opened between 9 May 2011 and 31 January 2012 with spend tracked up to December 2013. For this case category the analysis therefore only covers a cohort of 9 months of data tracked for up to two and half years. As the data only covers a 9 month period, spend for these cases has been scaled up by 4/3 to give an annual spend figure.
14. The analysis of private law family cases only includes cases that are ‘in scope’ or ‘partially in scope’ following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) changes introduced in April 2013. Cases ‘out of scope’ following the changes have not been included in the analysis. The spend on hearings billed prior to February 2012 has also been reduced by 10% to account for fee changes that came into effect after this date.

Changes to Public law family cases

15. Court bundle bolt-on payments under the FAS are currently claimed by advocates according to the size of the court bundle which contains all the served documents that are relevant and necessary to the case. In public law family cases, the court bundle is prepared by the Local Authority and contains all the documents served by either the Local Authority or one of the other parties involved in the case.
16. Under the changes being made to PD 27A, the actual court bundle will be restricted to the core documents required by the judge for that particular hearing. Under option 2, it is proposed that bolt-on payments be paid according to the contents of the Advocate’s bundle as reflected in a paginated list of all the served documents that are relevant and necessary to the case. It is assumed that this paginated list will contain a similar number of documents as the previous court bundle and so bundle bolt-on payments will be no higher or lower than they would have been before the revision of PD 27A.
17. Advocates will prepare the paginated list setting out the contents of the Advocate’s bundle which should be those documents that the advocate has agreed have been served with the other parties. The advocate will also be required to provide a written explanation as to why documents are relevant and necessary to the case. The Local Authority will continue to index the documents

served in the case which should help the advocate in producing the paginated list for the Advocate's bundle.

18. It is assumed that verifying the paginated list of all the served documents agreed as relevant and necessary to the case and certifying this on the Advocate's Attendance Form, will be no more time consuming for judges than the amount of time previously spent on verifying the size of the court bundle. This is on the basis that judges will still need to be familiar with all documents of relevance to the case.

Changes to private law family cases

19. In private law family cases, the advocate will be responsible for the preparation of the paginated list and obtaining the agreement of the other parties to the served documents which it lists as being relevant and necessary to the case. They will also be required to provide a written explanation of why the documents listed are relevant and necessary to the case. As with public law family cases, under option 2 bolt-on payments will be paid according to the contents of the Advocate's bundle as reflected in the paginated list.
20. The judge will be required to certify the size of the Advocate's bundle based on the paginated list and will need to be satisfied that this bundle does not include documents that should not form part of the bundle. It has therefore been assumed that the paginated list will contain the same documents as the previous court bundle and so bolt-on payments will be no higher than they would have been before the revision of PD 27A.
21. It is assumed that verifying the paginated list is no more time consuming for judges than the amount of time previously spent verifying the size of the court bundle.

Option 0: Do Nothing

22. The "*do nothing*" option is the base case. The base case is where there is no maximum court bundle size and advocates can continue to claim FAS bundle bolt-on fees as at present. There would be no change to legal aid expenditure or remuneration to advocates under this option.
23. As the President has confirmed that a maximum court bundle size of 350 pages will be introduced on 31 July 2014, the "*do nothing*" option will cease to exist from this date onwards and either option 1 or option 2 will need to be taken forward.

Option 1: No Changes to the FAS in response to change in bundle size

Description

24. This option proposes that no changes are made to FAS in response to the introduction of a maximum court bundle size, meaning that from the implementation of the reduced court bundle size, advocates will effectively no longer be able to claim these court bundle bolt-on payments.

Costs and Benefits

Legal aid service providers: Advocates

25. It is estimated that approximately £7m per annum is spent on court bundle bolt-on payments. This represents the overall loss to advocates if they are no longer able to claim FAS court bundle bolt-on payments.
26. The estimated spend of £7m per annum on court bundle bolt-on payments is based on analysis of cases started between 9 May 2011 and 8 May 2012 and tracking their progress through to

December 2013. This total was calculated by taking the spend on court bundle bolt-on payments for all open and closed cases started in the period, and scaling up the spend on Special Children Act (SCA) cases to account for only 9 months of data being available. While it is possible that open cases could incur additional court bundle bolt-on spend, these cases were not scaled to account for this due to the uncertainty as to what this additional spend could be.

Legal Aid Agency

27. The Legal Aid Agency would no longer have to pay court bundle bolt-on payments, leading to a saving of approximately £7m per annum. There may also be small administrative savings from no longer having to administer the court bundle bolt-on payments.

Judges

28. Judges would no longer need to sign the Advocate's Attendance Form confirming the size of a court bundle in order for advocates to claim the current court bundle bolt-on payment. This could result in some small administrative savings

Risks and uncertainties under Option 1

29. There is the risk that the analysis could slightly under-estimate the total FAS spend on court bundle bolt-on payments as it includes 'open' cases which could go on to submit further bills. However, the uncertainty around what will happen to these 'open' bills means that it would not be appropriate to scale these up. £7m is the best available estimate of the annual spend on FAS court bundle bolt-on payments.

Option 2: Advocate's bundle

Description

30. This option proposes that the levels of remuneration for bundle bolt-on payments is left unchanged, but that payment is linked instead to the contents of the Advocate's bundle. Verification for legal aid purposes would be provided by way of a paginated list of served documents that are relevant and necessary that the advocate should have agreed with the other parties in the case.

Costs and Benefits

Legal aid service providers - Advocates

31. Advocates would receive bolt-on fees based on the contents of the Advocate's bundle as reflected in the paginated list certified by the judge or person before whom proceedings were heard. The Advocate's bundle will contain all the served documents agreed as relevant and necessary to the case, rather than the core court bundle to be used by the judge at the hearing which will contain only those documents which focus on the issues to be resolved at that hearing. As the Advocate's bundle is expected to be the same size as the current court bundle, advocates are expected to receive the same level of remuneration from FAS in future as they do now and therefore there are no distributional impacts from this change. Both the preparation of a paginated list and the requirement to provide a written explanation of the relevance of the documents included in the Advocate's bundle are additional requirements. This will result in an administrative burden to advocates with an associated cost which will vary on a case by case basis.

Legal Aid Agency

32. There is expected to be no impact on the legal aid fund, on the basis that the average bundle bolt-on payment is expected to be the same as at present.
33. There will be small administrative costs to the LAA as a result of necessary changes to contracts, guidance and businesses processes in order to remunerate advocates on the basis of the Advocate's bundle rather than the court bundle. However, as the payment rates are not changing, costs are expected to be minimal.

Judges

34. Judges would certify the size of the Advocate's bundle on the basis of the agreed paginated list of served documents relevant and necessary to the case and would be able to review the explanation provided if they considered it appropriate to do so. Reviewing the explanation would be a small additional administrative burden to the Judge. The overall administrative burden to Judges is therefore likely to be higher in private law cases where there may be more need to consider explanatory statements.

Local Authority

35. In public law family cases, the Local Authority will continue to prepare an indexed list of served documents that are relevant and necessary for the case. This will aid the advocate in preparing the paginated list for the Advocate's bundle in agreement with the other parties. This change, therefore, is not expected to result in any additional burden to the Local Authority.

Risks and uncertainties under Option 2

36. Judges would be required to authorise FAS bolt-on payments on the basis of the Advocate's bundle, rather than the core court bundle provided to the judge for the relevant hearing. There is a risk that this could lead to some additional work for judges in ensuring that the documents referenced on the paginated list of the Advocate's bundle (the list of served documents agreed as relevant and necessary to the case). However, it is expected that the judge would need to be aware of the list of all served documents relevant and necessary to the case now and so no additional burden on judges is expected from this aspect of the proposal.
37. The analysis assumes that the Advocate's bundle is equivalent to the size of the court bundle that would have been submitted to the judge before the revision of PD 27A. However, if the Advocate's bundle is larger than the current average court bundle submitted to the judge then this would result in additional costs to the Legal Aid Agency, as higher bolt-on payments would be claimed.
38. In public law family cases, the paginated list which will outline the content of the Advocate's bundle will be agreed by the advocate in conjunction with the other parties. As the Local Authority will continue to produce an indexed list of the served documents relevant and necessary to the case, this should aid the advocate in producing the paginated list for the Advocate's bundle. As the advocate will also be required to provide a written explanation of why documents have been included on the paginated list, and their inclusion can be questioned by the court, there is no reason that the Advocate's bundle should be greater than the current court bundle.
39. In private law family cases, the advocate will be responsible for producing the paginated list of served documents relevant and necessary to the case in conjunction with the other parties. However unlike in public family law cases, there is no single Practice Direction or rule which sets out clearly which documents should be served in every case. There is therefore a greater risk that the advocate's bundles could include documents that have not been served. This could lead to claims for higher bolt-on payments.

40. However, the risk of additional spend arising in private law family cases is considered to be minimal as the contents of the Advocate's bundle will need to be agreed by the advocate with the other parties and there will remain the need for the advocate to provide written explanation as to why documents have been included in the paginated list, which can be considered by the court. It is therefore considered unlikely that any additional cost will arise in private law family cases. Based on closed case data for cases started between May 2011 and May 2012, just 8% of private law family cases claimed a court bundle bolt-on payment, and the current spend on bundle bolt-on payments in private law family cases is estimated to be around £100,000⁴. There would therefore need to be a substantial rise in the volume of bundle bolt-on claims in private law family cases for this to lead to a noticeable rise in FAS expenditure.

Enforcement and implementation

41. The introduction of a maximum limit on the size of a court bundle in family proceedings will come into effect on 31 July. As a result, we intend to introduce amendments to FAS through secondary legislation and contract amendment to coincide with this date.

⁴ This figure includes cases where there is uncertainty as to whether the case would still be in scope following LASPO.