

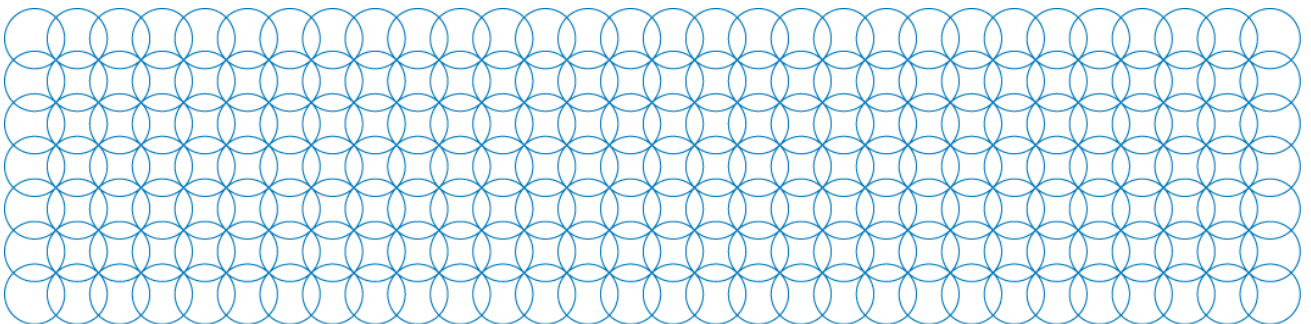


Ministry  
of Justice

# **Court bundles – Proposed changes to the Legal Aid Family Advocacy Scheme**

Consultation

Published: 13 March 2014







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of Justice

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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](http://www.justice.gov.uk)



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## Chapter 1: Executive Summary

- 1.1 This document sets out the Government’s proposals to change the current Legal Aid Family Advocacy Scheme (FAS) in England and Wales which are consequential to the proposed changes to Practice Direction 27A<sup>1</sup> (PD 27A) which govern the use of court bundles in family proceedings.
- 1.2 We do not anticipate that any of the proposals set out in this consultation would, if implemented, have an impact on legal aid clients and that Option 1, which would base bundle bolt-on payments on the Advocate’s bundle (as defined in paragraph 3.14), would have no impact on overall remuneration for advocates. However, the achievement of our key objectives (set out at paragraph 2.4) is dependent on the development of an effective framework for managing the content and size of that bundle. The alternative approach (Option 2), which proposes to redistribute current bundle spend into fixed hearing bolt-on fees payable when a case reaches a specified hearing, would involve a reduction in the level of the additional payments currently received by some advocates in some cases. However, the new fixed hearing bolt-on fees payable under Option 2 would be payable in a wider range of cases and while there may be some redistribution between advocates, we do not anticipate any impacts on either the level of remuneration paid to advocates overall, clients or the legal aid fund.
- 1.3 Views are invited on the questions set out below.

### Proposals for reform

- 1.4 Chapter 3 sets out the Government’s proposed options to amend the current bundle bolt-on fees payable under FAS as a result of the proposed introduction of limits on the size of court bundles.

### Impact Assessment

- 1.5 The separate Equalities Statement, accompanying this consultation, sets out the Government’s consideration of the equalities impacts of the proposed options for reform on family legal aid advocates, clients and the legal aid fund.

### Consultation

- 1.6 The Government would specifically welcome responses to the questions set out in this consultation paper from persons directly affected by the proposed reforms. Please respond via the online template. Those who have queries with either the consultation process or content of the paper during the consultation, may submit them directly to Christine Okiya ([Christine.Okiya@justice.gsi.gov.uk](mailto:Christine.Okiya@justice.gsi.gov.uk)) or 4<sup>th</sup> floor, point 4.41, Ministry of Justice, 102 Petty France, London SW1H 9AJ.

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<sup>1</sup> Practice Direction (PD) 27A – Family Proceedings: Court Bundles, [www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_27a](http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_27a)

## Schedule of Consultation Questions

### Chapter 3: Court Bundles

#### Option 1

- 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 and size 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 and size 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.

#### Option 2

- Q6.** Do you agree that redistributing the money currently paid through court bundle bolt-on fees into new 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 separate 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 where the case concludes only? Please give reasons.
- Q10.** Do you agree that separate fixed hearing bolt-on fees should be paid for Finance and Private Law Children Act cases? Please give reasons.
- Q11.** Do you agree that it would be disproportionate to make changes to the Family Graduated Fees Scheme? Please give reasons.

**Equalities Impact**

- Q12.** What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Please give reasons.
- Q13.** Do you agree that we have correctly identified the range of impacts under each of the proposed reforms set out in this consultation paper? Please give reasons.
- Q14.** Do you agree that we have correctly identified the extent of the impacts under each of these proposals? Please give reasons.
- Q15.** Are there forms of mitigation in relation to impacts that we have not considered?

## Chapter 2: Introduction

- 2.1 The current PD 27A<sup>2</sup> on court bundles, which prescribes amongst other things the content and format of the court bundle, generally applies to the majority of hearings in family proceedings in the High Court and County Courts. Under the revised Public Law Outline (PLO)<sup>3</sup> model currently being piloted, it also applies to public family law cases heard in the Family Proceedings Court (FPC). In future, it is expected that it will apply to the majority of family proceedings which will be heard in the new Family Court, expected to be introduced on 22 April.
- 2.2 Currently, there is no particular limit on the size of a court bundle submitted for any particular hearing. Under FAS<sup>4</sup>, advocates are entitled to specific bolt-on fees in both public law and private law proceedings where a court bundle is 351 pages or more. Different payments are made to advocates according to whether a hearing is interim or final.
- 2.3 PD 27A requires some amendment now in order to reflect the expected introduction of the new Family Court later this year. As part of this, the President of the Family Division has confirmed his intention to reduce the size of a court bundle to a maximum of 350 pages for most cases in order to streamline procedures and focus the attention of the court. Once implemented, this would effectively prevent advocates from claiming the current FAS bundle bolt-on fees in the majority of cases and therefore potentially reduce the level of remuneration advocates might otherwise have received for a case. While this might be justified if the amount of work required overall was also reduced, bolt-on fees are intended to be one way of remunerating advocates for handling complex cases, in particular those that involve reviewing and assessing significant volumes of evidence/research, etc, that must be completed in order to ensure that the hearing can be effective. As reducing the size of court bundles themselves does not necessarily affect this, Chapter 3 sets out options for reforming FAS which aim for advocates to continue to receive appropriate remuneration for the work they undertake and, as far as possible, focus remuneration on more complex cases.
- 2.4 The intention is to implement these consequential changes to FAS in a way that:
- is cost neutral;
  - avoids introducing any unmanageable risks to the stewardship of the legal aid fund;
  - as far as possible within those parameters;
    - focuses appropriate remuneration on complex cases; and
    - supports the aims of the Family Justice Review (FJR) reforms.

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<sup>2</sup> Practice Direction (PD) 27A – Family Proceedings: Court Bundles, [www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_27a](http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_27a)

<sup>3</sup> <https://www.justice.gov.uk/protecting-the-vulnerable/care-proceedings-reform>

<sup>4</sup> Schedule 3 of the Civil Legal Aid (Remuneration) Regulations 2013, [www.legislation.gov.uk/ukSI/2013/422/contents/made](http://www.legislation.gov.uk/ukSI/2013/422/contents/made)

## Chapter 3: Court Bundles - Proposals

### The case for reform

- 3.1 The current bolt-on fees payable for court bundles for public and private family legal aid cases are set out in the Civil Legal Aid (Remuneration) Regulations 2013<sup>5</sup>. The scheme affected by the proposed reduction in court bundle size is FAS. This scheme makes payment on the basis of fixed or standard fees for particular activities and specifically provides for bolt-on fees to be payable which are based on the number of pages in the court bundle, with higher bolt-on fees being payable where there are larger bundles (see *Table 1* below). This link has been used to provide additional remuneration, particularly in complex cases, with bundle size being used as a proxy measure for workload and complexity.
- 3.2 Under current Legal Aid Agency (LAA) contracts, certain restrictions apply to bundle bolt-on fees. In a:
- *public law case*: bundle bolt-on payments may only be claimed for a maximum of two interim hearings and each of these must be either a Case Management Conference, an Issues Resolution Hearing or otherwise a hearing which is listed for the hearing of contested evidence; and,
  - *private law case*: bundle bolt-on payments may only be claimed for one interim hearing per case (although any children and finance aspects of a case are treated separately) and court bundle payments may not be claimed at all in domestic abuse proceedings.<sup>6</sup> However, advocates can claim separate final hearing bundle bolt-on fees where the case has separate final hearings for Finance and Private Law Children (PLC) matters or where the case has two PLC final hearings<sup>7</sup> (when there has been a Finding of Fact hearing it will be paid as a final hearing).
- Any bundle bolt-on fee claimed is verified by the judge, along with matters such as the length of the hearing and whether any of the factors attracting the separate complexity bolt-on fees are present, at the end of the hearing on form EX506 (the Advocates Attendance Form)<sup>8</sup>, thereby providing cost-effective independent verification and control over spend in this area.
- 3.3 The current bundle bolt-on fees payable in both public and private family law proceedings are shown in *Table 1*.

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<sup>5</sup> [http://www.legislation.gov.uk/ukxi/2013/422/pdfs/ukxi\\_20130422\\_en.pdf](http://www.legislation.gov.uk/ukxi/2013/422/pdfs/ukxi_20130422_en.pdf)

<sup>6</sup> 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>

<sup>7</sup> <http://www.justice.gov.uk/downloads/legal-aid/funding-code/costs-assessment-guidance-2013-standard-contract.pdf> - para 14.10

<sup>8</sup> <http://www.justice.gov.uk/downloads/forms/legal-aid/advocates-attendance-form-0212.pdf>

Table 1: Current bolt-on fees payable – Court bundle payments<sup>9</sup>

Hearing Type	No of pages	Fixed fee
Interim Hearing	351-700 pages	£59.40
	701-1400 pages	£89.10
	Over 1400 pages	£89.10
Final Hearing	351-700 pages	£159.30
	701-1400 pages	£239.40
	Over 1400 pages	£318.60

- 3.4 The proposed introduction of a maximum court bundle size of 350 pages, which is expected to be applicable in the majority of family hearings, will effectively prevent the majority of cases triggering the current court bundle payment thresholds and therefore advocates being able to receive additional payment for relevant cases. The Government recognises that a reduction in court bundle size does not necessarily mean, however, 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 in preparing a case for a particular hearing following the implementation of the proposed changes to PD 27A.
- 3.5 Given the overarching principles (at paragraph 2.4), a key constraint on any reform is the need to protect legal aid fund spend and ensure that any new system has appropriate controls in place to manage the potential risk of increased costs to the legal aid fund. However, the challenge is to achieve this in a way which limits the impact on advocates and does not run counter to the overall aims of the FJR reforms.

### Previous consultation

- 3.6 The Government sought initial views from stakeholders on how to make changes to FAS to reflect the likely changes to PD 27A in Chapter 4 of its consultation paper *Supporting the introduction of the Single Family Court – Proposed changes to Family legal aid remuneration scheme* published on 28 October 2013. Given that the current court bundle bolt-on was intended to be one measure of the complexity and workload involved in preparing a case, that paper sought initial views on whether an alternative solution might be to restructure payment for court bundles, for example, by redistributing the value of bundle payments into the other current bolt-on payments for complexity in FAS<sup>10</sup>. This suggestion was made on the basis that such a change would make use of an existing framework and independent verification mechanism while still delivering appropriate remuneration in complex cases. The paper also invited suggestions for other potential approaches satisfying the overarching principles.

<sup>9</sup> See tables 1(d) and 2(e) of Schedule 3 to the Civil Legal Aid (Remuneration) Regulations 2013

<sup>10</sup> See tables 1(c) and 2(d) of Schedule 3 to the Civil Legal Aid (Remuneration) Regulations 2013

- 3.7 As summarised in the Government response<sup>11</sup>, generally speaking, respondents to that consultation took the view that complexity was not limited to the specified factors captured by the existing separate complexity bolt-on fees. Overall, they favoured the retention of some form of separate payment to remunerate advocates in other cases where those factors were not present but still involved a substantial amount of reading/documentation in advance of a hearing. In this context a number of respondents, including the Family Law Bar Association (FLBA), Bar Council and Resolution, generally favoured payments linked to a “shadow” (Advocate’s) bundle made up of a full index of all the papers served on the parties and/or all the necessary reading undertaken by the advocate in preparing the case that could be certified by the judge at the relevant hearing.
- 3.8 While the earlier consultation did not propose any specific reforms at that time, as the detailed changes to be made to PD 27A had not been formally announced, it did confirm that the Government had considered linking the current bundle bolt-on fee to the amount of material that the advocate had to examine to prepare the case for a particular hearing. As set out in that consultation paper, a key constraint on the adoption of such an approach was the need for an effective framework to provide appropriate controls on the claims being made. Given that a bundle, including all of the papers served on the parties or read by the advocate during the lifetime of the case could potentially extend both the number of cases that qualify for a payment and the size of the bundle in those cases, the overall level of payment and therefore costs to the legal aid fund could increase. In addition, as it would involve considering papers not necessarily required for the court hearing, it was unclear at that stage how such verification in respect of the Advocate’s bundle could be provided without creating additional burdens for the judiciary. As such, the response to the earlier consultation published on 29 January confirmed that the Government did not consider this to be a viable option.
- 3.9 Subsequently, during further discussions with MoJ, the Representative Bodies<sup>12</sup> suggested that verification of the size of the Advocate’s bundle could be undertaken as part of the normal hearing process with the judge, as now for the court bundle, verifying this on the Advocate’s Attendance Form. This is on the basis that the Advocate’s bundle would, potentially, likely be a key element of any hearing with additional documents being supplied from that bundle to supplement those included in the court bundle during the hearing in order to support the advocate’s submissions. If the documents contained in the Advocate’s bundle were generally considered at the hearing then, as suggested, verification could potentially require no or minimal additional work on the part of the judge.
- 3.10 Initial indications from the senior judiciary confirm that there may be some documents from the Advocate’s bundle that may not initially form part of future court bundles but that are discussed at the hearing and subsequently added to the court bundle. However, it is not clear that these will form a significant proportion of the documents in the Advocate’s bundle. As such, at this stage, the Government remains unclear as to how the content and size of the proposed Advocate’s bundle could be managed in a way that would not place an additional burden on the court,

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<sup>11</sup> Supporting the introduction of the single Family Court – Changes to the family legal aid remuneration schemes [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/276343/supporting-introduction-single-family-court-response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276343/supporting-introduction-single-family-court-response.pdf)

<sup>12</sup> The Law Society, the Bar Council, the Family Law Bar Association, the Association of Lawyers for Children and Resolution

the judiciary or the LAA. However, it does consider that there would be merit in exploring this further.

## Proposals

- 3.11 Given the overriding need to ensure cost neutrality and avoid introducing unmanageable risks to the fund, the Government is seeking views on two options for addressing the expected changes to court bundle sizes. The first involves basing future payments for bundles on the size of the Advocate's bundle but this is dependent upon the introduction of appropriate controls to manage the content and size of those bundles to avoid additional burdens on the court, the judiciary or the LAA. The second would involve redistributing current bundle bolt-on fee spend into new hearing bolt-on fees payable in all cases that reached a specified hearing.

### Option 1 – Advocate's bundle

- 3.12 Given the overarching principles (at paragraph 2.4), a key constraint on any reform is the need to protect legal aid fund spend and ensure that any new system has appropriate controls in place to manage the potential risk of increased costs to the legal aid fund. In the context of the Advocate's bundle, the key requirements are that there should be an objective measure and effective independent verification mechanism.
- 3.13 The objective measure for the current court bundle bolt-on payment is provided by PD 27A, which sets out the content of the court bundle. The verification mechanism is provided by the judge at the hearing who will see the court bundle and be referred to documents within that bundle allowing them to take a view on its size. This is then confirmed on the Advocate's Attendance Form. As it would not be a formal part of the court process, the proposed Advocate's bundle would not automatically be subject to any similar controls/verification mechanism. To satisfy the requirements of an objective measure and effective independent verification, an appropriate framework for controlling the contents and size would need to be put in place, allowing the Advocate's bundle to be used as the basis for bundle bolt-on payments.

### Contents of the Advocate's bundle

- 3.14 While advocates can reasonably be expected to have a range of records/files/documents that they hold in relation to a particular case, under the current provisions of PD 27A, only those that are directly relevant to the particular hearing should currently be included in the court bundle. In this context, copies of notes of contact visits, for example, should not be included in the court bundle unless specifically directed by the judge. Likewise, we take the view that the proposed Advocate's bundle should not necessarily contain every document that has ever been served or even read in a case. Instead, it should be those documents which, although not necessarily in the new court bundle, are nonetheless likely to be necessary to support the advocate's submissions in the matters being considered at a particular hearing.
- 3.15 The schedule of documents that would currently be served as the court bundle for the particular hearing for which payment is being claimed under PD 27A in its current form may be a relevant guide to what content should form the basis of payment. The Government is seeking views on this or alternative appropriate

systems/procedures that could be put in place to define the contents of the Advocate's bundle in such a way as to ensure appropriate remuneration and provide assurance of cost neutrality.

### Consultation Questions

- 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 PD27A? 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.

### Independent verification mechanism

- 3.16 While the Representative Bodies have suggested that the size and contents of the Advocate's bundle could be verified by the judge at the hearing by way of reference to a paginated and indexed contents list (which would, in effect, be the same schedule as would be supplied for the current court bundle) it is unclear as to the basis on which the judge would be able to confirm the accuracy of that list. Discussions with the senior judiciary have confirmed that there may, for example, be some cases where there is a discussion at the hearing about specific documents not included in the court bundle (either because they are specifically excluded or perhaps because of the proposed new limit). In these cases the judge will see those specific documents and they may, in due course be added to the court bundle itself. However, that would not necessarily involve the judge reviewing any other documents within the Advocate's bundle. Unless they did so, which would potentially impact on hearing times, the judge would have nothing to base their assessment of either the size or relevance of the contents of that bundle except the proposed paginated and indexed contents list.
- 3.17 This would clearly differ from the existing approach based on court bundles themselves. Currently, in addition to the advocate supplying a paginated and indexed list of the contents of the bundle<sup>13</sup>, the judge will also have a copy of the full bundle before them at the hearing and, potentially, be referred to multiple documents within the bundle during the hearing to support the advocate's submission. As a result, the judge should be able to quickly and easily form a view as to both the size of the bundle and whether its contents, generally, are relevant to the hearing.
- 3.18 Under a system based on the proposed Advocate's bundle, the judge would therefore potentially have less knowledge about the overall contents of that bundle than they would do of the court bundle and, consequently, it potentially provides less control than is currently the case. Therefore, the Government is seeking views on

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<sup>13</sup> Paragraph 4.1 of PD27A

appropriate verification processes that could be used to validate the contents and size of the Advocate's bundle.

- 3.19 For the avoidance of doubt, this option would not affect the current:
- (a). circumstances set out in LAA contracts where a bundle payment can be claimed<sup>14</sup>;
  - (b). thresholds for claiming bundle bolt-on payments; or
  - (c). bundle bolt-on fee levels.

### Consultation Questions

- 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.

### Option 2 – New hearing bolt-on fees

3.20 With the exception of bolt-on fees, advocates are remunerated under FAS on the basis of fixed fees that are payable according to the duration of the hearing. Different fixed fees are payable where the hearing lasts up to 1 hour (Hearing Unit 1) and up to 2.5 hours (Hearing Unit 2). Under current LAA contracts, where a hearing lasts more than 2.5 hours, the advocate can claim a maximum of 2 times the Hearing Unit 2 rate. While different fixed fees are payable depending, for example, on whether the case involves public or private family law proceedings and/or the particular matters involved in the case<sup>15</sup>, in each case once the relevant threshold is exceeded, the specified fixed fee is payable regardless of how long the actual hearing takes. For example, a hearing that lasts 2.4 hours will be remunerated at exactly the same rate as one which lasts just over one hour. The scheme therefore relies on an element of "swings and roundabouts" to ensure appropriate remuneration overall. Redistributing the money currently paid out through bundle bolt-on fees into a fixed hearing bolt-on fee or fees payable in all cases where a specified hearing is held would be consistent with this approach and would retain a separate payment mechanism for remunerating complex cases while also providing the necessary protection to the legal aid fund. Although this would involve a reduction in the level of the additional payments currently received by some advocates in some cases, the new fixed hearing bolt-on fees payable under this option would be payable in a wider range of cases and while there may be some redistribution between advocates, we do not anticipate any impacts on the level of remuneration paid to advocates overall.

<sup>14</sup> See paragraph 3.1 of this consultation paper

<sup>15</sup> Different fixed fees are payable, for example, if the case concerns care or supervision proceedings under section 31 of the Children's Act 1931 or other proceedings under Part V of that Act.



## Public law work

- 3.21 The revised Public Law Outline (PLO), which is expected to be formally adopted as the PLO 2014 when the new Family Court is implemented, is based around three principle hearings for the majority of cases: the initial Case Management Hearing, the Issues Resolution Hearing and the Final Hearing. Views are therefore sought on the proposal that the current total fund spend on court bundle payments in public law work should be redistributed and used to create new bolt-on fees payable in all cases that reach one or more specified hearings. In this context the new hearing bolt-on fees would be payable for the:
- (a) initial Case Management Hearing and/or the Issues Resolution Hearing; and,
  - (b) Final Hearing.
- 3.22 It is expected that the PLO 2014 will require the initial Case Management Hearing to take place between 12-18 days after the commencement of the case. While it is intended that this hearing will provide meaningful case management to ensure the progression of the issues without the need for further multiple interim hearings, it is unclear how much work would necessarily have been done by the advocate at that stage which could justify any bolt-on payment. Currently, around 6% of cases that are currently issued do not proceed beyond the first hearing and only around 12% of these currently receive any bundle bolt-on payment. Providing for all cases to receive a bolt-on fee for the initial Case Management Hearing could therefore expand the numbers of cases that would receive an interim payment resulting in a smaller interim bolt-on fee than might otherwise be the case.
- 3.23 Details of the fixed fees that would be payable under this option for public family law cases if a fixed hearing bolt-on fee was payable for the initial Case Management Hearing under this option are set out in *Table 2* below.

*Table 2: Public Law – hearing bolt-on fees if initial Case Management Hearing included*

Hearing type	Case Management Hearing Fee	Issues Resolution Hearing Fee	Final Hearing Fee
Special Children Act	£35.45	£35.45	£181.81
Other Public Law Children Act	£19.39	£19.39	£118.35

- 3.24 Given that the aim is to focus, as far as possible, remuneration on more complex cases and therefore, almost invariably, longer cases, we do not consider that this would be justified. In contrast, the Issues Resolution Hearing, which will usually take place several months after the start of the case, represents a more logical place to focus payment. Under the revised PLO, the advocate is required to have completed the majority, if not all, of the necessary preparatory work in a case in advance of that hearing. As such, redistributing the current total fund spend in respect of court bundle bolt-on fees for interim hearings in public law cases into a single bolt-on fee (payable at the Issues Resolution Hearing; the separate hearing bolt-on fee would be based on the current bundle spend on final hearings in these cases) payable at the final hearing where the case concluded with no fee payable at the initial Case Management Hearing stage, would ensure that advocates received

remuneration at the stage where the majority of work is likely to have been done. To reflect current practice, where a case settles at the Issues Resolution Hearing, the hearing would be paid as a final hearing and the Final Hearing bolt-on fee would be payable instead of the Issues Resolution Hearing bolt-on fee.

- 3.25 The majority of current bundle payments in public law cases are made in respect of Special Children Act (SCA) cases and the current spend on Other Public Law Children Act (OPC) cases is relatively low. As such, introducing the same fees in respect of the Issues Resolution Hearing and Final Hearing for both types of cases would result in SCA cases receiving much smaller hearing bolt-on fees than if different fees applied to each type. Therefore, under this option it is proposed that different hearing bolt-on fees for SCA and OPC cases should be introduced to maintain the existing distribution of payment across these types of cases.
- 3.26 Details of the fixed fees that would therefore be payable under this option for public family law cases under this option are set out in *Table 3* below.

*Table 3: Public Law – Proposed hearing bolt-on fees*

Hearing type	Issues Resolution Hearing Fee	Final Hearing Fee
SCA	£74.73	£181.81
OPC	£47.74	£118.35

### Private law work

- 3.27 Following the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) in April 2013, legal aid is no longer available for the majority of private law cases. However, it remains available where there is a risk of domestic violence or child abuse in the case, and for a child who is a party to a case. It is also available for certain protective injunctions and forced marriage protection orders, in cases involving the unlawful removal of children, for the mediation process and for specified EU and international agreements concerning children or maintenance.
- 3.28 Unlike public law cases, there is currently no overarching procedural structure governing the resolution of private law cases to which any new fees could be attached. Instead, given in particular that private law cases can have multiple different interim hearings, it would seem sensible to focus payments on the point at which the case concludes.
- 3.29 In this context, the Government is aware that the intention of the Private Law Working Group is to encourage more effective use of court time and earlier settlement of cases, with the aim of resolving around 50% of cases at the First Directions Hearing Resolution Appointment. The Government fully supports this aim and therefore under this option the proposed new hearing bolt-on fee would be payable at either the First Directions Hearing Resolution Appointment, if the case is resolved at that stage, or the subsequent hearing where the case is resolved. Views are sought on the proposal that total bundle bolt-on spend on private law cases should be focussed on a single new fixed hearing bolt-on fee, payable at the hearing where the case concludes.

- 3.30 The majority of current bundle payments are made in respect of Private Law Children (PLC) Act matters and the current spend on Finance matters is relatively low. However, the number of cases with PLC hearings on which the new payment could be made is substantially higher than the number with Finance hearings. Introducing the same fixed hearing bolt-on fee payable in both types of cases would result in Finance cases receiving much smaller hearing bolt-on fees than if different fees applied to each type. To maintain the current distribution of spend across these types of cases, therefore, it is proposed that under this option different hearing bolt-on fees for PLC and Finance cases should be introduced.
- 3.31 Details of the fixed hearing bolt-on fees that would be payable for private family law cases under this option are set out in *Table 4* below.

*Table 4: Private Law Children and Finance – Proposed hearing bolt-on fee*

Hearing Type	Fee
PLC	£53.78
Finance	£100.23

## Consultation Questions

**Q6.** Do you agree that redistributing the money currently paid through court bundle bolt-on fees into new 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.

- 3.32 Details of the methodology used to calculate the fixed fees under this option are set out in **Annex A**. In addition, a full initial Impact Assessment also accompanies this consultation.

## Non-FAS cases

- 3.33 FAS was introduced on 8 May 2011 and the majority of family proceedings are remunerated under that scheme. A very small and decreasing number of cases, which commenced before that date, are remunerated under an earlier scheme - the Family Graduated Fees Scheme (FGFS)<sup>16</sup>. This scheme also provided for bundle

<sup>16</sup> The Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001

bolt-on payments to be made, for example, different payments are triggered where a bundle reached 176 or 351 pages, with different fees payable for different types of hearings. As such, these cases would also be affected by the proposed limits on court bundle size. However, internal LAA financial data indicates that the number of cases paid under this scheme has fallen significantly during the course of 2013, from 14% of advocate's claims in March 2013 to 7% in January 2014 as these cases have concluded. We expect the number of FGFS cases to reduce even further over the next few months as the new Family Court is implemented and the drive to speed up the resolution of cases continues. Given the continuing fall in the numbers of cases paid under that scheme, it is not proposed to make any changes to that scheme.

### Consultation Question

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

### Implementation

3.34 If introduced, it is anticipated that these reforms would be implemented by way of amendments to LAA contracts and the Civil Legal Aid (Remuneration) Regulations 2013, as necessary, later this year.

### Transitional provisions

- 3.35 It is expected that the proposed revisions to PD 27A will apply to all cases, including cases where proceedings have already been issued. As such, the proposed restrictions on bundle sizes and the consequential changes to bundle bolt-on fees would apply immediately to all cases after they are commenced. It is expected that this would have no impact on the sums that advocates receive under Option 1 compared to now.
- 3.36 However, given that Option 2 necessarily involves a redistribution of money currently spent on court bundle bolt-on payments into hearing bolt-on fees, in order to avoid potential overpayments, an advocate who has received an interim court bundle bolt-on payment in a public law case under the current scheme would be precluded from receiving the proposed Issues Resolution Hearing bolt-on fee in respect of that case as well. However, the Final Hearing bolt-on fee would still be payable in all cases that reach that stage after the commencement date.
- 3.37 In the context of private law cases, there would only be a single payment for the hearing where the case is resolved. In order to ensure that a consistent approach is taken across all case types, the new hearing bolt-on fee proposed under Option 2 would be payable in all private law cases that conclude after the commencement date.

## About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. barristers, solicitor etc)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable)	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	Please tick box <input type="checkbox"/>
Address to which the acknowledgement should be sent, if different from above	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## Contact details/How to respond

To make responding to this consultation easier and to assist Government in analysing the responses it receives, we would encourage respondents to use the online consultation tool at <https://consult.justice.gov.uk>.

Alternatively, please send your response electronically by email to Christine Okiya at [Christine.Okiya@justice.gsi.gov.uk](mailto:Christine.Okiya@justice.gsi.gov.uk).

### Publication of response

A paper summarising the responses to this consultation will be published in summer 2014. The response paper will be available online at <http://www.justice.gov.uk/index.htm>.

### Representative Groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

### Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that under the FIOA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality generated by your IT system will not of itself, be regarded as binding on the Ministry of Justice.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

## Consultation principles

Responses to the consultation should be made using the online survey. However, if you have any complaints or comments about the consultation process you should contact Sheila Morson on 0203 334 4498, or email her at [consultation@justice.gsi.gov.uk](mailto:consultation@justice.gsi.gov.uk).

Alternatively you may wish to write to the address below:

Ministry of Justice  
Consultation Coordinator  
Better Regulation Unit  
Analytical Services  
7<sup>th</sup> Floor, 7.02  
102 Petty France  
London SW1H 9AJ

## **Annex A: Methodology used to calculate the value of the fixed hearing bolt-on fees proposed under option 2.**

### **Overview**

1. In order to model the new fixed fee payments proposed under Option 2 the amount spent on interim and final bundle payments under the current FAS scheme was calculated and then redistributed across cases closed over the same period. The value of the new payments under each option was set according to the number of applicable interim and final hearing payments that are on the case.
2. This Annex sets out the data that was used, assumptions that were made, and how the modelling was carried out in order to arrive at the values of the new fixed fee bolt-on payments presented in the main consultation document. A full initial Impact Assessment accompanies this consultation and is available at <https://consult.justice.gov.uk> which sets out how the changes affect the remuneration in individual cases.

### **Data and Main Assumptions**

3. LAA administrative data on FAS expenditure is available for cases starting from 9 May 2011 through to the end of November 2013. In order to have a year's worth of closed case data, the modelling was carried out on all cases started between 9 May 2011 and 8 May 2012 with spend tracked up to December 2013, although this data is restricted for SCA cases<sup>17</sup>. 'Closed cases' were classified as all cases with a final bill date or a final hearing payment. Open cases without a final hearing were not included in the analysis as there is too much uncertainty to conclude what the final bill on these cases might be. The wider classification of 'closed' covers 92% of public cases started in the period and 81% of private law cases.
4. The FAS data includes cases with multiple certificates - these are cases where multiple children are registered on one case. For the purposes of the analysis, multiple certificates were joined together and any cases where at least one certificate was outside the dates of the analysis were excluded.
5. Under the PLO 2014, cases are expected to be condensed into only 3 hearings: a Case Management Hearing (CMH), an Issue Resolution Hearing (IRH) and a Final Hearing (FH). However, as current cases frequently have more than three hearings, assumptions have had to be made as to which cases would have which hearings under the revised PLO in order to be able to model which cases would receive the fixed fee payments. The followings assumptions have therefore been used:
  - cases that have at least one interim hearing payment are assumed to have a Case Management Hearing;
  - cases with more than one interim hearing payment are assumed to have both a Case Management Hearing and an Issue Resolution Hearing; and

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<sup>17</sup> For SCA, data is only available on cases started between 9<sup>th</sup> May 2011 and 31<sup>st</sup> January 2012 that closed before December 2013.



- cases with a final hearing payment are assumed to have a Final Hearing.

Where a case settles at the interim hearing stage and is paid the final hearing rate this will be billed as a final hearing and treated in the analysis as such.

6. In Private Law Children (PLC) cases, the Finding of Fact Hearing can also receive a bundle payment paid at the final hearing rate. In addition, where a private law case has separate final hearings for Finance and Children issues it is possible for two final bundle payments to be made. The same rules have therefore been applied to the new fixed fee bolt-on payment and so the new fee will be paid twice where there are two or more PLC final hearings on a case (due to a case having both a Finding of Fact Hearing and a final Hearing) and/or where a case has separate final hearings for Finance and Children matters.
7. The analysis of private cases only includes cases that are ‘in scope’ or ‘partially in scope’ following the LASPO changes introduced in April 2013. Cases ‘out of scope’ following the changes have not been included in the analysis.

## Analysis and Results

8. The first stage of the analysis was to calculate the bundle expenditure on cases included in the selection. The results of this analysis are presented in *Table 1* and show that £4.5m is available for redistribution in SCA cases, £0.3m in OPC cases and just under £0.1m in private law cases (PLC and Finance cases)<sup>18</sup>.

*Table 1: Current Bundle Expenditure; closed cases started between 9 May 2011 and 8 May 2012 (9 May 2011 – 31 Jan 2012 for public and private law cases)*

	Interim	Final	Total
<b>SCA (000s)</b>	£1,343	£3,196	£4,540
<b>OPC (000s)</b>	£84	£197	£281
<b>PLC (000s)</b>	£19	£48	£66
<b>Finance (000s)</b>	£3	£6	£9

9. The second stage of the analysis was to calculate the number of cases that would receive the new fixed fee payments options. *Table 2* presents the number of cases expected to have an Issue Resolution Hearing (IRH) or a Final Hearing (FH) in the case of public law. As explained above, these figures are based on current case payment data where cases with an IRH are any cases with at least two interim hearings, and cases with a Final Hearing are any cases with a final hearing payment on the case.

<sup>18</sup> These figures differ from the £7m figure quoted elsewhere as this is an estimated annual figure based on all open and closed cases rather than just those in the selection.

*Table 2: Volume of cases with relevant hearings in public law; closed cases started between 9 May 2011 and 8 May 2012 (9 May 2011 – 31 Jan 2012 for SCA)*

	<b>Issue Resolution Hearing</b>	<b>Final Hearing</b>
<b>SCA</b>	17,973	17,581
<b>OPC</b>	1,768	1,664

10. *Table 3* gives the number of cases with at least one Final Hearing on a Finance issue, and the number of cases with a Final Hearing on a Private Law Children’s issue. The PLC cases are split by whether a case has just one final hearing, or at least two. The *Table* therefore gives the number of final hearings on which the new fixed fee bundle payment would be paid, since it is possible for one case to receive a payment for both a Finance and Children’s hearing, and two bundle payments where there are at two or more Children’s hearings.

*Table 3: Volume of cases with relevant hearings in private law and number of applicable hearings for new fixed fee payment; closed cases started between 9 May 2011 and 8 May 2012*

<b>Category</b>	<b>One Final Hearing</b>	<b>Two Final Hearings</b>	<b>Applicable Hearings</b>
PLC	857	189	1,235
Finance	88	N/A	88

11. The new fixed fee bundle payments have been calculated by taking the bundle expenditure in *Table 1* and dividing it by the number of cases/hearings across which the spend is to be allocated in *Tables 2 and 3*. For example, in the case of Public Law, the interim bundle spend is to be allocated to any case with an Issue Resolution Hearing. The interim bundle spend in SCA cases (£1.3m) was therefore divided by the number of cases with an interim resolution hearing (17,973) to arrive at the new fixed fee payment of £74.73.
12. The new fixed fee payment values are presented in *Table 4*. In the case of Public Law, the interim bundle spend has been allocated to cases with an Issue Resolution Hearing and the final bundle spend to cases with a final hearing. In the cases of private law, the bundle spend on Finance hearings has been distributed across the number of cases with a Final Finance Hearing and the bundle spend on PLC hearings has been distributed across the number of applicable PLC hearings as set out in *Table 3*.

*Table 4: Values of new fixed fee payments*

	<b>CMH Payment</b>	<b>IRH Payment</b>	<b>Final Payment</b>
<b>SCA</b>	N/A	£74.73	£181.81
<b>OPC</b>	N/A	£47.74	£118.35
<b>PLC</b>	N/A	N/A	£53.78
<b>Finance</b>	N/A	N/A	£100.23

## Risks/Limitations

13. The options have been set and the analysis done in order to keep the FAS cost-neutral. However, there is the risk that spend could vary under the new fixed fee payments compared with what is currently spent on bundles. The main risks to this analysis are set out below:
- The analysis is based on the mix of current closed cases. Under the revised PLO, it is possible that the mix of hearings on a case could vary, altering the spend on the new fixed fee payments compared to the current bundle expenditure.
  - Cases which currently settle at the interim hearing stage and are paid at the final hearing rate will bill as final hearings and be treated in the analysis as such. As there is no flag to show these cases settled at the interim hearing stage, there is a risk that the analysis could over estimate the number of Issue Resolution Hearings over which the bundle spend is to be redistributed. This is because in the analysis if a case has at least two interim hearings and a final hearing then cases would be treated as having a CMH, IRH and FH whereas the intention of the PLO is that cases which settle at the IRH would have no more than two hearings. This could result in a lower spend on the FAS than at present if cases which settle at the interim hearing stage have fewer hearings than at present.
  - As the FAS only started in May 2011, there are some cases which started between May 2011-2012 that will not have closed and so are not included in the analysis. Cases classified as 'open' are where the final bill has not yet been submitted to the LAA and there is no final hearing on the case, so there is uncertainty as to whether these cases could be more or less costly than the cases included in our analysis. As public law cases make up the majority of family cases - and it is more probable they will receive a bundle payment - the 8% of open cases are more likely to have an impact on the risk to advocates/legal aid fund. Although 19% of private cases remain open, the risk to advocates/legal aid fund of them being excluded from our analysis is lower because private cases are less likely to reach a final hearing or incur a bundle payment. Yet in both public and private family law, the number of bundle bolt-on payments that can be claimed in a case is capped, which limits the extent the open cases could distort the value of the new fixed fee.
  - If the open cases had a significantly higher or lower current bundle spend compared with closed cases then this could result in either an aggregate gain or loss to advocates/legal aid fund. However, this risk is considered to be small as the analysis captures any cases started between May 2011-2012 that closed or had a final hearing prior to December 2013 and therefore already captures many lengthy cases.

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