

EXPLANATORY MEMORANDUM TO
THE CIVIL LEGAL AID (REMUNERATION) (AMENDMENT) (NO. 4)
REGULATIONS 2014

2014 No. 1389

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
2. **Purpose of this instrument**
 - 2.1 This instrument amends the Civil Legal Aid (Remuneration) Regulations 2013 (as amended - the “Remuneration Regulations”). Specifically it seeks to introduce the concept of the Advocate’s bundle, the mechanism which payment of bundle bolt-on fees to advocates will be linked to in future rather than the court bundle. It also amends the definition of “advocate’s meeting” to refer to the updated Practice Direction governing such meetings now in effect.¹ To make these changes amendments are necessary to the Family Advocacy Scheme (FAS).
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative context**
 - 4.1 This Statutory Instrument implements a proposal to amend FAS as set out in “*Court bundles: Changes to the legal aid Family Advocacy Scheme*”².
 - 4.2 Regulation 8 and Schedule 3 of the Remuneration Regulations make provision, under FAS, for the payment of fees by the Lord Chancellor to advocates who provide family legal aid services under arrangements for the purposes of Part 1 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO). Tables 1(d) and 2(e) in Part 1 of Schedule 3 provide for bundle bolt-on fees which are paid to advocates based on the size of the court bundle in a particular hearing. The requirements for court bundles in family proceedings are governed by Practice Direction 27A. This instrument amends the arrangements for bundle bolt-on fees under FAS as a consequence of the introduction of a maximum limit on the size of a court bundle under that Practice Direction. It also amends the definition of “advocate’s meeting” as a result of the updating of Practice Direction 12A, which governs such meetings.

¹ S.I 2010/2955. Practice Direction 12A (Care, Supervision and other Part 4 Proceedings: Guide to Case Management) came into effect on 22 April 2014 and replaced Practice Direction 12A (Public Law Proceedings Guide to Case Management: April 2010)

² https://consult.justice.gov.uk/digital-communications/court-bundles-proposed-changes-to-fas/consult_view

5. Territorial extent and application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

7.1 Practice Direction 27A (PD 27A)³ 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 FAS, however, advocates are able to claim court bundle 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. The levels of remuneration paid to an advocate are set out in the Remuneration Regulations (as amended)⁴.

7.2 With the Family Justice Review reforms driving a more efficient and effective family justice system, the President of the Family Division has, in seeking to streamline procedures and focus the attention of the court on the issues which need to be resolved, approved changes to PD 27A to introduce a maximum 350 page limit on the size of a court bundle in most family cases. The introduction of this maximum limit will, however, effectively prevent advocates from qualifying for bundle bolt-on fees under the Remuneration Regulations that provide for different bundle bolt-on fees where the court bundle is 351 pages or more. Bundle bolt-on fees are paid in recognition of workload, particularly in complex cases, where the advocate is required to review and assess significant volumes of evidence, research etc, in preparation for the hearing.

7.3 The Government recognises that the introduction of a limit on the size of a court bundle does not, however, 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 necessary work they are required to undertake in a case, particularly in terms of reviewing and assessing significant volumes of evidence, whilst retaining the focus for remuneration on more complex cases.

7.4 In March this year, the Government consulted on proposals to change FAS. As a result of that consultation, the Government will be proceeding on the basis of amending FAS to link the current level of bundle bolt-on fees paid to advocates to the Advocate's bundle rather than the court bundle. This change is not intended to affect the current levels of payment that advocates

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

⁴ <http://www.legislation.gov.uk/ukxi/2014/586/contents/made>

receive. The same fees will continue to be paid for interim and final hearings as now.

7.5 The Advocate's bundle will consist of those served documents that are relevant and necessary to the case. Advocates will, however, be required to produce a paginated list of the documents that had been served which should be agreed with the other parties, in addition to providing a written explanation of why documents included in the paginated list were considered relevant and necessary to the case. The agreed paginated list, along with the explanation as to why documents are included in the Advocate's bundle, would be submitted to the court at the relevant hearing by the advocate for certification of the size of the bundle by the judge or person before whom proceedings are heard prior to making a claim for remuneration. The purpose of the explanation is to ensure that only those documents that are relevant and necessary to the case and that would be included in the current court bundle are included in the Advocate's bundle for legal aid purposes. Public family law cases currently account for around 98% of all legal aid spend on bundle bolt-on fees. In these cases, the Government expects that the basis of the paginated list will be the list of documents prepared and served by the Local Authority under the Public Law Outline (PLO) 2014. Under this process, the advocate is already required to explain why any documents not forming part of the Local Authorities written evidence should be included in the current court bundle. As such, the Government does not consider that requiring advocates to confirm this in writing should place any particular additional burden on them. However, it would provide necessary assurance about the validity of any documents included in the Advocate's bundle for legal aid purposes. Regulation 2(4) inserts a new paragraph into the Remuneration Regulations which introduces the concept of the Advocate's bundle. Necessary amendments will also be made to legal aid contracts, relevant guidance and forms to effect this change.

7.6 The changes to Practice Direction 27A which have led to the consequential changes necessary to FAS come into force on 31 July 2014. For any relevant hearing which takes place on or after that date, the payment of bundle bolt-on fees to advocates will be based on the content of the Advocate's bundle rather than the court bundle. For determinations relating to a claim for a hearing which takes place prior to that date, bundle bolt-on fees will continue to be made on the basis of the size of the court bundle.

8. Consultation

8.1 The Government worked with the representative bodies of the legal professions in developing the proposals for consequential changes to FAS, resulting from the introduction of a maximum limit on the size of a court bundle in family cases. The subsequent consultation "*Court Bundles – Changes to the legal aid Family Advocacy Scheme*"⁵ was published on 13 March and closed on 10 April 2014. The Government received 19 responses to its consultation, the majority of which were from representative

⁵ https://consult.justice.gov.uk/digital-communications/court-bundles-proposed-changes-to-fas/consult_view

bodies or providers of family legal aid services. The overwhelming majority of respondents supported the Government's proposal to make changes to FAS which linked bundle bolt-on payments to the Advocate's bundle rather than the court bundle. In taking this concept forward, the Government has tried to build on current practice and processes whilst ensuring that appropriate mechanisms are in place that enable verification of spend on bundle bolt-on fees. This has meant that a small administrative burden will be placed on advocates in that they will be required to produce a paginated list of the contents of the Advocate's bundle and a written explanation of why the documents contained in the Advocate's bundle are relevant and necessary to the case. This burden, however, is not anticipated to be significant.

8.2 The consequential changes necessary to FAS are intended to ensure that advocates continue to receive the same level of bolt-on fees they receive now where the Advocate's bundle is 351 pages or more when the changes to PD 27A become effective on 31 July 2014. The changes are intended, as far as possible, to be cost-neutral and have little or no impact on legal aid recipients or those providing family legal aid services.

8.3 The Government's response to this consultation was published on 2 June and is available at https://consult.justice.gov.uk/digital-communications/court-bundles-proposed-changes-to-fas/consult_view.

8.4 We have not, however, consulted specifically on this instrument.

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument as the changes proposed are relatively small. The changes aim to retain the current bundle bolt-on scheme framework and level of fees paid but link payment of bolt-on fees to advocates to the content and size of the Advocate's bundle rather than the court bundle. A programme of training and guidance for providers is being prepared by the Legal Aid Agency to support the transition to the new arrangements.

10. Impact

10.1 The consequential changes necessary to FAS as a result of the introduction of a maximum limit on the size of a court bundle is not intended to change the fee income of advocates. Small costs/administrative burdens will occur to the Legal Aid Agency in amending contracts, processes and guidance and to advocates in producing the paginated list and explanation needed for certification of the size of the Advocate's bundle. This is, however, expected to be minimal.

10.2 The impact of the Government's proposed option to amend FAS based on the Advocate's bundle was updated following publication of "*Court bundles: Changes to the Legal Aid Family Advocacy Scheme*". This impact assessment is available at https://consult.justice.gov.uk/digital-communications/court-bundles-proposed-changes-to-fas/consult_view. An Impact Assessment has not been prepared specifically for this instrument.

10.3 There is a small risk that the judiciary may be required to carry out additional work in ensuring that the documents referenced on the paginated list of the Advocate's bundle are relevant and necessary to the case. However, this burden is not expected to be significant.

11. Regulating small business

11.1 The legislation applies to small business, only insofar as it affects the contractual relationship between the Legal Aid Agency and those providing family legal aid services or the payment arrangements for advocates.

11.2 The Ministry of Justice has not taken any specific steps to minimise the impact of the requirements on firms employing up to 20 people.

11.3 A small administrative burden may occur to advocates in producing the paginated list and explanation needed for certification of the size of the Advocate's bundle. This burden is not expected to be significant but is necessary in ensuring that appropriate verification can be provided in the use of public funds.

12. Monitoring and review

12.1 The operation of and expenditure on the legal aid scheme is continually monitored by the Ministry of Justice and the Legal Aid Agency. The Ministry of Justice will, however, be monitoring the effectiveness of the changes in these Regulations as part of separate work on assessing the overall impact of the implementation of the Family Justice Review reform programme.

13. Contact

13.1 Any enquiries about the contents of this memorandum should be addressed to:

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