

EXPLANATORY MEMORANDUM TO
THE COMMUNITY LEGAL SERVICE (FUNDING) (AMENDMENT) ORDER 2014

2014 No. 1818

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 the instrument**
 - 2.1 This instrument amends the Community Legal Service (Funding) Order 2007 (SI 2007/2441) (the “Funding Order”) to provide for consequential changes to the family legal aid schemes following the introduction of the new single Family Court. It also introduces the concept of an Advocate’s bundle, the mechanism by which payment of bundle bolt-on fees to advocates will be determined, and amends the definition of an “advocates’ meeting”.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.

4. **Legislative Context**
 - 4.1 Section 6(4) of the AJA provides that the Lord Chancellor may by Order require the Commission to fund the provision of any of the services under subsection (3) in accordance with the Order. The Crime and Courts Act 2013 (Family Court: Consequential Provision) Order 2014 (SI 2014/1733) amended the AJA to provide that advocacy in proceedings before the family court is specified as a service not excluded from the AJA.
 - 4.2 The Funding Order makes provision for remuneration of funded services, and applies to cases to which the Access to Justice Act 1999 (the “AJA”) continues to apply i.e. pending cases which began prior to the commencement of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

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 A new single Family Court was established on 22 April 2014 by the Crime and Courts Act 2013. This is a national court for family proceedings in England and Wales. Judges capable of sitting in the new Family Court include lay Justices, District Judges, Circuit Judges and High Court Judges. Cases are heard on the basis of the most appropriate level of judge needed for the particular case. Before the introduction of the single Family Court, remuneration for legal professionals providing family legal aid services varied according to the court before which proceedings were heard, not by reference to the person hearing the case.
- 7.2 This Order amends the Funding Order to provide for payment for legal professionals to be based on the person or court before which proceedings are heard. The amendments the Government are making to the Funding Order under the AJA are equivalent to those made to the Civil Legal Aid (Remuneration) Regulations 2013 (S.I 2013/422) (“the 2013 Regulations”) by the Civil Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2014 (S.I 2014/586) under the Legal Aid Sentencing and Punishment of Offenders Act 2012 (“LASPO”), and were set out in the response to the consultation “*Supporting the introduction of the single Family Court – Changes to the family legal aid remuneration schemes*”. These amendments are intended to ensure that the mechanism for payment of family legal aid reflects this new structure and jurisdiction of the single Family Court.
- 7.3 Secondly, this instrument implements the equivalent changes to the Funding Order as those made to the 2013 Regulations by the Civil Legal Aid (Remuneration) (Amendment) (No. 4) Regulations 2014 (S.I 2014/1389) as set out in “*Court bundles: Changes to the legal aid Family Advocacy Scheme*”. These changes are necessary because a maximum limit on the size of the court bundle has been introduced by Practice Direction 27A¹. The Funding Order presently provides that bundle bolt-on fees are paid to advocates based on the size of the court bundle in a particular hearing. This instrument introduces the concept of an Advocate’s bundle. The level of bolt-on fees will now be linked to the Advocate’s bundle instead of the court bundle.
- 7.4 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. 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. Therefore, the consequential changes to the Family Advocacy Scheme (“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.

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

- 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 an agreed paginated list of the documents that have been served. The paginated and indexed list will then be certified by the Court. This will ensure that only those documents that are relevant and necessary to the case are included in the Advocate’s bundle for legal aid purposes. The Government does not consider that requiring advocates to confirm this in writing should place any particular additional burden on them.
- 7.6 Finally, this instrument amends the definition of “advocates’ meeting” in the Funding Order to reflect changes made to Practice Direction 12A, which governs such meetings.
- 7.7 This instrument makes equivalent amendments to the Funding Order under the AJA as were made to the 2013 Regulations under LASPO, although a different drafting approach was taken for the amendments relating to bundle bolt-on fees in order for the provisions to fit within the current structure of the Funding Order which includes more detailed provisions on bundle bolt-on fees.

8. Consultation outcome

- 8.1 The Government worked closely with the representative bodies of providers of family legal aid services to develop the proposals for consequential changes to the family legal aid schemes as a result of the introduction of the single Family Court. The subsequent consultation “*Supporting the introduction of the single Family Court – Proposed changes to the Family legal aid remuneration schemes*” was published on 28 October 2013 and closed on 25 November 2013. The Government received 12 responses to its consultation, the majority of which were from representative bodies or providers of family legal aid services. The majority of respondents supported the Government’s proposed changes to the family legal aid fee schemes. The Government took the decision to proceed on the basis of the changes it proposed in the consultation document, as set out in the consultation response “*Supporting the introduction of the single Family Court – Changes to the family legal aid remuneration schemes*”. The amendments made to the Funding Order implement the changes as those set out in the consultation paper.
- 8.2 The Government also 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 – Proposed changes to the legal aid Family Advocacy Scheme*”² 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 bodies or providers of family legal aid services. The overwhelming majority of respondents supported the Government’s proposal to link bundle bolt-on payments to the Advocate’s bundle rather than the court bundle. A small administrative burden will be placed on advocates in that they will be required

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

to produce a paginated list of the contents of the Advocate's bundle and a written explanation of why the documents are relevant and necessary to the case. This burden, however, is not anticipated to be significant.

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/results/court-bundles-consultation-response.pdf>

8.4 The Government has not consulted specifically on this instrument. 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.

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument as the changes proposed are relatively limited in their effect. The changes relating to bundle bolt-on fees 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 the family legal aid remuneration schemes as a result of the implementation of the single Family Court aim to make no change to the fee income of the providers. As a result no impact assessment was prepared in respect of this policy.

10.2 The consequential changes necessary to FAS as a result of the introduction of a maximum limit on the size of a court bundle are not intended to change the fee income of advocates. Small costs/administrative burdens will be incurred by the Legal Aid Agency in amending contracts, processes and guidance and by 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.

10.3 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](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.

10.4 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 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 & 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

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