

Scottish Legal Aid Board

Consultation on SLAB’s approach to financial eligibility assessment

December 2021

#### Overview

1. The Scottish Legal Aid Board (SLAB) is a non-departmental public body responsible for the administration of the legal aid schemes in Scotland. Our core business is taking decisions in connection with applications for legal aid and assessing claims for payment for work done from solicitors and counsel. As a public body our powers, functions and duties are set out in the legal aid legislation. We do have some discretion in how we apply statutory tests, but that discretion can be broad, or can be focused by tests, factors or criteria contained in regulations. This consultation is about how we apply our discretion which is a matter of policy, developed by us and for which we are accountable.
2. This consultation focuses on our discretion in relation to financial eligibility assessment, or means assessment as we will refer to it in this paper. There are two main sections to this consultation. The first - Our approach to means assessment - provides an overview of the key steps involved in means assessment, setting out our general approach to making decisions pertaining to them. **We want to hear your views on these steps in the assessment, with a view to identifying possible unintended consequences that you might see resulting from our current approach.** This feedback will inform future consideration of any need for change.
3. The second section of the consultation paper – Options for change - concerns areas of change we have identified and seek your views on. **We want to hear your views on how proposals for change may impact on applicants, the legal profession and others who support individuals requiring legal assistance.** This might be support workers or advice providers. Evidence and insights into any impacts on protected characteristics and corporate parenting responsibilities are particularly sought.
4. This consultation is a step towards a more modern, user focussed and transparent legal aid service. We are developing statements of policy for all the decisions we take, and those policies will provide foundation guidance for staff, applicants and the profession. Once we have completed this consultation, we will develop and publish guidance for applicants and solicitors and separate guidance for our assessment staff, all of which will be published on our website.

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# **Why are we consulting?**

1. SLAB is committed to providing a means assessment process that results in fair and equitable outcomes. We aim to deliver a process that is simple and transparent, making the outcomes of means assessment more predictable and understandable.
2. As a public body our powers, functions and duties are set out in the legal aid legislation. That legislation defines precisely how some elements of the legal aid scheme must operate but SLAB is also given discretion in relation to the operation of other elements.
3. Our discretionary powers for means assessment are broad and their application has evolved over time in response to changes within society and households. There has been an increased reliance on individualised assessment for civil legal aid that can lead to the assessment of means being time consuming and onerous.
4. The 2017 review ‘[Rethinking Legal Aid - an independent strategic review of legal aid in Scotland](https://www.gov.scot/publications/rethinking-legal-aid-an-independent-strategic-review/)’ highlighted that on average it can take around 50 days for an outcome of assessment to be reached. In that time there can be multiple administrative interactions between applicants and SLAB decision-making staff. The nature of the current system can be taxing for both applicants and SLAB decision-makers and is a potential barrier to accessing legal assistance.
5. This consultation paper is an opportunity to engage stakeholders in our decision-making policy for means assessment by describing the decisions we have to make and how we make them.
6. In this paper we have:

* Provided an overview of the central stages of means assessment and summarised our decision-making policy related to them in the section ‘Our approach to means assessment’. We do so because we are interested in views on our current approaches, evidence of equalities impacts or corporate parenting considerations. While we do not currently intend to change these, **we want feedback from lived experience that may inform consideration of future change**.
* Identified areas of change and proposals for that change we want your views on in the section ‘Options for change’. Areas highlighted for potential change centre on the types of allowances for living expenses we take into account when assessing disposable income, with the aim of simplifying and streamlining decision-making. **We want evidence and insights from stakeholders, including members of the public, on how changes proposed may impact different individuals or groups**.

1. By making these changes and considering the impact of your evidence, we aim to facilitate an assessment process that balances our duty to responsibly expend public funds with a realistic assessment of what is disposable and therefore affordable for households, and reduce the administrative burden on applicants and SLAB.
2. We have focused our work so far on means assessment for civil legal aid because it is the most complicated and lengthy assessment. We recognise the importance of consistency in decision-making wherever feasible and any options we eventually take forward will be considered for both the children’s and criminal schemes, pending further appraisal. We therefore encourage feedback on potential impacts on any of the schemes.

Expected outcomes of this consultation

1. Inform and contribute to appraisal of options for change
2. Provide additional evidence on equalities issues for consideration as part of impact assessment
3. Contribute to advice provided to government on possible future proposals for legislative change.

# **Background to SLAB**

1. SLAB was set up in 1987 to manage legal aid in Scotland. We are a non-departmental public body responsible to the Scottish Government. Our core business is taking decisions in connection with applications for legal aid and assessing claims for payment for work done. You can find out more about what we do on our website.[[1]](#footnote-2)
2. As a public body our powers, functions and duties are set out in the legal aid legislation.[[2]](#footnote-3) That legislation defines precisely how some elements of the legal aid regime must operate but we are also given some discretion in relation to the operation of other elements. The exercise of such discretion is subject to the wider provisions and principles of administrative law such as, for example, that decision making must be rational and proportionate. One area of discretion relates to the operation of components of means assessment.

## How the legal aid system works

1. Ministers in the Scottish Government:

* decide legal aid policy
* set the rules for legal aid.

1. The Scottish Parliament makes and changes legislation, including any tests of financial eligibility. These tests are then applied to each application for a legal aid grant by SLAB assessment staff.
2. The Scottish Government makes a budgetary provision for legal aid. It is an uncapped provision; the amount spent on legal aid is demand led. This means there is no restriction on grants or payments of legal aid simply because the budget has been or will be exceeded. We do not hold this budget to distribute; we draw down funds from government on a monthly basis to be able to pay the accounts received and assessed.

# **The Legal Aid Review: Maintain scope but simplify**

1. We have been working with government colleagues to agree a programme of work that can give effect to some of the themes set out in legal aid review’s final report[[3]](#footnote-4) and the Scottish Government’s recent consultation[[4]](#footnote-5) in advance of any changes that government may decide to take forward through new legislation.
2. There was strong support in the consultation for simplification of the current system, whilst maintaining the current broad scope of legal aid. Changes to the statutory framework, including regulations, are for the Scottish Government and, ultimately, the Scottish Parliament. We have been focussing on simplifying what we can within the existing statutory framework. We are doing this through the Guidance on the Administration of Legal Aid (GALA) project.

# **The GALA project**

1. Historically, the Legal Aid Handbook was the main source of information about, and guidance on, legal aid. It was a resource used by both our staff and solicitors. We revised the Handbook into the format of the legal aid guidance (LAG) with the launch of our new website in August 2019.
2. The LAG remains the primary legal aid reference material for solicitors but we needed to take a different approach for our staff. Through GALA we have developed a new framework for our policies and guidance on legal aid applications and accounts. These are published on the [GALA website](https://policydmg.slab.org.uk) as we complete the development process for each policy to support staff when making their decisions. The LAG will be reviewed and updated, as appropriate. This is a two-year programme of work. This project will help us:

* Set out clearly where the statutory framework gives us discretion in any aspect of legal aid decision-making
* Clearly state our policies for applying this discretion in all the decisions we make
* Provide training for staff applying these policies, with guidance written specifically for decision-making
* Clearly communicate with the profession and others about our decision-making, thereby improving our accountability for our policies and decision-making
* Make plain what information we require from solicitors and advocates to take a final decision first time.

1. In some areas we are setting down our current policy and will review it in due course. Other areas are subject to in-depth review, to consider what changes might be possible within our current statutory framework that might simplify the system. Means assessment is one of those areas we reviewed in detail to understand whether changes in our approach were necessary or could be beneficial. More information on the GALA project can be found on our [website](https://www.slab.org.uk/news/legal-aid-framework-project-publishes-first-policies-and-decision-makers-guidance/).

# **Glossary of terms**

The following terms are used by us when explaining means assessment. Our definitions of them are set out below.

* **Aggregation** – means including another individual’s financial resources (Income and/or Capital) in the calculation of the applicant’s eligibility for legal aid
* **Computation period** – the period of time over which an assessment of financial resources is or will be undertaken
* **Disregard** – means to exclude a resource (a source of income or capital) from the total calculation
* **Bring to account** – means to include a resource (a source of income or capital) or reasonable expense into the total calculation
* **Disposable Capital** – the remaining resources available to an individual after reasonable allowances have been excluded
* **Disposable** **Income** – the remaining resources available to an individual after necessary living expenses have been excluded
* **Deduction** – an amount subtracted from disposable income that reflects the cost of an expense or service, such as housing costs or debts
* **Allowance (partner or dependant)** – a standard amount deducted from disposable income and set to cover the day to day costs of either an applicant’s partner or dependant
* **Personal** **allowance** - a standard amount deducted from disposable income and set to cover the day to day costs of the applicant
* **Lower Capital limit** - Amount of capital which is excluded from disposable capital, to calculate a capital contribution. If the disposable capital calculated is below this amount, no capital contribution is payable
* **Lower income limit** – amount of income which is excluded from disposable income, to calculate an Income contribution. If the disposable income calculated is below this amount, no income contribution is payable
* **Maximum Contribution** (Income or Capital) - The amount calculated the applicant is able to afford to pay. Applicants will be refunded any overpayment, in the event that the cost of the case, upon conclusion, is less than the maximum contribution.

# **Background to means assessment**

1. We received 16,470 civil legal aid applications between October 2020 and September 2021.
2. Approximately 20% of these applications were Form 2 applications, meaning they are non passported. Of these, the nearly half are granted with contribution (47%), closely followed by a large group that are granted with no contribution (41%).
3. Around 8% of applications were abandoned by the applicant, and about 4% of applicants have been found ineligible.
4. Just over half of Form 2 applications received take up to or less than three months to complete (from date of registration). There is however much variation within the other half of applications that take longer than three months to finalise. On average it takes around 100 days for an application to be completed, but it can take much longer in some instances.

## The statutory framework for means assessment

1. Civil legal aid is the form of legal aid available to meet the costs of representation in civil proceedings before the civil courts of the Scottish legal system (which includes the United Kingdom Supreme Court), and some, but not all, statutory tribunals.
2. Eligibility for civil legal aid is assessed by us in accordance with criteria that are stipulated in the legislation and regulations.
3. There are three elements to eligibility for civil legal aid. These are:

* that the applicant has probable cause to engage with the proceedings
* that it is reasonable that legal aid be made available
* that the applicant is financially eligible.

1. The first two are known collectively as the **merits test** and the latter as the **means assessment**. The means assessment extends beyond eligibility to separate matters relating to cost and affordability which arise from provisions concerning possible payment of contributions by those who are found to be eligible.
2. Our assessment process effectively assesses the two separate outcomes of eligibility and contribution at the same time. This is despite the fact that within the legislation there is outwardly clear separation of the provisions relating to financial eligibility and the provisions relating to contributions payable.
3. There are two instruments governing means assessment:

* Legal Aid (Scotland) Act 1986 (the Act)
* The Civil Legal Aid (Scotland) Regulations 2002 (the Regulations)

1. [The Act](https://www.slab.org.uk/solicitors/legal-aid-legislation/legislation/the-legal-aid-scotland-act-1986/part-iii-civil-legal-aid/) sets the disposable income and capital limits for eligibility, while the Regulations provide rules for how to calculate how much disposable income and capital an applicant has.
2. Our only discretion in relation to these limits is to be able to grant legal aid to someone whose capital is above the limit if it appears to us that they can’t afford to proceed without legal aid. This is not part of the means assessment process itself and so is not addressed as part of this consultation, but our approach to applying that discretion will be considered at a later stage of the GALA project.
3. The limits are set out below:

|  |  |
| --- | --- |
| Disposable income | Disposable capital |
| Lower income limit £3,521 | Lower capital limit £7,853 |
| Upper income limit £26,239 | Upper capital limit £13,017 |

1. The rules for computing both income and capital are contained in schedules to the Regulations. Schedule 2 provides the rules for assessing disposable income, and Schedule 3 provides the rules for assessing disposable capital.
2. These rules govern the types of income and capital sources that can be brought to account in the assessment and those that cannot, along with deductions that can be made from income or capital sources for general necessities. The Regulations prescribe allowances and also instruct where we must calculate the specific amount to be deducted.
3. Our duty in undertaking a means assessment is to determine what disposable resources an applicant has available to them, with which they could afford a private legal service.
4. We must make other decisions when conducting a means assessment, and these are also set out in the Regulations. Two main decisions made during the course of an assessment include: over what time period assessment of financial circumstance will take place; and the circumstances in which the resources of another person or persons other than the applicant shall be brought into the assessment.
5. A summary of the decisions we must make in order to assess the resources available to an applicant is below.

|  |  |  |  |
| --- | --- | --- | --- |
| * Over what period of time the income of the applicant is assessed * Over what period of time the capital of the applicant is assessed | * Circumstances in which another person’s resources shall be included in the assessment of means:   + A partner of the applicant   + A person with obligation of aliment to the applicant | * What sources of income shall be included in the calculation of disposable income and what source or amounts shall be disregarded * What expenditure shall be deducted from disposable income:   + in respect of specific expenditure types   + for general living expenses | * What sources of capital shall be brought to account, what source shall be disregarded * What shall be deducted from a capital source * in respect of a necessary expense |

# **Our approach to means assessment**

This section of the consultation summarises our general approaches to key areas of means assessment.

We do not intend to substantially change our approaches here, but we will review these and subsequently publish our policies to improve clarity and transparency about our decision making.

As part of that review we will consider views and feedback collected through this consultation and consider changes where there is evidence of a need for them.

1. Our duty as an administrative body is to carry out decisions in line with the legislative framework.
2. Where the legislative framework gives us authority to determine what decision shall be made and or how a decision shall be made (this is our discretionary power), our approach and actions are reflective of our policy.
3. Whilst this information sets down our general decision-making policy, it does not reflect the fact that we use our discretion often to make reasonable exceptions in extenuating circumstances, where that information is brought to our attention.

## Period of computation

1. The Regulations define period of computation for assessing disposable income as the period of 12 months following from the date of the application for legal aid, or such other period of 12 months as in the particular circumstances of any case the Board may consider to be appropriate.
2. We therefore have discretion to decide which 12 month period we will use to assess an applicant’s financial circumstances.
3. Our policy is to apply the defined period of computation as set out in Regulation 2, unless it would be more equitable to review a different 12 month period in order to provide a more realistic assessment of means.
4. Disposable Capital is assessed at a point in time - the date of application. There is no equivalent of the statutory 12 month period over which we are required to assess capital set in the Regulations.

##### **Question 1**

Do you have evidence of any adverse impacts of our current assessment of computation period? Please describe this evidence and the kind of impact it is.

##### **Question 2**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to the computation period?

## Aggregation

1. The Regulations require us to consider whether another person’s resources should be included in the assessment of means alongside the applicant’s in deciding if the applicant qualifies for civil legal aid and how much, if any, they can afford to contribute towards the cost of their legal services.
2. The Regulations require that we take account of the resources of a partner or spouse wherein two persons living together as husband and wife or in a relationship which has the characteristics of the relationship between husband and wife, regardless of the sex of the two people in a relationship together.
3. There are statutory exceptions to whose resources shall be taken into consideration, and these are found in regulation 11(1) and 11(A).
4. We have discretion to determine what characteristics of a marriage are to be considered when assessing a relationship.
5. Our policy is to consider the degree of cohabitation (how often a couple spend living together during an average week), how long the couple have been in a relationship together, any financial support provided within the relationship and any other factors deemed relevant.

##### **Question 3**

Do you have evidence of any adverse impacts of our current assessment of whether to aggregate or not? Please describe this evidence and the kind of impact it is.

##### **Question 4**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to aggregation?

## Disposable capital

1. We have both statutory and discretionary decisions to make when determining an applicant’s disposable capital. Capital includes savings and physical items of value, as well as investments, equity or money due to the applicant.
2. We consider disposable capital to be the amount of capital available to an individual, excluding any items or amounts of capital necessary to the applicant’s day to day life, such as their home, general furniture and clothing. We must disregard certain sources of capital and make allowances for some capital saved in order to assess what is available to the applicant.
3. In the circumstances of an individual case, we have discretion to disregard an amount of capital. In considering whether to do so, we will have regard to the circumstances of the case including disregard capital the impact on the applicant of receiving publicly funded representation. We will also apply our discretion if the following circumstances apply: the capital is only held by the applicant on a temporary basis (for example, while they sell and buy their main home); where the capital has been earmarked for a necessary purpose (for example, the purchase of new accommodation following a relationship breakdown); or the capital is a compensation payment.

##### **Question 5**

Do you have evidence of any adverse impacts of our current assessment of disposable capital? Please describe this evidence and the kind of impact it is.

##### **Question 6**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to disposable capital?

## Assessing sources of income

1. We have both statutory and discretionary decisions to make when determining the income sources to take into account to assess an applicant’s total income.
2. The regulations require us to disregard certain sources of income, such as some benefits. We must also assess any other income sources and determine whether they should be included.
3. Our approach to income sources not specified in the regulations, is to bring into account any money the applicant receives from any source during the computation period that is not a payment provided to cover an additional support need (for example, Scottish Child Payments) or a compensatory benefit.
4. We have discretion to disregard income if we consider it reasonable to do so, having regard to the nature of the income or the circumstances of the case. If the income is linked to the case, for example, arising as a result of a death, we will disregard the payment. Having regard to the circumstances of the case, we will consider whether there is a wider public interest in the case and the impact on the applicant of receiving publicly funded representation. We apply these factors to decide whether it is reasonable to disregard any of the applicant’s income in order to calculate their disposable income.
5. For a full list of our statutory duties regarding disregarded income sources please see appendix A.
6. After assessing the sources of income, we calculate the applicant’s disposable income. See the section below on **Accounting for costs of living.**

##### **Question 7**

Do you have evidence of any adverse impacts of our current assessment of sources of income? Please describe this evidence and the kind of impact it is.

##### **Question 8**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to sources of income?

1. Please note, further questions about our policy on assessing deductions and allowances are set out below.

## Accounting for costs of living – our current approach

1. The key objective of means assessment is the identification of what resources an applicant has available to them with which they could access private legal services or contribute to their publicly funded legal services (that is, disposable income). Key to this identification of available resources is consideration of costs of living that are essential, or not available for expenditure on legal services: that is expenditure which an applicant unavoidably incurs, and which therefore reduces what can properly be considered disposable income.
2. The legislative framework gives us a focus for what should be considered essential costs of living. It specifies[[5]](#footnote-6) that costs an applicant incurs for the following shall be deducted:

* housing costs
* work related costs
* maintenance payments.

1. Outside of these specific areas, the regulations give us a broad discretion to allow reasonable amounts in the assessment of disposable income in relation to any other matters for which an applicant must provide.
2. We currently use our discretionary powers to make further allowances for costs an applicant may incur and be meeting, where those costs are deemed to be reasonable. Over the years the assessment of what is a reasonable allowance has been extended to take account of common circumstances applicants have to provide for, such as travel costs for contact arrangements, minimum repayments on credit and store cards, and additional costs for heating and food if the applicant demonstrates they have an age, disability or other medical related reason for incurring higher food or heating bills.
3. The overarching objective of this approach is to make the most realistic assessment of what financial resources an applicant actually has available to them. This requires decision-makers to make judgements about the costs an applicant incurs and assess whether it is reasonable to consider the income from which they are met to be disposable, whilst balancing our responsibility to reasonably expend public funds.
4. There is an obvious benefit to our current approach in that - given the extent of our discretion and flexible approach - we are able to consider a range of different circumstances and make allowances for the costs associated with these.
5. There are however limitations to this approach and potential risks, such as:

* it is a time consuming and administratively onerous process
* the extent of individualised case-by-case assessment and discretion may mean that what are broadly similar cases are not always treated alike
* for applicants who are unable to evidence their circumstance, unless there are extenuating circumstances such as leaving home to a place of safety, or fail to notify us of those circumstances, the assessment may not reflect their true financial condition
* this approach can benefit higher income earners who have higher expenditures, or those are able to demonstrate spending through credit card and store cards
* our decision-makers inevitably have more individual judgment to make during their assessment about what is a necessary expenditure and what is not.

1. Importantly, the regulations do not require that an applicant’s day to day food, heating, travel and clothing costs are to be deducted, or specify how such costs might be calculated. This is in contrast to the position in respect of an applicant’s partner or dependents, in respect of whom the regulations require the deduction of specific allowances as part of the assessment, which are assumed cover these day to day needs.
2. In the absence of specific provision in the regulations, our current policy is not to make any discretionary allowance for the applicant’s own basic living expenses (food, heating and so forth) unless these can be evidenced to arise from an age, disability or other medical related reason.
3. This means that some expenses which might logically be considered as ‘essential living costs’ are not deducted in our means assessment and the income from which they are met continues to be viewed as disposable for eligibility assessment purposes.
4. While not explicitly stated, the historic rationale for this policy position has been that the lower income limit specified in the Act for the calculation of any contribution[[6]](#footnote-7) from disposable income was assumed to be intended to cover the applicant’s own day to day living costs, because the legislative framework does not specify that these should be taken into account anywhere else in the assessment.

## Change proposal – introduction of cost of living allowances

This section of the consultation outlines a proposal for which we are seeking feedback and input to assist us in further appraising and finalising our recommendation.

Our appraisal is built on assessment against the following objectives:

* Simplify the assessment but maintain scope of eligibility
* Easier access to legal aid for those eligible
* Reduced legal aid administration for solicitors, applicants and SLAB.

1. We have reviewed our policy on disposable income assessment, specifically our approach to making discretionary deductions and our approach to not allowing day to day costs of living to be deducted during eligibility assessment.
2. Our review has been directed by objectives we seek to meet through any future change agenda. Those objectives are above.
3. We also aim to provide an equitable, consistent, transparent and contemporary approach to this assessment.
4. We have identified an option of change that most feasibly allows us to meet our objectives for review and change to means assessment. This option focuses on amending our policy in relation to discretionary deductions, as set out above, by introducing standard allowances that cover day to day costs of living for an applicant and their household, within the assessment of eligibility, rather than assuming that these costs have already been taken into account in the setting of the lower income limit.
5. The proposed change would be achieved by introducing a range of standard allowances and a personal allowance for the applicant, which together reflect the average costs of living for households of various sizes in the United Kingdom, using tools evidenced and managed externally to us. This would mean – for instance – a standard allowance for the costs generally expected to be incurred by a two-parent family plus two children family, and so on.
6. In order to make this change we would also be changing the way we use our discretionary powers when assessing certain costs an individual may incur, as the approach we are proposing would replace the current need for an assessment specific to their individual circumstance.

##### **What is a standard allowance structure?**

1. Used widely throughout the social security sector to calculate benefits or subsidies (see Council Tax Reduction Scheme for an example), as well as in legal aid systems in other jurisdictions, standard allowance structures are constructed to reflect both the various types of expenditures an average household can expect to incur and the costs of those expenditures. These also often include additional premiums that are costed to cover additional needs a household may have due to disability or carer responsibilities, or being a single parent.
2. Alongside social benefit schemes, there are publicly available methods of calculating the costs of living for different household types that are constructed based on assessment of need or actual spending patterns within the UK (see outcomes of the [Office for National Statistics Living Costs and Food Survey](https://www.msn.com/en-gb/?ocid=iehp) and the [minimum income standard’s annual budgets](https://www.lboro.ac.uk/research/crsp/minimum-income-standard/household-budgets/)). These provide realistic and contemporary reflections of cost of necessary items and services and are updated regularly.
3. Another example of a tool used to manage and set average household spending is the [Standard Financial Statement](https://sfs.moneyadviceservice.org.uk/en/what-is-the-standard-financial-statement). This is a universal income and expenditure template which is used to summarise a person's income and outgoings, along with any debts they owe. The template includes spending guideline figures that are standard allowances providing for basic costs of each household member. They are updated annually to reflect changes to expenditure patterns based on data taken from the annual ONS Food and Living Costs survey and/or any significant fluctuations in the Consumer Price Index.

##### **Why are we considering this structure as an alternative?**

1. A standard allowance structure would provide an evidence-based rationale for what we deduct for costs of living. It would be adapted to reflect the applicant’s general circumstance such as household composition and possibly other support needs such as disability-related assistance.
2. This would enable greater predictability for applicants, while reducing the burden on them in relation to providing details of (and justification for) their specific individual spending. This should result in a faster, less intrusive and administratively more efficient assessment process, as well as better reflecting disposable income by taking into account more day to day household costs.
3. We have appraised the impact of a standard allowance on both assessed eligibility and maximum contributions assessed, and found that – despite taking a standardized, less specific approach to individual applicants and their circumstances - the tools used in the UK public social policy arena are either on par or more generous than the intensive, individualised approach which we currently take. This meets our objective of maintaining scope of eligibility whilst simplifying the assessment process.

##### **What would this change mean in practice?**

1. The lower income limit would continue to be used in the calculation of contributions, but it would no longer be viewed as a proxy allowance for general day-to-day living costs.
2. Applicants would not have to provide evidence of additional expenses they incur or day to day costs of living they are meeting. The allowances will reflect an average cost relative to household composition and assign the deduction automatically.
3. Staff would not be required to assess the reasonableness of expenditures incurred by applicants, see verification of actual expenditure or calculate estimated amounts expended over the computation period.

##### **Benefits**

1. A more holistic assessment of the household’s basic costs of living are factored into the assessment of eligibility.
2. Applicants do not have to prove their expenditure for general costs, reducing administrative burden on applications, solicitors or support staff working with individuals, and SLAB
3. All applicants are given the same allowance, relative to their household composition, providing a consistent and balanced assessment of what is disposable.
4. A robust, contemporary and evidence based external assessment of costs of living is calculated and deducted in the assessment of disposable resources

##### **Risks**

1. A reduction in our application of our discretionary powers, although the option does not exclude us from making exceptional provisions for particular circumstances, should they arise.
2. Higher income earners who have higher expenditures they can demonstrate to us likely benefit from the current individualised assessment. This change may affect their final outcome of assessment, although our modelling suggests this is not a large cohort and as with all applicants, what is excluded from the standard allowance option is in part replaced by the introduction of cost of living allowances for the applicant themselves.
3. At this stage we are consulting on the principle of this approach: as of yet, we have not determined the tool or method we would implement – there is costing and further appraisal work to do. We are interested in views from stakeholders that will assists us in analysing the impacts of this type of change, and any methods by which this change could be implemented.

##### **Question 9**

What are your views on the proposal being considered to introduce standard allowances that reflect average costs of living into our means assessment?

##### **Question 10**

Do you have evidence to indicate that a change from individualised assessment of certain costs to standard allowances set to cover a wider range of costs may result in any unintended adverse consequences?

##### **Question 11**

Can you identify additional benefits or risks to either retaining the individualised assessment option or the standard allowance option?

##### **Question 12**

What types of circumstances, expenditures, goods and services do you think should be considered reasonable to make an allowance for when determining disposable income?

##### **Question 13**

Are there any circumstances, expenditures, goods and services you do not think should be considered reasonable to make an allowance for when determining disposable income?

##### **Question 14**

If we were to move to a standard allowance structure, what model(s) for constructing the allowances do you think might be appropriate?

##### **Question 15**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to the proposal to introduce standard allowances?

# **Other change options for consideration - housing and travel policy**

This section of the consultation details some discrete changes we seek to make to our statutory deductions policies following review of our current approach.

The changes relate to our assessment of housing costs and travel to work costs.

We seek feedback and views on these recommendations as set out below.

## Change to housing costs policy

##### **Current approach**

1. Our current policy is to deduct the actual amount being paid for housing expenses for householders, including any costs paid during the computation period by the householder for repairs or maintenance.
2. SLAB defines housing expenses for householders as including:

**Householder** – The regulations require us to consider a householder to be someone who rents their accommodation through a formal agreement (social or private rental) or an applicant who owns their home.

* Rent or mortgage
* Council tax and water charges
* Building and contents insurance
* Repairs and maintenance incurred during computation period that are not simply aesthetic upgrades to the household but for health and safety purposes.

1. For a householder who is not paying their housing costs, we will not make a deduction for those expenses, unless the debt incurred by non-payment is being met – that is, where the applicant has housing cost arrears and is repaying those, we will deduct whatever amount is being repaid. This approach seeks to accurately reflect the actual financial circumstance specific to the individual at the point at which they applied for legal aid.

**Recommended change**

1. We recommend amending our policy so that housing costs an applicant is liable for but not paying, and therefore is incurring a priority debt[[7]](#footnote-8) for, shall be deducted from disposable income total.

**Rationale for change**

1. We recommend this option because it aligns best with our [values](https://www.slab.org.uk/corporate-information/how-we-work/our-values/), as well as providing a reasonable and realistic assessment of financial circumstances.
2. We would allow all costs liable to be paid to be deducted in order to more accurately depict the financial circumstance of the household, enabling more accurate assessment of both eligibility (and affordability if the applicant is assessed as paying contributions).

##### **Benefits**

1. The change enables a more accurate reflection of circumstance, avoiding potentially adversely impacting those who may be experiencing financial hardship that results in an inability to pay housing costs and in turn misrepresents the actual financial situation they are in.
2. This also reduces the risk to the Fund through collections of contributions where those who have housing costs they are not meeting have a calculated disposable income level that is inconsistent with the reality of their financial circumstance, and as a result do not have the ability to pay their contributions as assessed.

##### **Risks**

1. We recognise that some may consider that the deduction of costs not paid is an unfair advantage for some applicants. This risk may be managed by enhanced levels of evidence of cost required for private sector tenancies in particular.

##### **Question 16**

What are your views on the proposed change to allow housing costs an applicant is liable for but not paying to be deducted disposable income total?

##### **Question 17**

Do you have evidence to indicate this change to our housing policy may be unnecessary or result in any unintended adverse consequences?

##### **Question 18**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to this change to our housing policy?

## Change to work related costs

##### **Current approach**

1. We are required by the regulations to deduct expenses related to an applicant’s employment, where their employment consists **wholly or in part of a wage or salary.**
2. **We are to consider deducting the following:**
3. the reasonable expenses of travelling to and from that person’s place of employment;
4. the amount of any payments reasonably made for membership of a trade union or professional organisation;
5. when it would be reasonable to do so, an amount to provide for the care of any dependent child living with the person concerned during the time that person is absent from the home by reason of employment; and
6. the amount of any contribution paid, whether under a legal obligation or not, to an occupational pension scheme within the meaning of the Social Security Pensions Act 1975 or to a personal pension scheme within the meaning of section 1 of the Pension Schemes Act 1993.
7. There are no definitions set out in the regulations to limit what may be considered a reasonable expense of travelling to and from a place of employment. This means we have discretion to determine what expenses may be deducted for travel.
8. We have, over time, amended the definition of travel costs to include any costs associated with running a vehicle that an applicant indicates they use for travelling to and from work.

###### **Recommended change**

1. We recommend amending our policy on what can be considered a travel cost for work purposes so that instead of deducting the actual costs associated with running and maintaining a vehicle used to travel to work, we would instead deduct the HMRC standard rate of 45p per mile for an applicant’s travel to work.
2. This would not change our approach to payment of travel costs where the applicant takes public transport to work. This would remain a deduction based on actual costs of that travel.

##### **Rationale for change**

1. Our aim in proposing this change to our current approach is to seek simplification and provide a fair and balanced approach to all applicants.
2. Amending this policy by setting the HMRC standard rate aligns our policy with wider UK policy and allows the rate to be amended in order to maintain this alignment. The 45p/mile rate is set so as to incorporate some of the additional costs associated with maintenance of a vehicle, out with fuel, and therefore would still provide for some of these costs, albeit on a standard rate basis and not actual costs.
3. By providing those who drive their vehicle to and from work with a wide range of deductions related to that vehicle, we risk unbalancing the benefit of car ownership and use for work with other modes of transport. Having regard to our public body climate change duties, we want to ensure our policies do not favour car travel over other modes of transport.

##### **Benefits**

1. This option would align our policy on travel related costs for applicants with policies on travel for solicitors in accounts policies.
2. As already stated, the 45p/mile rate is set so as to incorporate some of the additional costs associated with maintenance of a vehicle and therefore would still provide for some of these costs.

##### **Risks**

1. This option does not take into consideration the type or variation of vehicle the applicant owns or leases, which may have an impact on the types of costs they incur.
2. Changes in UK fuel costs would not be immediately reflected in this cost, however this option links the rate for travel to the HMRC allowance and means our rates will keep pace with changes elsewhere.

##### **Question 19**

What are your views on the proposed change to deduct the HMRC standard rate of 45p per mile for an applicant’s travel to work?

##### **Question 20**

Do you have evidence to indicate this change to our travel for work policy may be unnecessary or result in any unintended adverse consequences?

##### **Question 21**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to this change to our travel to work policy?

# Responding to this consultation

1. We have included some specific questions in the Consultation Questionnaire which we are seeking your views on. However, respondents are not required to submit an answer to all questions and can choose to answer some or all of the questions as they choose.
2. Of course, views on any other matter would also be most welcome. Please address these in the area provided at the end of the questionnaire.
3. SLAB looks forward to receiving your views on these issues and other aspects of the proposed changes to the Interest of Justice test in summary criminal proceedings.

#### Deadline

1. Consultation on the proposed changes runs for an eight week period from **Wednesday 1 December 2021**. Please ensure any responses are submitted to us by **5pm** on **26 January 2022**.

#### How to respond

##### **Online**

1. You can respond using our online [Consultation Questionnaire](https://www.slab.org.uk/financial-eligibility-assessment-consultation/).

##### **By email**

1. If you wish to respond by email, please complete the Consultation Questionnaire provided at Appendix B.
2. Completed questionnaires should be emailed to: [consultations@slab.org.uk](mailto:consultations@slab.org.uk)

**Enquiries**

If you have a query about the consultation process, please contact:

1. Cindy Morrice, Civil Finance Manager, Civil Finance, [morriceci@slab.org.uk](mailto:morriceci@slab.org.uk).

# **Appendix A - SLAB’s statutory duties when calculating disposable income and capital**

|  |  |
| --- | --- |
| **DISPOSABLE INCOME** | |
| **Statutory disregarded income sources** | **Statutory deductions and allowances** |
| income support payments  income based jobseeker’s allowance  back to work bonus (payable under the Jobseekers Act 1995  any payment made under the Community Care (Direct Payments) Act 1996 or as a direct payment as defined in section 4(2) of the Social Care (Self-directed Support) (Scotland) Act 2013  state pension credit  any income-related employment and support allowance  constant attendance allowance paid as an increase to a disablement pension  any sums paid to a person as holder of the Victoria Cross or the George Cross  any Welfare Fund payment  personal independence payment  armed forces independence payment  any Scottish child payment  child disability payment  short term assistance  universal credit  Attendance allowance  Disability living allowance | All sums expended to earn a profit from trade or business (self-employment)  For salary or waged employment:   * expenses of travelling to and from place of work * trade union or other professional organization fees * childcare where the person is absent from home for employment * contributions to occupational pension scheme or personal pension scheme   Tax  Contributions payable by person under 1992 Act (for following 12 months)  Standard allowance for interest or dividends payable on loan or investment  Council tax and water charges  Rent or mortgage if the person is a householder  Living accommodation costs if the person is not a householder  Standard allowance for maintenance of partner  Standard allowance for maintenance of dependent children  Maintenance payments for former spouse/s, children or other relatives |

|  |  |
| --- | --- |
| **DISPOSABLE CAPITAL** | |
| **Statutory disregarded sources of capital** | **Disregarded items of a capital nature** |
| Any amount above the disposable capital limit where that person is in receipt of income support, an income-based jobseeker’s allowance or an income-related employment and support allowance or universal credit  Welfare Fund payment  A back to work bonus  payment made under the Community Care (Direct Payments) Act 1996  any payment made under the Windrush Compensation Scheme, or connected payment  any Scottish child payment  money by way of financial assistance towards the cost of the proceedings in respect of which legal aid is applied for | The household furniture and effects of the dwelling house occupied by that person  articles of personal clothing  the personal tools and equipment of that person’s trade  value of any interest in the main or only dwelling in which that person resides  allowance for any debts owed  capital amounts where the applicant is a pensioner |

# **Appendix B: consultation questionnaire**

#### Respondent information

Name:

Email address: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Are you responding as an individual or an organisation? \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

*If an organisation, please enter your organisation's name:* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
  
SLAB would like your permission to publish your consultation response. Please indicate your publishing preference below:

|  |  |
| --- | --- |
| Publish anonymous response |  |
| Publish response with name |  |
| Do not publish my response |  |

*NOTE: If you are responding on behalf of an organisation, anonymous publishing refers only to your name, not your organisation’s name. If this option is selected, organisation name will still be published.*

We may wish to contact you again in the future, but we require your permission to do so. Are you content for SLAB to contact you again in relation to this consultation exercise?

|  |  |
| --- | --- |
| Yes |  |
| No |  |

*By submitting a response you give us permission to analyse and include your response in our results.*

##### **Specific consultation questions**

For Q1 and Q2 detail, see ‘Period of computation’ section of document (page 12).

**Question 1**

Do you have evidence of any adverse impacts of our current assessment of computation period? (Please describe this evidence and the kind of impact it is.)

**Question 2**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to computation period?

For Q3 and Q4 detail, see ‘Aggregation’ section of document (page 12-13).

**Question 3**

Do you have evidence of any adverse impacts of our current assessment of whether to aggregate or not? (Please describe this evidence and the kind of impact it is.)

**Question 4**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to aggregation?

For Q5 and Q6 detail, see ‘Disposable capital’ section of document (page 13).

**Question 5**

Do you have evidence of any adverse impacts of our current assessment of disposable capital? (Please describe this evidence and the kind of impact it is.)

**Question 6**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to disposable capital?

For Q7 and Q8 detail, see ‘Assessing sources of income’ section of document (page 14).

**Question 7**

Do you have evidence of any adverse impacts of our current assessment of sources of income? (Please describe this evidence and the kind of impact it is.)

**Question 8**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to sources of income?

For Q9 to Q15 detail, see ‘Change proposal – introduction of cost of living allowances’ section of document (pages 17 - 20).

**Question 9**

What are your views on the proposal being considered to introduce standard allowances that reflect average costs of living into our means assessment?

**Question 10**

Do you have evidence to indicate that a change from individualised assessment of certain costs to standard allowances set to cover a wider range of costs may result in any unintended adverse consequences?

**Question 11**

Can you identify additional benefits or risks to either retaining the individualised assessment option or the standard allowance option?

**Question 12**

What types of circumstances, expenditures, goods and services do you think should be considered reasonable to make an allowance for when determining disposable income?

**Question 13**

Are there any circumstances, expenditures, goods and services you do not think should be considered reasonable to make an allowance for when determining disposable income?

**Question 14**

If we were to move to a standard allowance structure, what model/s for constructing the allowances do you think might be appropriate?

**Question 15**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to this change option to introduce standard allowances?

For Q16 to Q18 detail, see ‘Other change options for consideration – housing and travel policy’ section of document (pages 21 - 22).

**Question 16**

What are your views on the proposed change to allow housing costs that an applicant is liable for but not paying to be deducted from the disposable income total?

**Question 17**

Do you have evidence to indicate this change to our housing policy may be unnecessary or result in any unintended adverse consequences?

**Question 18**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to this change to our housing policy?

For Q19 to Q21 detail, see ‘Change to work related costs’ section of document (pages 23 - 24).

**Question 19**

What are your views on the proposed change to deduct the HMRC standard rate of 45p per mile for an applicant’s travel to work?

**Question 20**

Do you have evidence to indicate this change to our travel to work policy may be unnecessary or result in any unintended adverse consequences?

**Question 21**

Do you have any experience or evidence to indicate there are equalities considerations we should take into account in relation to this change to our travel to work policy?

1. [www.slab.org.uk/corporate-information/what-we-do/](http://www.slab.org.uk/corporate-information/what-we-do/) [↑](#footnote-ref-2)
2. The Legal Aid (Scotland) Act 1986 [www.legislation.gov.uk/ukpga/1986/47/contents](https://www.legislation.gov.uk/ukpga/1986/47/contents) [↑](#footnote-ref-3)
3. [www.webarchive.org.uk/wayback/archive/reviews/legal-aid-review](http://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/Topics/archive/reviews/legal-aid-review) [↑](#footnote-ref-4)
4. [www.gov.scot/publications/legal-aid-reform-scotland-consultation-response/](https://www.gov.scot/publications/legal-aid-reform-scotland-consultation-response/) [↑](#footnote-ref-5)
5. For a full list of our statutory duties regarding allowances please see appendix A. [↑](#footnote-ref-6)
6. Once a disposable income figure has been established, we use this to determine whether the applicant is eligible for legal aid or not. If it is above the upper disposable income limit of £26,239, they are ineligible. The upper income limit has not been uprated since 2011. If their disposable income is below the upper income limit, they are found eligible. If their income exceeds the lower income limit (£3,521, also unchanged since 2011), they are eligible with a contribution, calculated in accordance with the prevailing rates to successive bands of disposable income in excess of the lower income limit. [↑](#footnote-ref-7)
7. Priority debts are debts that can cause you particularly serious problems if you don’t do anything about them. [↑](#footnote-ref-8)