

Respondent information

Name

Tim Mouncer

Email

[redacted]

Are you responding as an individual or an organisation?

Organisation

Please enter your organisation's name

The Law Society of Scotland

SLAB would like your permission to publish your organisation's consultation response. Please indicate your preference.

Publish response with name

Are you content for SLAB to contact you again in relation to this consultation exercise?

Yes

Specific consultation questions

Q1: What are your views on how we assess reasonableness as part of the taxation test?

SLAB should change the content of the factors taken into account in the assessment of reasonableness

Please provide further information of any changes proposed and the reason(s) for your answer:

The consultation document sets out a desire to be more transparent in how decisions are taken in the assessment process. In terms of transparency, we have repeatedly asked SLAB to publish decisions by auditors of court. Though these may be geographically limited in application, may require redaction to comply with data protection legislation, and not every determination of an auditor is accompanied with written reasons, we believe this is an important resource to the profession. It is frustrating that our request for SLAB to publish these remains unresolved.

Increasing the transparency of the process may support firms around simplified legal aid accounts but we reiterate the need to develop a more public-centred legal aid system and will continue to raise this with SLAB, Ministers and other stakeholders as part of discussions on the proposed Legal Aid Reform Bill.

At paragraph 7 it is stated that the feeing system set out in regulations cannot be changed. We believe however that changes to legal aid regulations may be simpler to achieve than changes to primary legislation. If there are deficiencies that SLAB has identified which could ease the frustrations noted these could be promoted as a quick fix pending a wider Legal Aid Reform Bill. We would welcome any opportunity to discuss amendments to regulations which could be made in the shorter term ahead of the potentially lengthy process of introducing primary legislation.

At paragraph 8 the provisions and principles of administrative law are noted. Feedback from our members is that applications for judicial review to challenge SLAB on the provisions and principles of administrative law are extremely difficult to secure.

Paragraph 25 sets out a perception of how private client work is carried out and funded and compares this to the provision of legal aid funded work. For legal aid work however there is a statutory obstacle, in that work beyond a particular expense threshold, however necessary, reasonable and economical, will not be reimbursed unless previously agreed by SLAB. Particularly for civil legal aid, this causes significant issues for firms carrying out necessary work for which the expense cannot be retrospectively approved.

Feedback from members is that the factors used to determine reasonableness appear vague and largely discretionary. The assessment of accounts often appears arbitrary and varies by assessor.

Q2: What are your views on the process for seeking further information to support account entries that have been abated?

Paragraph 25 sets out a perception of how private client work is carried out and funded and compares this to the provision of legal aid funded work. For legal aid work however there is a statutory obstacle, in that work beyond a particular expense threshold, however necessary, reasonable and economical, will not be reimbursed unless previously agreed by SLAB. Particularly for civil legal aid, this causes significant issues for firms carrying out necessary work for which the expense cannot be retrospectively approved.

The administrative cost of adjudicating accounts disputes over small sums, both for SLAB and firms providing legal aid, is undoubtedly not cost-effective. There are other jurisdictions, such as the Netherlands, with its 'high trust' model, where there are more effective ways to determine what is professionally appropriate in a given case. We would encourage analysis of the approach taken in the Netherlands and other jurisdictions.

The process of seeking further information is often seen as unnecessary, time-consuming and arbitrary. Feedback from members is that the assessment is often inadequate, either failing to recognise the needs of the client, or to cover the professional practice requirements established by the Law Society, particularly in responding to vulnerable clients.

Examples provided by members include that even when experienced law accountants, some of whom are previous SLAB employees, are used to create and submit accounts, abatements are often made for reasons they do not anticipate or understand. Assessors commonly take the view that work undertaken should be abated even when the firm considers it to be carried out in good faith and necessary to the case. When abatements are challenged they are often paid, suggesting they were incorrectly abated in the first place.

Details are routinely requested by SLAB when Sheriff Officers are used to serve proceedings, even though they are clearly required due to interim order hearings being fixed in a short time scale.

A further example is the recent change in policy around payment of shorthand writer fees. The pursuer in an action is responsible for booking the shorthand writer and if the Proof settles within seven days of the Proof, a cancellation fee is applicable. Previously this outlay was paid by SLAB without difficulty, but the policy changed in around 2019 with SLAB expecting the cancellation fee to be split between Pursuer and Defender. Apart from the increased bureaucracy this causes, SLAB have also imposed this policy change retrospectively on historic accounts pre-dating the change in policy, with some charges applied for cases dating back to 2014. This policy would appear to cost rather than save SLAB and is an example of the bureaucratic and unreasonable approach to the accounts process.

Q3: What are your views on how we could best keep up to date on what is 'usual' in any given practice area?

The policy provided in the consultation document states that if a charge is 'usual' it requires a narrative justification. If it is usual and within the range of professional judgement in the conduct of a case, this should not require additional justification.

There is an argument that the distinction between usual and unusual work is unhelpful and should be removed. It is seen by our members as justification for paying 'usual' work at rates lower than other work. Our position is that payment should be made for work properly carried out whether it is usual or not.

The policy notes that usual charges can change over time and references shifts in patterns of charging for particular work or case types. This has been placed under significant pressure as a result of the pandemic, where existing fee structures have not easily accommodated changes in practice. The use of skeleton arguments in immigration and asylum cases, or the submission of case documents using the Civil Online portal are some examples of this.

There are practice areas that engage protected characteristics that cannot be considered 'unusual' under the guidance as presented in the document – including children's legal aid, immigration and AWI. The guidance should reflect this, and ideally, provide guidance sectorally on what is reasonable or usual. Research from EHRC on access to justice may be helpful in informing this work.

(note referred to above: <https://www.equalityhumanrights.com/sites/default/files/research-report-99-equality-human-rights-and-access-to-civil-law-justice.pdf>)

Q4. Does the assessment process set out on page 11 of the consultation paper or appended policy statements raise any concerns in relation to treatment of care experienced young people, equality groups or other vulnerable people?

Yes

Please provide the reason(s) for your answer:

The process of seeking further information is often seen as unnecessary, time-consuming and arbitrary. Feedback from members is that the assessment is often inadequate, either failing to recognise the needs of the client, or to cover the professional practice requirements established by the Law Society, particularly in responding to vulnerable clients.

The position on 'unusual' work as set out at paragraph 36 raises equality concerns, balancing the need to avoid excessive consultation while also meeting the needs for clients that require more extensive consultation and reassurance. SLAB's approach to accounts assessment should recognise that there are circumstances where the particular characteristics and vulnerabilities of the client will properly require their solicitor to provide advice and representation in a way that is tailored to the needs of the client, in line with their professional duties as solicitors. This may result in work which SLAB would consider 'unusual', but which is essential in ensuring that vulnerable clients are effectively represented. In seeking additional evidence in such cases, we would suggest that it is important that SLAB adopts an approach which is proportionate and clear to solicitors at the point of submitting the account. The ultimate aim of SLAB's approach to accounts assessment should be ensuring real and effective access to justice for vulnerable clients by way of access to suitably experienced and appropriately remunerated solicitors.

SLAB may wish to consider additional training for decision-makers in this area, perhaps in respect of individual differences, communication barriers and how practitioners should and do seek to maximise legal capacity and participation for clients with a range of vulnerabilities.

We are aware that SLAB has signed a legal agreement with EHRC under section 23 of the Equality Act 2006. It is unclear what changes to accounts or SLAB processes overall are required under this agreement, or contemplated to mainstream equality as required under the relevant legislation.

There is reference at 7(f) in the policy document to the client's 'particular vulnerabilities'. This needs clarification as to whether this refers to protected characteristics, such as mental health, disability and others, or whether refers to the wider and developing understanding of temporary vulnerability, which would apply to most individuals involved in court processes.

There is also a question of whether client vulnerabilities should be considered as unusual, particularly as many case types invariably involve people with vulnerabilities. For instance, legal aid is available to complainers in sexual offences cases, to make representations around the disclosure of medical or telephone records – it is unclear whether assistance would be considered as usual or unusual, or whether such a client would be considered as vulnerable under this policy. The policy articulated raises questions around whether SLAB is compliant with equality legislation and further clarity is required.

As stated above, there are practice areas that engage protected characteristics that cannot be considered 'unusual' under the guidance as presented in the document – including children's legal aid, immigration and AWI. The guidance should reflect this, and ideally, provide guidance sectorally on what is reasonable or usual. Research from EHRC on access to justice may be helpful in informing this work:

www.equalityhumanrights.com/en/our-work/news/scottish-legal-aid-board-sign-legal-agreement-improve-approach-equality

Paragraph 40 notes immigration cases as an example of 'unusual' charges due to the potential need for interpretation services. This needs further articulation – because of the protected characteristics engaged in these cases, it is questionable whether this should be considered 'unusual'.

We believe SLAB should consider the overall process in light of the implementation of the UN Convention on the Rights of the Child.

Q5: To what extent is the purpose of the policy statements clear and understandable?

The comment that a different approach needs to be taken for SLAB staff is unhelpful. Legal aid guidance and staff guidance should be consistent. An open approach would be to align both, or to publish staff guidance, including any written specifically for decision making. An example of this is the decision guidance published by the Department for Work and Pensions. We note the recent publication of Children's policies and decision-makers guidance and would encourage the further publication of decision-makers guidance across the full scope of legal aid work.

(DWP guidance as referenced above: <https://www.gov.uk/government/publications/advice-for-decision-making-staff-guide>)

Feedback from members is that the policy statements are not sufficiently clear and understandable, with the whole process appearing complicated to both practitioners and SLAB staff and overly bureaucratic.

Q6: How useful is seeing the policy statements as an underpinning for future guidance? Please provide reasons for your response.

We do not consider the distinction between usual and unusual work to be a suitable starting point for future guidance for reasons set out elsewhere in this response.

Feedback from members is that the process as a whole needs to be simplified and made less bureaucratic.

Q7: What are your views on how the meetings and letters policy as stated are reflected in current practice?

As stated above, the letters and meetings policy fails to recognise that in some cases, particularly when the client has vulnerabilities or language issues the solicitor needs to adapt to, repeated consultation may be required. The current abatements approach creates particular difficulties for firms dealing with clients with protected characteristics where there is a need to balance avoiding excessive consultation while meeting the needs of the client.

Q8. What are your views on how the civil and children's counsel fees policy as stated is reflected in current practice?

As noted elsewhere we believe SLAB should consider the overall process in light of the implementation of the UN Convention on the Rights of the Child.

We have no specific comments on the civil and children's counsel fees policy as stated.

Q9. What are your views on the proposed changes to our policy on outlays related to travel and associated expenses?

Travel expenses are presented in the consultation document as being discretionary, but members of the profession report that they are routinely told that travel cannot be paid, for instance, for traveling to consultations, even where this is clearly necessary to undertake the work. The default position appears to be that travel can only be paid for specific work under the rules and SLAB have no discretion.

Regarding funding, we have argued that the 50% cut to the funding of travel fees made in response to the financial crisis should be reversed, although this policy will only have the desired effect if travel fees cover all reasonable travel undertaken by members of the profession in the necessary course of legal aid work. This has had a particular impact on access to justice in rural areas, reflected in our geographic analysis of the areas in which firms have ceased providing legal aid services, and in the feedback from legal aid firms.

We agree the mileage rate should be increased to reflect the current HMRC rate and that it should be pegged to HMRC rates in future.

Q10. What are your views on the proposed policy on travel to court?

Please refer to our comments in response to Question 9.

Q11. What are your views on the proposed policy on overnight travel?

Please refer to our comments in response to Question 9.

Q12. What are your views on the proposed changes to our spoken language interpreting and translation policy?

One issue around interpreters and translators is the lack of retrospective payment, namely that the cost of interpreters or translators must be met by the firm for the first meeting between solicitor and client. We have asked for this to be changed, or for firms to be able to access the services available to public bodies without charge, for instance, video signing (where appropriate for the client).

We have also asked for outlays for experts, interpreters and similar services to be paid direct by SLAB at agreed rates.

Q13. To what extent do you agree or disagree with our approach to funding adjustments from the Legal Aid Fund?

Completely disagree

Please provide the reason(s) for your answer:

A private client requesting reasonable adjustments from a firm as a service provider under equality legislation would not be required to meet the costs of that adjustment; similarly, for publicly funded clients, there should not be a charge above that for any client not seeking a reasonable adjustment.

SLAB should absorb the costs of any reasonable adjustments made and provided through public funding;

additionally, SLAB should cover the costs of any reasonable adjustments made by a firm for a client at first consultation that ultimately will be eligible for legal aid.

Q14. What are your views on whether the current approach to guidance as set out for criminal legal assistance applications would be beneficial for accounts assessment?

We have no specific comments other than to reiterate the broader issues reported with the accounts assessment process as a whole.

Q15. Are there particular examples from other organisations or features that you would like to see incorporated into accounts assessment guidance?

The administrative cost of adjudicating accounts disputes over small sums, both for SLAB and firms providing legal aid, is undoubtedly not cost-effective. The 'high trust' model from the legal aid system in the Netherlands should be explored, allowing greater latitude for exercising professional judgment in the resolution of cases.

As stated above, the open publication of decisions guidance for staff by the Department for Work and Pensions set out at <https://www.gov.uk/government/publications/advice-for-decision-making-staff-guide> is valuable in increasing transparency and is a model we would like to see followed by SLAB. We note the recent publication of decision maker guidance in children's legal aid and believe this should be rolled out with the open publication of all decision maker guidance.

Q16. Please provide your views on any further aspect of accounts assessment that has not been covered by responses above.

The consultation opens by stating it is a step towards a more modern user focussed legal aid service. There needs to be clarity around what a user focused legal aid system involves. If the users in question are legal aid providers, there is undoubtedly a benefit in reducing the bureaucracy of the system. This has been raised by our members as a reason for firms leaving the legal aid sector, including in feedback on our strategy paper in 2016 and our survey of members submitted to the legal aid fee review panel in 2020. It is not immediately clear how a reformed accounts process would benefit the ultimate end-users, the public, save that firms would not leave the sector because of the level of bureaucracy involved.

Ahead of the broader reforms to the system due to be introduced during this Parliament, there are actions under the gift of the Scottish Legal Aid Board which could reduce the administrative burden on firms beyond the scope covered in this consultation paper. As stated above, a 'high trust' model similar to the approach in the Netherlands could significantly reduce both the administrative burden on firms and on the Scottish Legal Aid Board's accounts assessment resources. We propose a cap on abatements. If abatement is less than for example £50 for advice and assistance or £100 for civil work in cannot be cost effective to make it.

In paragraph 12 the powers of Ministers are set out. It should be noted that Ministers may also make directions around the provision of legal aid, particularly to provide legal aid where human rights may otherwise be violated.

Paragraph 15 notes the ongoing review into how legal aid is paid. While we welcome the fact that a review is underway, we believe the real-terms cuts over many years do not require further evidence. A further 5% increase in fees is anticipated in 2022, but with inflation forecast to run to over 5% in spring 2022 this will represent another real-terms cut to fees.

The consultation notes that seeking further information can be time consuming and frustrating. The latest performance statistics from SLAB demonstrate the cashflow challenges facing firms: 19 days to bank for civil A&A and ABWOR accounts as a target; 23 days for civil legal aid; and 42 days for negotiations (with 67.5% of initial assessments paid). (reference to <https://www.slab.org.uk/?download=file&file=23401>)

The position with clawback is particularly unclear and a clear definition of when this applies would greatly assist all involved, including those at SLAB charged with making decisions on when and how to apply clawback. Feedback from members is that SLAB will advise that clawback applies, but once challenged the decision is reversed. This does not provide confidence that the present system is well understood by SLAB, let alone practitioners. The impact of this can be significant given the potentially high sums to be paid by clients if clawback does apply.

The process of confirming and finalising accounts is also problematic and inconsistent. Feedback from members includes examples of cases where concluding the various accounts for long-running proceedings including for instance divorce, interdict, repossession and appeal proceedings has been problematic, with two different figures provided for the client's remaining contribution. Even once SLAB assure the firm that a final figure has been given and the firm transfers the balance of funds to the client, SLAB may at a later date advise that further contributions are required by the client. The firm in this case is left in the difficult position of having to advise their client of the need to claw back these additional funds having advised in

good faith that final figures had been agreed. Given the differing advice on contributions, a great deal of work is required on the part of firms to finalise accounts.

Feedback from members is that the level of bureaucracy in the legal aid system creates a significant barrier to firms. The accounts assessment process as a whole needs to be far simpler, more user friendly and less bureaucratic. Detailed and extensive feedback was provided to the legal aid panel in 2020 and further comment can be provided on request.