



Submitted for Ministerial Approval - Sept 2017

Section 25B Legal Aid (Scotland) Act 1986

CODE OF PRACTICE FOR CRIMINAL LEGAL ASSISTANCE

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Part A - Introduction

Section 1 Introduction, Principles, and Definitions

Introduction

- 1.1 This Code describes the standards of conduct and service required of solicitors who elect to provide publicly funded criminal legal advice and representation services. It is an important part of a wider framework of legislation, practice rules, standards, procedures and court rules that registered solicitors must follow. Together this framework ensures and promotes adequate protection for the interests of clients, the courts, the wider justice system and the Scottish Legal Aid Fund.
- 1.2 The Code aims to both set and raise awareness of the standards required of solicitors who provide publicly funded services. In doing so, it shapes and promotes the availability to the people of Scotland of quality assured criminal legal assistance.
- 1.3 The Scottish Legal Aid Board (“SLAB”) maintains and publishes a register of solicitors eligible to provide criminal legal assistance and the firms with which they are connected, called the Criminal Legal Assistance Register (“the register”). Those appearing on the register have committed to abide by the standards set out in the Code.

Principles underlying the Code of Practice

- 1.4 The following principles underlie the Code. Accordingly, solicitors providing services funded by Criminal Legal Assistance must:-
 - display high standards of professionalism and act independently, honestly, ethically and with integrity both directly in relation to the delivery of criminal legal assistance and otherwise.
 - provide a proper standard of service to their clients and act in a way consistent with the best interests of their clients, their professional obligations, their duties as officers of the court and the legal aid legislation.
 - comply with their regulatory obligations, engaging with SLAB in the exercise of any of its functions, and with other agencies within the justice sector in an open, timely and co-operative manner.
 - ensure that publicly-funded services are delivered with due regard to economy and that costs incurred are for work and expenses that are actually, necessarily, reasonably and appropriately undertaken or incurred in pursuance of competent and appropriate representation.
 - treat all those with whom they come into contact in the course of providing criminal legal assistance with respect, dignity and courtesy. This includes clients, witnesses,

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staff of other firms and those employed by criminal justice agencies, including Police Scotland, SCTS, COPFS and SLAB.

Definitions

1.5 The following definitions apply in the Code:

<i>The Act</i>	Legal Aid (Scotland) Act 1986 (hereafter “the Act”)
<i>Criminal Legal Assistance</i>	Criminal advice and assistance, criminal ABWOR and/or criminal legal aid
<i>Duty criminal legal assistance</i>	Criminal Legal Assistance provided at police stations, courts or otherwise in accordance with arrangements made by SLAB.
<i>Duty solicitor</i>	a solicitor (see below) who, in respect of a particular date or period, or otherwise as required, is by virtue of inclusion in arrangements made by SLAB, in a position to provide duty criminal legal assistance
<i>Firm</i>	includes, as the context requires, a firm of solicitors, an incorporated practice, a licensed legal services provider, a sole solicitor, SLAB as the Public Defence Solicitors’ Office and Solicitor Contact Line, or a law centre or other practice unit; and which firm may either be a firm registered by SLAB as a firm with which registered solicitors are connected, or a firm in course of applying for such registration
<i>Fund</i>	means the Scottish Legal Aid Fund
<i>Register</i>	the register established and maintained by SLAB under section 25A of the Legal Aid (Scotland) Act 1986 otherwise known as the Criminal Legal Assistance Register
<i>Criminal Quality Assurance Committee</i>	the committee made up of members from SLAB, the Law Society of Scotland and lay members, formed in relation to the quality assurance scheme administered by SLAB under Part IVa of the Act
<i>Solicitor</i>	a solicitor holding a valid Scottish practising certificate and registered in terms of Section 25A(3A) of the Act or in course of applying for such registration, unless otherwise stated. This includes trainee solicitors and solicitors otherwise subject to practising certificate restrictions to the extent that such solicitors are in a position to provide criminal legal assistance
<i>Legal Aid Online</i>	the system for electronic submission to SLAB of applications and accounts

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Part B - The Providers of Criminal Legal Assistance**Section 2 Registration**

This section describes the basic requirements to be registered with SLAB for: firms, compliance managers and solicitors.

What does the legislation say about this?

Section 25B(1) of the Legal Aid (Scotland) Act 1986 states (irrelevant sub-section are omitted):

25B(1) The Board shall prepare a draft code of practice in relation to the carrying out by solicitors of their functions with regard to the provision of criminal legal assistance and, without prejudice to the generality of the foregoing, the code may include provision as to -

- (a) The conditions to be complied with in order to qualify for registration including -*
 - (i) the attendance by the solicitor at a sufficient number of specified courses relevant to the provision of criminal legal assistance, including courses in criminal law, evidence and pleading and professional ethics;*
 - (ii) The keeping of records in a particular format;*
- (e) (ii) the extent to which he attends courses relevant to the provision of criminal legal assistance, including courses in criminal law, evidence and pleading and professional ethics;*

and any other matter relating to the organisation of or accounting for criminal legal assistance which appears to the Board to be relevant.

Applications for registration - Firms

2.1 A firm applying for registration must:

- be a firm regulated with the Law Society of Scotland
- nominate a compliance manager
- confirm that it complies with the Code.

Resources & Infrastructure

2.2 A firm is expected to:

- ensure that all staff are adequately trained, skilled and resourced to undertake their duties and are familiar with Legal Aid On-line and follow the Act, regulations and guidance, as appropriate.
- have appropriate equipment, infrastructure and resources available, to provide an adequate professional service in each individual case. This includes the use of

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technology to communicate effectively and securely with justice system bodies and clients in custody.

Data Protection

- 2.3 A firm must be registered as a Data Controller with the Information Commissioner's Office. All personal data should be appropriately encrypted and any transfer of data should meet the requirements of the Data Protection Act 1998.

Firm Compliance Manual

- 2.4 A firm must have a compliance manual which sets out how the firm complies with the code of practice.
- 2.5 A compliance manager must be an individual authorised by the firm and in a position to perform the functions set out at paragraph 2.7 below.
- 2.6 A compliance manager is expected to:
- make the application for the nominating firm to be registered and inform SLAB of any changes
 - certify that the firm and its staff comply with the Code when the application is made
 - monitor and ensure ongoing compliance with the Code
 - notify SLAB as soon as reasonably practicable of any changes within the firm relevant either to registration or compliance with the Code
 - liaise with SLAB regarding the firm's or an individual solicitor's compliance with the Code
 - make available to SLAB any firm procedures required under the Code
 - ensure that there is an effective firm-level system of monitoring and supervision of account preparation and submission by solicitors
 - ensure that necessary corrective and remedial action is taken in the event of any non-compliance.

Applications for registration - Solicitors

- 2.7 A solicitor applying for registration must:
- be a solicitor holding a practising certificate issued by the Law Society of Scotland with no restriction affecting their entitlement to provide criminal legal assistance;
 - be connected to a firm that is already registered or has applied for registration;

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- not de-registered under section 25D of the Act nor subject to exclusion under section 31 of the Act;
- confirm they comply with the Code of Practice.

2.8 A solicitor must have an individual email account and

- ensure that SLAB has an up to date address for that account; and
- regularly access and manage as appropriate, the material SLAB issues to the solicitor at that email address.

When applying for registration - Continuing Professional Development (CPD) requirement

2.9 A solicitor is expected to have attended or conducted a minimum of 15 hours of training relevant to the provision of criminal legal assistance in the twelve months prior to application.

This may include training in criminal law, evidence and pleading, legal aid or professional ethics.

This provision does not apply to a second year trainee who has held a criminal law and practice “seat” for more than three months as part of their traineeship prior to the date of application.

2.10 If the solicitor has not attended or conducted sufficient relevant training in the twelve months prior to application, they must undertake to do so in the six months following the solicitor’s registration.

Once registered - ongoing CPD requirement

2.11 A solicitor must attend or conduct a minimum of 5 hours of relevant training in each practising certificate year. For solicitors to whom paragraph 2.12 applies, the training undertaken must comprise wholly of criminal law, evidence and pleading.

2.12 If there are an insufficient number of files to allow a solicitor to be assessed under Criminal Quality Assurance Scheme, the solicitor is expected to demonstrate to the satisfaction of the SLAB Criminal Quality Assurance Committee that they have the required knowledge, skills and experience to deliver criminal legal assistance.

2.13 A solicitor must keep a record of relevant training they attended.

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Section 3 Standards of conduct

This section describes the standards of conduct expected of a solicitor providing criminal legal assistance.

What does the legislation say about standards of conduct?

Section 25B(1) of the 1986 Act states (irrelevant sub-sections are omitted):

25B(1) The Board shall prepare a draft code of practice in relation to the carrying out by solicitors of their functions with regard to the provision of criminal legal assistance and, without prejudice to the generality of the foregoing, the code may include provision as to -

(b) the standards of conduct expected of a solicitor providing or proposing to provide criminal legal assistance.

- 3.1 A solicitor must prepare and conduct work to the standard of a reasonably competent solicitor by carrying out professionally, promptly and expeditiously all work that is actually, necessarily and reasonably undertaken with due regard to economy.
- 3.2 A solicitor must comply with all legal, ethical and professional obligations of a solicitor providing or intending to provide criminal legal assistance, including the solicitor's duties to the client, as an officer of the court and under the Code.
- 3.3 A solicitor must have an up to date knowledge of the law, legal aid guidance, the Code and the firm's own system of management and administration.
- 3.4 A solicitor must not discriminate unlawfully on grounds of any protected characteristic under the Equality Act 2010 in their professional dealings with clients, other staff, other lawyers or others involved in respect of criminal legal assistance and the justice system.
- 3.5 A solicitor is expected to engage with SLAB in the exercise of any of its functions or otherwise, in an open, timely and co-operative manner.

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Section 4 Standards for conducting a case and representing clients

This section describes the expectations about how a case should be conducted, if funded by legal assistance.

What does the legislation say?

Section 25B(1) of the Legal Aid (Scotland) Act 1986 states (irrelevant sub-sections are omitted):

25B(1) The Board shall prepare a draft code of practice in relation to the carrying out by solicitors of their functions with regard to the provision of criminal legal assistance and, without prejudice to the generality of the foregoing, the code may include provision as to -

- (c) *the manner in which a solicitor should conduct a case and represent the client, including:*
- (i) *The passage of timeous and accurate information to the client in relation to the case;*
 - (ii) *The frequency of meetings with the client;*
 - (iii) *The giving of advice to the client as to the consequences of any decision made by the client in relation to his defence;*
 - (iv) *The taking of such precognitions as may be necessary;*
 - (v) *The conduct of relations with the prosecution;*

and any other matter relating to the organisation of or accounting for criminal legal assistance which appears to the Board to be relevant.

4.1 **As the circumstances of each case may require**, a solicitor is expected to:

- (a) consider whether the client is fit to enter a plea or understand the proceedings.
- (b) take and record instructions from the client on the plea to be tendered initially and any subsequent changes.
- (c) give clients accurate, appropriate, well informed and complete advice and explanations to enable them to make informed decisions.

If it would assist the client's understanding and where it is appropriate and practicable, that advice should be provided to the client in writing.

Where appropriate to the case, a solicitor is expected to give advice on:

- sentencing and the application of Section 196 of the Criminal Procedure (Scotland) Act 1995 in relation to early pleas of guilty
- any special conditions of bail and the consequences of any breach
- the outcome of the matter, including any sentence, whether any appeal should be considered and any further action the client is required to take.

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- (d) timeously advise the client about the availability and operation of criminal legal assistance, including the client's obligations, and take appropriate and effective steps to grant or apply for the appropriate form of criminal legal assistance, consistent with the client's instructions and position.
- (e) advise the client of the steps that can be taken by the client in order to assist the efficient and effective conduct of the matter.
- (f) communicate effectively with the client, using language that is understandable and appropriate to the age and capacity of the client.
- (g) engage with the client and others as necessary for the proper conduct of the case, where possible avoiding and not instigating meetings, etc. that do not or cannot reasonably be anticipated to advance the case.
- (h) actively engage with the prosecution to discuss and facilitate the efficient progress of cases, including as appropriate the agreement of evidence.
- (i) consider, where available, relevant disclosure from the prosecution and discuss it with the client and take instructions.
- (j) take details for, and frame, such precognitions as may reasonably be expected to be necessary for the preparation and conduct of the client's case.
- (k) avoid unnecessary travel, for example by the use of local agents, video conferencing or other video or audio media. Travel in the case must be demonstrably justifiable from the case content and must be correctly apportioned with other cases.
- (l) when establishing necessary evidence, under reference to the client's position and instructions, take all reasonable steps to do so with due regard to economy. Keep a record of the steps taken to establish the anticipated evidence.
- (m) identify and instruct in good time necessary experts, subject to requirement to obtain sanction.
- (n) cite witnesses deemed necessary for the defence in good time for any diet of trial at which those witnesses are to be led in evidence and minimise their inconvenience and expense, for example by use of stand-by arrangements, where that is within the solicitor's control. Keep witnesses informed and about arrangements and any changes.
- (o) provide (or otherwise arrange) in any case in which the solicitor is instructed, competent and responsible representation at any diet of the court at which representation for the client is required and not cause unnecessary disruption of or delay to court business. This includes the situation where a client appears from custody on a warrant granted in the case previously.

4.2 Where a solicitor instructs a local agent, relevant background information and clear instructions must be provided and recorded on the file.

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- 4.3 A solicitor must check and ensure that original documents and other property held by the solicitor or firm belonging to the client are returned at the conclusion of the case to which they relate.
- 4.4 A solicitor must refrain from withdrawing from acting without just cause. Where a solicitor does withdraw immediate notice should be given to the court and SLAB, and unless impracticable, to the client. Notification to SLAB should specify the reasons for withdrawal.

Section 5 Systems for management & administration

This section describes the business process requirements for firms and solicitors providing legal assistance.

What does the legislation say about this?

Section 25B(1) of the Legal Aid (Scotland) Act 1986 states (irrelevant sub-sections are omitted):

25B(1) The Board shall prepare a draft code of practice in relation to the carrying out by solicitors of their functions with regard to the provision of criminal legal assistance and, without prejudice to the generality of the foregoing, the code may include provision as to -

- (f) *the manner in which records are kept, including:*
- (i) *Maintaining books of account, and presentation of accounts to the Board, in a specified format;*
 - (ii) *Office procedures;*
 - (iii) *Time recording systems;*
 - (iv) *Instructions given to the staff*

and any other matter relating to the organisation of or accounting for criminal legal assistance which appears to the Board to be relevant.

Personal work and time recording

- 5.1 A solicitor, including a solicitor exercising extended rights of audience, must create and maintain an accurate chronological record either contemporaneously or timeously of all work which is chargeable on a time basis, attendances at court, prison or police station and travel where an outlay is chargeable.
- 5.2 On request and within a timescale agreed with SLAB:
- a solicitor must be able to provide their completed timesheets for the previous three years; and

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- a firm must be able to provide the timesheets of all solicitors who have been connected with the firm for criminal legal assistance for the previous three years.

Case recording

5.3 A solicitor must maintain client files in good and logical order to the standard and effect that, were another solicitor to assume conduct of the case, they could clearly and easily establish:

- all client instructions and advice given
- the stage the case has reached
- the outcome of court diets or any negotiations
- the status of legal assistance funding
- any other relevant matter.

5.4 A solicitor is expected to make file notes timeously of: interactions with the client where matters of importance are conveyed, other time spent on relevant work, consultations and court attendances.

File notes should record the name of the person undertaking any work on the file, including their status as well as start and finish times of all activities (where work is chargeable on a time basis). File notes must be sufficient to demonstrate the work undertaken.

5.5 A solicitor must ensure that files and records are maintained, retained and readily accessible for a period of not less than three years from date of payment of the relevant account by SLAB, or conclusion of the case, whichever is the later.

5.6 Where a firm maintains electronic files only, a firm must make these available in a paper format, if requested by SLAB for the purposes of monitoring of compliance, including peer review, or to support SLAB's assessment of any associated account.

5.7 Where notification is given specifying the requirement for a file or files to be made available to SLAB for the purposes of Account Assessment, Compliance, Peer Review or Investigations, files or file content must not be altered, removed or added to before the file is provided to SLAB. This provision does not affect printing or extraction of material or other intromission with files for any proper purpose, such as appropriate preparation for peer review in accordance with guidance, which does not alter or inappropriately augment or diminish original file content or other records.

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Financial transaction recording

- 5.8 A solicitor must ensure the proper, accurate and timeous recording of all financial transactions with, or on behalf of, all criminal legal assistance clients and must ensure records are accessible, up to date and complete.
- 5.9 These records must be maintained, retained and be accessible for a period of three years from date of payment of the relevant account by SLAB, or the conclusion of the case, whichever is the later.

Instructing a local or other agent

- 5.10 Where circumstances require instruction of a local or other agent, a solicitor must only instruct another registered solicitor to undertake Criminal Legal Assistance.

Corrective action

- 5.11 The compliance manager and solicitors connected with the firm, as appropriate, must take effective corrective action to deal with and prevent recurrence of any issue constituting non-compliance with the Code identified by the firm, SLAB or another third party.
- 5.12 The firm must have procedures in place to ensure that all identified issues are recorded, that appropriate corrective action is taken and that records of such corrective action are maintained.

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Part C - Criminal Legal Assistance Process

Section 6 Specific requirements of the criminal legal assistance process

This section describes the things that solicitors and firms need to do as part of the applications and accounts processes.

What does the legislation say about this?

Section 25B of the Legal Aid (Scotland) Act 1986 states (irrelevant sub-sections re omitted):

25B(1) The Board shall prepare a draft code of practice in relation to the carrying out by solicitors of their functions with regard to the provision of criminal legal assistance and, without prejudice to the generality of the foregoing, the code may include provision as to -

(d) The manner in which applications for criminal legal assistance are to be presented;

and any other matter relating to the organisation of or accounting for criminal legal assistance which appears to the Board to be relevant.

Applications for, and accounts relating to, legal assistance

6.1 A solicitor is responsible for the content and presentation of:

- all applications for criminal legal assistance and all ancillary matters in connection with those applications, submitted in their name; and
- any claim for payment in connection with criminal legal assistance, submitted in their name.

This applies whether work in connection with applications or accounts is delegated by the solicitor within the firm, to an external law accountant or is undertaken personally.

6.2 A solicitor must ensure that all information relevant to the making of an application is recorded, evidence of financial verification is obtained (or that all reasonable steps are taken to obtain it) and copies of relevant documentation such as payslips and bank statements are taken, retained as appropriate and provided to SLAB when requested, or as required.

Letters of engagement

6.3 A solicitor is expected to send a letter of engagement to the client. It must include:

- advise of the requirement of the firm and its solicitors to comply with the Code
- refer to, the internet address of SLAB, currently www.slab.org.uk as a means by which the client may obtain further details about the Code

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Contributions

- 6.4 A solicitor is expected to ensure that the client is advised of, and agrees to, the quantification of any contribution payable in respect of criminal advice and assistance, as well as the timescales or instalments or other arrangements the solicitor proposes for payment of such contribution, and any enforcement or steps which the solicitor would take in the event of delay or failure to make payment in accordance with those arrangements.

Meetings with clients

- 6.5 A solicitor must ensure that facilities are available to enable them to:

- take instructions
- review evidence and
- provide advice

in circumstances which afford the client the opportunity to speak confidentially, preferably in a setting away from court.

This might, depending on the circumstances, include the cost effective use of:

- face to face meeting in an office or a meeting room
- secure video conferencing
- telephone call
- other video or audio media.

- 6.6 A solicitor or trainee solicitor, (or unqualified member of staff under the supervision and direction of a solicitor) must only visit a client in custody where they have taken instructions to do so by the client or there is a need to do so at that time in relation to an ongoing case in which the solicitor is acting, which need is not otherwise reasonably met by other means.

Police station advice

- 6.7 A firm must have a working contact or messaging system by which any calls by Police Scotland, the Solicitor Contact Line (SCL) or other relevant agencies can be made to a solicitor of that firm, either as the named solicitor or duty solicitor, where a person in custody has:
- requested that the Police notify that solicitor in terms of section 43 of the Criminal Justice (Scotland) Act 2016 (CJSA)
 - exercised rights under section 44 of the CJSA to consult with a solicitor or under section 32 to have a solicitor present at interview.

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- 6.8 A solicitor must deal promptly with any notification under section 44 or section 32 of the CJSA to determine if further action is required and whether they are able to undertake that further action.
- 6.9 Where they are unable to take further action, a solicitor must promptly contact the Solicitor Contact Line to explain that they are unable to act in relation to the further action required.
- 6.10 Where a solicitor is able to provide advice and assistance, they should do so in a reasonably practical timescale under regard to the best interests of the client, and the facts and circumstances of the case including arrangements discussed and made with the investigating officer of Police Scotland or other relevant agency.
- 6.11 If the solicitor is not available to receive notifications or monitor voicemail messages promptly, the caller must be advised of the alternative arrangement they should use, including contacting the SCL.
- 6.12 When undertaking police station advice, a solicitor must maintain a record of the work, including all client instructions and advice given. Records of work undertaken in connection with police station advice, and any subsequent work in relation to investigative liberation or release on undertaking must be maintained timeously, adequately and legibly in order that in the event an urgent mandate to deliver papers to another solicitor is received, a solicitor is in a position to implement the mandate as soon as possible.

Preparing accounts

- 6.13 A solicitor's account or claim for payment must be prepared and submitted in accordance with the fees regulations, including notes on the operation of the regulations (where applicable), the Criminal Legal Assistance Handbook and SLAB guidance to the profession.
- 6.14 An account or claim must be clearly, accurately and logically presented in a form which enables SLAB easily to assess it.
- 6.15 Account entries relating to work chargeable on the basis of time expended must record the start and finish time of the work item, the name or initials of the person undertaking the work and whether they are qualified or unqualified, and be accompanied by narrative sufficient to substantiate the time expended and consequently the charge made.

Experts, outlays, witness fees and expenses

- 6.16 A solicitor must only instruct an expert or professional witnesses, and incur other outlays where necessary.

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- 6.17 A solicitor is expected to take reasonable steps to be satisfied that the expert or professional has appropriate credentials and is suitably qualified to provide the service sought.
- 6.18 A solicitor is expected, where possible, appropriate and cost effective, to make efforts (i) to agree the evidence of expert or professional witnesses or (ii) jointly instruct same. Similarly, any other outlay reasonably susceptible to being incurred on a joint basis should be so instructed.
- 6.19 A solicitor must pay the necessary expenses or fees of witnesses and other outlays generally in the case without delay and certainly no later than the date fourteen working days after the date of payment of the relevant account/amount by SLAB.

Mandates/transfers/different solicitors acting at different stages

- 6.20 A solicitor or firm must facilitate the effective and efficient transfer of all Criminal Legal Assistance matters by ensuring that the transfer of papers and legal aid (or fixed payment ABWOR) relating to a criminal matter are completed and executed by the client in the form required by SLAB.
- 6.21 Both the incoming and outgoing solicitor are expected to co-operate in facilitating the established process for transferring a grant of criminal legal assistance.
- 6.22 There are situations where a transfer of legal aid is not required but another solicitor is instructed to act in subsequent procedure arising from the same matter. Upon receiving notification of a mandate, a prior solicitor must comply with a request for the urgent delivery of the previous case papers where required for ongoing proceedings or any appeal.

Section 7 Monitoring - Section 25B(1)(e) Legal Aid (Scotland) Act 1986

- 7.1 Solicitors and firms must co-operate with SLAB, and facilitate timeously the supply to SLAB or access to the firm's premises for any information and/or material which it requests for the purposes of:
- compliance audits; or
 - quality assurance peer review