

March 2021

Use of interim fees by solicitors during Covid-19 restrictions

Background information

As a response to the Covid-19 pandemic, ‘lockdown’ restrictions were introduced in Scotland in late March 2020. Solicitors were impacted by significant restrictions on the type and volume of business that could proceed in court, as well as restrictions on movement for the general public. The Law Society of Scotland undertook [research](#) about the impact on firms. This showed that “the vast majority of the private practice sector of the Scottish solicitor profession has ... been adversely affected”. The survey also showed that many firms had accessed the various schemes put in place by the UK and Scottish Governments to support business affected by the pandemic, with over 60% furloughing legal and/or administrative staff, over 40% accessing the £10,000 grant scheme and around 15% obtaining rates relief. Around 20% of firms had not accessed any support schemes at the time the LSS survey was carried out.

In response to the immediate impact of pandemic related restrictions on the operation of legal aid and the justice system and their anticipated impact on solicitor cash flow, SLAB and the Scottish Government introduced a number of [special measures](#) to sit alongside the general business support schemes. These measures were designed to provide legal aid specific support to firms at this time, and included both operational and financial changes.

In most types of legal aid cases, solicitors are paid at the conclusion of proceedings, or when they have finished providing advice and assistance. The nature of the emergency lockdown measures meant that almost all ongoing court business came to an immediate halt, creating significant uncertainty as to when cases could proceed to a resolution and, in turn, when solicitors would be able to submit their accounts for payment. While it could not have been known in late March how long those measures would remain in place, and therefore how long solicitors might be unable to submit final accounts, it was clear that a court hiatus of any length would have a potentially significant effect on solicitor cash flow¹.

SLAB already had provision to allow firms to claim an ‘interim fee’ in many legal aid types, but the availability of these schemes was subject to a range of conditions. While the existing interim fees were fairly well used in civil legal aid, the arrangements for solemn legal aid were rarely utilised.

¹ While advocates were also likely to be affected, many already submitted accounts during the lifetime of cases.

To enable and encourage greater take up, the interim fee arrangements across all legal aid types were [extended](#) and [expanded](#) during April 2020 to allow solicitors to claim an interim fee across all aid types where there had been a delay due to Covid-19 restrictions. The time limits and minimum values for initial and subsequent claims were also reduced. The [procedure was simplified](#) from 1 July 2020, to allow interim payments without the need for a full account in solemn and children's legal aid. From 5th August 2020 the [proportion payable](#) as an interim payment in solemn criminal, civil detailed fees or children's legal aid rose from 75% to 100%. These arrangements will continue until the expiry of the Coronavirus (Scotland) Act 2020, and therefore will be in place until at least March 2021.

Legal aid businesses have continued to operate throughout the pandemic and their clients have continued to receive much needed advice. The expansion of the interim fee arrangements was designed to help businesses through a period of reduced court activity, and potentially limited client interactions.

The take up rate of the interim fees schemes has been variable. Analysis showed that a substantial number of firms had not submitted any interim fees since April despite having active cases which could attract an interim payment.

There was no clear pattern to take up: some firms with otherwise relatively small reductions in payments had made use of the interim schemes, while others with significant falls in payments had not done so. Nor was there an obvious explanation for the lower than expected take up, or its variation.

We identified a number of possible explanations, for example that firms were able to manage cashflow without using the interim schemes, or they did not know about the schemes, did not realise that the conditions for interim fees had changed to cover a wider range and value of cases or that the system no longer required a detailed account to be submitted. The latter change was intended to simplify the process, especially for firms who had furloughed those usually responsible for preparing accounts or dependent on law accountants who may also have furloughed staff. It was also possible that, despite the widening of criteria, some firms did not have any cases that would qualify.

Given the range of possible explanations, and particularly to determine whether there was anything SLAB could do to assist take up where needed, we decided to undertake a short piece of structured research to gather evidence about firms' decision-making in relation to the schemes.

Research aims

The aim of the research was therefore to explore the reasons for the lower than anticipated use of Covid-19 interim fee arrangements in some areas of legal aid, in particular to identify whether there are any barriers to using the interim fee arrangements. The findings from the research will be used to help SLAB consider if there is more we can do to assist solicitors to access interim payments should they need to do so.

Methodology and sample

The research consisted of telephone interviews with solicitors, undertaken by a member of SLAB's research team. The fieldwork took place from Monday 9th to Thursday 19th November 2020.

Two samples of solicitors were identified from SLAB's databases: practitioners of solemn legal aid, with no/infrequent use of the expanded interim fee arrangements for solemn work, and practitioners of civil legal aid, with no/infrequent use of the expanded interim fee arrangements for civil. There was a small amount of overlap between the two samples; one solicitor interviewed as part of the 'civil legal aid' group was also part of the 'criminal legal aid' sample.

The solemn legal aid sample consisted of 231 practitioners, of which 13% were based outside Scotland's central belt. A target of 12 interviews was set, and 13 were undertaken, for this group. We aimed to undertake interviews with practitioners working both within and outwith the central belt. This was also achieved; five interviews were with firms from outwith the central belt.

The civil legal aid sample consisted of 208 practitioners, of which 17% were based outside Scotland's central belt. A target of 8 interviews was set for this group. This was achieved, including two with administrative staff involved in decision making for the firm's legal aid accounts. For this group we were only able to interview one respondent from outside the central belt.

There was a generally good response to the survey; of those who were available to speak to the majority agreed to take part in the survey. However a number of firms, particularly those undertaking civil legal aid, were unreachable for research purposes due to office closures.

Findings

Background

Most respondents said they had used the expanded interim fee arrangements, at least to some extent. However, almost all the criminal legal aid practitioners who had used the arrangements had done so exclusively for summary fixed fees.

All of those interviewed were aware of the expanded interim fee arrangements, and had heard about them early in lockdown. Almost all respondents mentioned SLAB as either their only source, or one of their sources, of this information. SLAB's website, update email(s) and Twitter feed were all mentioned as being used. Other sources of information mentioned were: local Bar Association, colleagues / other solicitors, the Law Society.

Respondents were asked who was responsible for dealing with legal aid accounts normally (pre-pandemic) for their firm. There was a wide range of responses to this question; with practitioners, admin staff and law accountants all mentioned. The most common response from the civil legal aid sample was a mixture of both in-house and law accountants, with more complex case going to law accountants. Those from the criminal legal aid sample were most likely to undertake accounts themselves, and less likely to use law accountants.

Decision making on use of interim fees

For most respondents the decision to limit use of the expanded interim fee arrangements was a considered one; significant barriers to their use were rarely mentioned.

A minority of respondents have not used the interim fee arrangements at all, because they have been **able to manage without** them. In a very few cases using the arrangements does not appear to have been considered; for instance where legal aid income is not significant to the business, or where the lockdown restrictions did not have a significant business impact.

Use of **other sources of finance**, such as central or local government schemes, including furlough for staff, or VAT deferral, were mentioned a number of times. These were used by those who did not make use of interim fees, as well as those who did.

Some respondents were also concerned that interim fees could have **tax implications** as income might be maintained or even increased while running costs were reduced due to furlough, rates rebates etc.

Other respondents who had not used the interim fee arrangements, or only partially used them, held back more reluctantly, with some interim fees effectively held in reserve in case they were needed at some point in the future.

This careful management of cashflow over a period of uncertainty was a key consideration for a number of respondents. In an essentially demand led system, respondents reflected a view that the response to the pandemic meant income had been permanently lost, rather than postponed, and raised concerns that (in a still uncertain situation) **income needs to be budgeted** to cover a period that is likely to last for many months. More than one respondent mentioned concerns over ‘cashing in all my chips’ (if they interim fee’d all the accounts that they technically could) or feeling the need to ‘keep something back’.

The budgeting approach was mentioned as an important decision making factor by respondents across both the criminal and legal aid groups. However, it was particularly apparent amongst those criminal legal aid solicitors who decided to submit interim fees for their **summary fixed fee work, but not solemn**. This group typically identified that the rationale for choosing summary over solemn, was that summary accounts (which are fixed fees) are simpler and do not take as long. Some also identified them as better value for money, in terms of the income generated for the effort in preparing and submitting an account. This was particularly important when admin staff may not have been available due to furlough. No respondent mentioned the impact of the simplification of procedure in July (allowing solemn interim payments in relation to Covid-19 without the need for a full account) when comparing the ease of submitting summary and solemn accounts.

Another reason given was that if interim fees were submitted in too many solemn cases a small firm could be overburdened with these trials at a future date (particularly given the uncertainties during lockdown over courts resuming). This could then lead to problems (including cashflow problems) at a later stage, for example due to having to use agents.

Other respondents also identified **lack of admin support or lack of time** as barriers to submitting interim fees. These were often linked, with a number of solicitors mentioning the impact on their time of having reduced admin support due to furlough. This included firms where the solicitor might already be involved in rendering accounts, but was impacted by taking on other admin tasks. For some respondents (but not all) these barriers are less relevant now, for example as staff have returned to work. Some respondents noted that this had allowed them to submit interim fees recently, or would allow them to in the near future. However others looked back to the lockdown period as a time when they had more time available for these types of task. In relation to pressure of work and admin, one respondent noted how hard it was to keep up with the frequent updates received during this time, from SLAB and other organisations.

Other respondents mentioned a range of other factors. A psychological barrier to using interim fees and **working for money that has already been received** was mentioned on occasion. Respondents noted that this was not necessarily logical, but felt that it was a genuine consideration in decision-making.

A significant barrier was experienced by one practitioner who was physically **unable to access their law accountant** during lockdown, or the subsequent ‘tiered’ restrictions in the Autumn of 2020. This meant they were unable to submit solemn interim fees since these were reliant on a law accountant to undertake these.

One respondent mentioned concerns that receiving money from interim fees would not be helpful since it could be **abated at the conclusion** of the case.

Some of the barriers relevant to using interim fees in relation to Covid-19 were felt to also apply at other times. For instance:

- some firms have a general **policy of not submitting interim fees**, preferring to send in a single account once the work is completed.
- the decision not to claim interim fees in solemn due to perceived complexity compared with summary fixed fee was described by some as a general policy.

Views on expanded interim fees

The research explored how and when respondents *first* became aware of the expanded arrangements. However it did not explicitly cover the subsequent updates: simplified procedure for solemn and children’s (July); increase to 100% of claim in solemn, children’s and civil detailed fees (August). Some respondents spontaneously mentioned the increase to 100%, and described this in positive terms, even if they did not use interim fees themselves. The extent of awareness of the simplified position was unclear.

Almost all respondents were positive about the introduction of expanded interim fee arrangements “as a way of helping cope with the Covid-19 impact on cashflow”². This included those who did not use them themselves, but saw this as an opportunity for other firms. Some described it as being a ‘relief’, for example allaying fears over job losses.

A proportion of those who were positive, also had some reservations. The civil legal aid respondents were most positive, with only a small proportion expressing reservations. By contrast the criminal legal aid respondents were considerably more likely to qualify a positive response. A reservation mentioned by more than one respondent was concern that

² Quote from the relevant question in SLAB’s interview tool.

lack of work during the lockdown period will cause cashflow and/or income problems that will have a longterm effect, and cannot be compensated for by interim fee payments.

A few respondents had more neutral or negative views of the expanded interim fee arrangements because they considered that other measures were more relevant. Increased fee rates overall were sometimes mentioned here, and these were also noted elsewhere by some of those who were positive about the interim fee arrangements.

The expanded interim fee arrangements will be in place until at least 31st March 2021. Respondents were asked whether they expected to use them in the next six months. As might be expected there were mixed views; those that were positive towards the interim fee arrangements often expected to start or continue. However there was a sense of 'business as usual' around some of these intentions, rather than an urgent need to use them to ensure income.

Criminal legal aid solicitors were less likely to expect that they would start or continue using the expanded interim fee arrangements in relation to solemn. In contrast to the civil sample, here comments suggested they were more likely to use them only in response to pressing cashflow or income need; something they hold on to for the future as an action they may need to take but do not necessarily want to.

Additional comments

At the end of the interview respondents were asked whether they would like to add any comments around interim fees. Most respondents gave a response, although most of them were not directly related to the interim fee.

In relation to interim fees, concern about the removal of these provisions and the need for a decent notice period ('2 - 3 months') was suggested. This was seen as necessary to allow solicitors to plan their use of interim fees arrangements, rather than having to make a snap decision.

On other themes, some respondents mentioned the existing level of fee rates, which are set by Regulations, sometimes alongside concerns about firms potentially going out of business. SLAB continues to participate in the Scottish Government's [payment panel](#). The panel was set up to advise on an evidence-based approach for a review of fee levels for legal aid services, with the aim of ensuring these are sustainable, as part of an effective payment structure.

Other respondents praised SLAB's support generally, and the service provided at this time. One civil respondent in particular noted that the turnaround times of accounts had been

‘brilliant’ during this period, with some payments coming in the next day. They emphasised how important this is to small businesses in helping them to plan financially.

Conclusions and next steps

The research shows that, for the people we spoke to, the majority have taken decisions to use the interim fee provisions in a purposeful way, to suit their individual business need in a period of great uncertainty. This reflects the purpose of these expanded arrangements. It suggests that SLAB does not need to make efforts to improve take-up, as long as firms are widely aware of all the support available to them at this time.

The research with this group suggests that SLAB’s main communication channels are successfully reaching solicitors. The findings suggest that SLAB should continue to work to ensure that solicitors have all the information they need easily available, at the right time. This is particularly important in a dynamic situation, like that during most of 2020.

There is some indication from this research that some firms’ approach to the use of interim fees has been shaped by concern of greater future problems than they are currently experiencing. The pandemic has increased uncertainty for many businesses. For firms undertaking legal aid work, and especially court and tribunal work, their ability to progress cases to conclusion is significantly constrained by decisions made and resources available elsewhere in the justice system. Those decisions and resources are in turn constrained by both prevailing public health guidance, which itself is subject to change over time, and the capacity - physical, financial, legal, human and technological - of the courts, and in criminal cases the Crown and police, to safely progress cases in a rapidly evolving working environment. In this context, uncertainty is inherent and so caution is understandable.

As outlined earlier in this briefing, there are both increasing volumes of new business and an acceleration in the rate at which cases are progressing to conclusion. For firms facing current cashflow difficulties, more transparency about these trends may assist decision making about whether and to what extent they can prudently improve their position now by accessing work in progress by way of interim fees.

Firms may also have a concern about a cliff-edge should the interim fee arrangements be withdrawn, which could leave a potentially unbridgeable gap in income until sufficient cases conclude. The interim fee arrangements will remain in place for as long as the Coronavirus (Scotland) Act is in force.

SLAB should continue to work with the Scottish Government to ensure that the interim fee arrangements remain in place as long as necessary, including potentially identifying a

legislative vehicle for a longer term extension of these provisions should they be needed beyond the lifespan of the Coronavirus (Scotland) Act. SLAB should also continue to communicate clearly with solicitors to provide clarity and, in due course, the longest feasible period of notice should the interim arrangements come to an end.

SLAB will also provide regular updates for solicitors on application numbers and payment levels for different types of legal aid. We hope that this information on the work coming into the system and the rate at which payments are being made will be useful as a guide to prospects of overall future income. Our aim in doing this would be to help firms make informed choices as to whether, when and to what extent they access interim fees, particularly where they are reticent about doing so due to uncertainty about the future and current demand for services and associated projected income patterns.

Further information

This research briefing is available on our website www.slab.org.uk

If you would like further information about this research please contact the Research Team at research@slab.org.uk



Research Briefing published March 2021
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