Consultation on SLAB’s approach to approval for unusual work in civil legal aid

August 2022



Scottish Legal Aid Board

#### 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. This includes the schemes in relation to civil legal assistance. In civil legal aid cases, solicitors must request our approval to undertake ‘work of an unusual nature.’ We are now consulting on how we might change our approach in this area: in particular, how we implement our definition of the term ‘unusual’.
2. We currently provide a list of work we consider to be unusual in our [**published guidance**](https://www.slab.org.uk/guidance/work-of-an-unusual-nature-or-likely-to-involve-unusually-large-expenditure/). This consultation now presents a proposal for revising our policy in this area, by updating the items on that list, as well as by proposing a general definition of what we consider ‘unusual.’
3. Our aim in exploring our policy in this area is to ensure our approach to unusual prior approval is as up to date and proportionate as possible, avoiding unnecessary work for both solicitors and SLAB, whilst continuing to meet our obligation to ensure that all funded cases meet the statutory tests. This change on which we are consulting is therefore aligned with the Legal Aid Review’s strategic aim of maintaining scope but simplifying. **[[1]](#footnote-2)**
4. We are also undertaking an equalities impact assessment of both the current approach and the proposed change, and seek evidence to support that assessment as part of this consultation.
5. This consultation is a step towards a more modern, user focused 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. We are committed to a system of prior approval (or ‘sanction’) which is easy to understand; proportionate (for both solicitors and ourselves); takes an appropriate approach to managing risks to the Legal Aid Fund; and which properly reflects the nature of the work which solicitors undertake once legal aid is in place.
2. Our discretionary powers in the area of prior approval are broad. We recognise that there may be some items of work being treated as requiring unusual prior approval, when they may no longer be unusual in current practise. This, in turn, means unnecessary work for both solicitors and ourselves.
3. This consultation paper is an opportunity to engage stakeholders in our decision-making policy for unusual prior approval by describing the decision we have to make and how we make it.

**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.

# **Background to SLAB**

1. SLAB was set up in 1987 to manage legal aid in Scotland as 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.**[[2]](#footnote-3)**
2. As a public body our powers, functions and duties are set out in the legal aid legislation.**[[3]](#footnote-4)** 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: for instance, that decision making must be rational and proportionate. One such area of discretion is how we approach the definition of unusual for prior approval in the context of civil legal aid.

# **Background to unusual approvals**

1. Within civil legal aid, we received 3,016 requests for approval to undertake work of an unusual nature between April 2021 and March 2022.
2. Approximately 80% of these applications were made in three case categories, all within family law: contact, residence, and variation. In total, however, there were requests for unusual work across 54 case categories.
3. 64% of applications were granted, 31% were refused, and 3% subject to a restricted grant, with the remainder being abandoned, continued or rejected. It is important to note that most refusals are because prior approval was simply not required, rather than refusals on the substantive merits of the application.

## The statutory framework for prior approvals

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), as well as the First-tier Tribunal for Scotland (Housing and Property Chamber).
2. Once civil legal aid has been granted, there are certain forms of work for which solicitors must obtain our approval to carry out and ultimately be paid for. These are instructing counsel or expert witnesses; undertaking work of an unusual nature; and undertaking work involving unusually large expenditure. This approval can be obtained either prior to undertaking the work, or in some cases where certain criteria are met retrospectively.
3. The law governing prior approval is the *Civil Legal Aid (Scotland) Regulations 2002* (‘the Regulations’). In particular, Regulation 21 governs the types of work for which our approval is required, with Regulation 21(e) specifying that our prior approval is required for ‘work of an unusual nature’.
4. The Regulations provide us with significant discretion. Of particular interest here is the fact that ‘work of an unusual nature’ is not further defined or specified, and thus is a matter for us to define. Nor is the test to be applied to work of an unusual nature specified.

# **Our current approach to the definition of ‘unusual’ for prior approval assessments**

This section of the consultation summarises our current approach to requests to undertake unusual work.

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. The key steps we take in our decision-making in this area are:
   1. Is the work unusual (is prior/retrospective approval actually required)?
   2. If unusual, does it satisfy a test of reasonableness?
4. As noted above, the focus of this consultation is the first step only.

## Implementing a definition of ‘unusual’

1. At present, our [**published guidance**](https://www.slab.org.uk/guidance/work-of-an-unusual-nature-or-likely-to-involve-unusually-large-expenditure/)**[[4]](#footnote-5)** provides a series of specific examples of work we consider require unusual prior approval, and work which would not.
2. In practice, our approach here broadly reflects what might be considered a standard definition of unusual: the types of work requiring unusual prior approval are those which arise less often, or which would not be expected in the various types of case at hand.
3. However, there are currently various forms of work which require our prior approval as unusual work, but do not obviously fall into an obvious definition of unusual. Our current view is that these are primarily:
   * Supervised contact
   * Family mediation
   * Court-ordered drug and alcohol reports
   * Bonds of caution.
4. These forms of work are not unusual in terms of how often they arise, the level of cost generally associated with them, or in their novelty.
5. These forms of work might *once* have been unusual - even if they should not be considered so at this point.
6. As noted above, in terms of impact, the consequence of this position is that certain forms of ‘usual’ work nonetheless require unusual prior approval: this means unnecessary time expended by solicitors and SLAB, as well as avoidable delay for assisted persons.

##### **Question 1**

To what extent do you agree with the current defined list of unusual work?   
*(Strongly agree, agree, neither/nor, disagree, strongly disagree)*

*Please give a reason for your answer.*

##### **Question 2**

Can you identify any further specific forms of work which currently require approval as ‘unusual’, but which in your view should not?

*Please provide a reason for your response.*

Our guidance currently identifies the following forms of work as being unusual in nature. (It should be noted that this is not a comprehensive list which covers all potential work which would require our prior approval as unusual work).

• Commission and diligence for recovery of documents where optional procedure has not been exhausted, or where no time to use optional procedure  
• Any work to commission the taking of evidence of witnesses;  
• The costs of an assisted person attending court;  
• Family therapy;  
• Post-certificate sanction, if decree has been granted;  
• Extension of shorthand writer’s notes where not ordered ex proprio motu;  
• Arranging for a witness to travel from some distant country to give evidence in Scotland;  
• Arranging to hold a consultation between counsel and an expert witness at the expert’s practices and thus incurring substantial time and travel costs;  
• Getting a transcript of evidence (except where this is required by the court ex proprio motu);  
• Various forms of work relating to conveyancing;  
• Statutory reports under the Adults With Incapacity Act 2000 where not required in terms of the Act and not ordered by court;  
• Any work related to keeping a watching brief on relevant proceedings.

# **Proposed change option: introducing a general definition of unusual, and removing specific forms of work from the requirement of prior approval**

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 identified a change option that most feasibly allows us to meet our objectives for review and change. This option focuses on articulating a general definition of unusual, as well as clearly setting out the implications of that change for some existing forms of work subject to unusual prior approval.
2. Given the terms of Regulation 21, this change is at our discretion. Our proposed definition is as follows:

*Unusual work is that which would not ordinarily and as a matter of course be expected to be carried out in the typical case of its kind, and/or in the particular circumstances of the case at hand.*

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

1. Our view is that the definition above broadly reflects the general usage of the word ‘unusual’, which is already broadly reflected in most of the specific examples set out in our current guidance. Adopting this definition, however, would mean that the current forms of work which do not sit well under the ambit of unusual approvals would logically no longer be subject to this requirement.
2. The use of a general definition also enables us to be more flexible as things change, and enable us to better make decisions as new forms of work appear. Published guidance would continue to make clear what we consider to be usual/unusual at a given time, but would be more clearly tied to a general definition.
3. The proposed definition recognises that work can be unusual in the context of cases which are similar (for example, comparing to ‘typical’ cases) but also can be unusual in its own specific way (that is, ‘the particular circumstances of the case at hand’).

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

1. Our modelling of this option against 2021/22 data assumes that the immediate implications of this would be that various types of work would no longer require prior approval. As suggested above, our view is that these would be:
   * Supervised contact
   * Family mediation
   * Bonds of caution
   * Court-ordered drug and alcohol reports.
2. Modelling the impact of this change against the 2021/22 data indicates that such a change would reduce the number of requests for unusual prior approval by around 40%.

Work no longer requiring prior approval would continue to need to be justified at the Accounts stage, in line with our policies on the taxation standard.[[5]](#footnote-6) Our policy is that the word ‘work’ in the context of ‘work of an unusual nature’ primarily covers unusual outlays incurred by the solicitor, as well as some forms of work undertaken by the solicitor which is not ordinarily expected in a case of that type (for example, a watching brief or overseas travel).

However, unusual prior approval is not required and does not cover work which a solicitor is taking which is part of the day to day running of the case (meetings, letters, hearings). For example: a longer than average letter may be unusual for the purposes of Accounts assessment, but would not require unusual prior approval in order to be payable.

1. For further information on our approach to accounts assessment, we have provided examples of our draft policies in our consultation on accounts assessment.**[[6]](#footnote-7)**
2. We acknowledge that having prior approval in place gives a degree of comfort as to ultimate payment at Accounts stage. However, we have clear policies on Accounts assessment that will ensure work which is no longer subject to prior approval will be assessed in a transparent and fair way which ensures payment is still made appropriately.
3. We would not be changing the way in which we assess the payment of this work at Accounts stage. It would not be the case that we would question why the work was done or the appropriateness of doing the work. Our policy is that a charge is ‘usual’ if it: aligns with rates we set out for particular charges,**[[7]](#footnote-8)** has been ordered by the court, accords with historical precedent, currently accepted practice or patterns of charging for the particular area of work, particular case, or work item.
4. More generally, a principle based definition allows us to take a more flexible approach, deal with new types of work as they arise and aligns our policy with the administrative law principle that a policy must be rational within the objectives of the statutory framework. We would continue to supplement this with an updated list of work we generally consider to be unusual.
5. This would require us to put in place a means of keeping up to date with changes in practice and types of work being undertaken. As well as internal analysis of the requests we receive, our initial view is that this could involve periodic discussions with the profession, relevant service providers and law accountants. This would be combined with our approach to keeping up to date on what is usual and emerging practice for implementing our accounts assessment policies.
6. It is important to note that this change would not override our policy on unusually large expenditure: for instance, where proposed family mediation were to cost over £3,000 (usual for the purposes of the ‘work of an unusual nature’ definition), this would continue to require prior approval for unusually large expenditure.

##### **Benefits**

1. Having an overarching definition of unusual would provide a rational and easily understandable basis for stating our policy in this area, allowing clear and transparent guidance to be produced for both solicitors and SLAB staff. This will also mean better alignment with SLAB values, such as transparency and responsiveness.
2. A significant benefit to this option will be the time saving for solicitors and merits staff at the front end of the process, as various forms of work no longer require prior approval applications to be submitted and assessed.
3. This will also mean benefits for assisted persons, and others associated with the case: for example, in supervised contact settings, it may mean contact can take place more quickly, which may be beneficial for both the AP and children.

##### **Risks**

1. We see no obvious risks in moving to this position, but would welcome any alternative views on this.

##### **Question 3**

To what extent do you agree with this proposed change to a principle based definition?  
*(Strongly agree, agree, neither/nor, disagree, strongly disagree)*

*Please give a reason for your answer.*

##### **Question 4**

Can you identify additional benefits or risks relating to the proposed change?

*Yes (please elaborate); No; Don’t know*

##### **Question 5**

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 a specific definition of unusual / remove these types of work?

*Yes (please elaborate); No*

##### **Question 6**

Do you have any views on how best SLAB might ensure our understanding of what is usual/unusual stays up to date with developments in practice and procedure, and how such information might be gathered from solicitors and others?

*Yes (please elaborate); No*

##### **Question 7**

Please provide your views on any further aspect of approval for unusual work that has not been covered by responses above.

# **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 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 any other aspects of the proposed change to prior approval for work of an unusual nature.

#### Deadline

1. Consultation on the proposed changes runs for a six week period from **Monday 1 August 2022**. Please ensure any responses are submitted to us by **5pm** on **Friday 9September 2022.**

#### How to respond

##### **Online**

1. You can respond using our [**Consultation response form on our website**](https://www.slab.org.uk/consultation-response-form-approach-to-approval-for-unusual-work-in-civil-legal-aid/).

##### **By email**

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

**Enquiries**

1. If you have a query about the consultation process, please contact us at [**consultations@slab.org.uk**](mailto:consultations@slab.org.uk).

# **Appendix A: 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**

##### **Question 1**

To what extent do you agree with the current defined list of unusual work?

|  |  |
| --- | --- |
| Strongly agree |  |
| Agree |  |
| Neither agree nor disagree |  |
| Disagree |  |
| Strongly disagree |  |

**Question 1a.**Please give a reason for your answer.

|  |
| --- |
|  |

##### **Question 2**

Can you identify any further specific forms of work which currently require approval as ‘unusual’, but which in your view should not?

|  |  |
| --- | --- |
| Yes |  |
| No |  |
| Don’t know |  |
| *If Yes, please elaborate:* | |

##### **Question 3**

To what extent do you agree with this proposed change to a principle-based definition?

|  |  |
| --- | --- |
| Strongly agree |  |
| Agree |  |
| Neither agree nor disagree |  |
| Disagree |  |
| Strongly disagree |  |

**Question 3a.**Please give a reason for your answer.

|  |
| --- |
|  |

##### **Question 4**

Can you identify additional benefits or risks relating to the proposed change?

|  |  |
| --- | --- |
| Yes |  |
| No |  |
| Don’t know |  |
| *If Yes, please elaborate:* | |

##### **Question 5**

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 a specific definition of unusual/remove these types of work?

|  |  |
| --- | --- |
| Yes |  |
| No |  |
| *If Yes, please elaborate:* | |

##### **Question 6**

Do you have any views on how best SLAB might ensure our understanding of what is usual/unusual stays up to date with developments in practice and procedure, and how such information might be gathered from solicitors and others?

|  |  |
| --- | --- |
| Yes |  |
| No |  |
| *If Yes, please elaborate:* | |

##### **Question 7**

Please provide your views on any further aspect of approval for unusual work that has not been covered by responses above.

|  |
| --- |
|  |

1. [**www.gov.scot/news/legal-aid-review/**](http://www.gov.scot/news/legal-aid-review/) [↑](#footnote-ref-2)
2. [www.slab.org.uk/corporate-information/what-we-do/](http://www.slab.org.uk/corporate-information/what-we-do/) [↑](#footnote-ref-3)
3. 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-4)
4. NB – this guidance also covers our position on unusually large expenditure. [↑](#footnote-ref-5)
5. It is important to note that whilst usual/unusual is also a framing within our Accounts reasonableness policy, there is a distinction between ‘unusual’ for the purpose of prior approval, and ‘unusual’ for Accounts assessment. [↑](#footnote-ref-6)
6. [**www.slab.org.uk/news/consultation-launched-about-legal-aid-accounts-assessment/**](http://www.slab.org.uk/news/consultation-launched-about-legal-aid-accounts-assessment/) [↑](#footnote-ref-7)
7. We are aware that for the specific forms of work that will be affected by the proposed policy change (supervised contact &c.), we do not set specific rates, and as such, this specific aspect of our Accounts policy will not be relevant here. [↑](#footnote-ref-8)