

Scottish Legal Aid Board consultation

Consultation on SLAB’s approach to accounts assessment

September 2021

# **Overview**

1. The Scottish Legal Aid Board (SLAB) is a non-departmental public body responsible for the administration of the legal aid schemes in Scotland. Our core business is taking decisions in connection with applications for legal aid and assessing claims for payment for work done from solicitors and counsel – we call this accounts assessment. As a public body our powers, functions and duties are set out in the legal aid legislation. We do have some discretion in how we apply statutory tests, but that discretion can be broad, or can be focused by tests, factors or criteria contained in regulations. This consultation is about how we apply our discretion which is a matter of policy, developed by us and for which we are accountable.
2. SLAB is launching this consultation as we want your views on the specific changes we are proposing for the assessment of some travel and language interpreting and translation charges. We are proposing to change these policies to align with other available benchmarks or provide as much consistency across different aid types as we can.
3. This consultation is a step towards a more modern user focussed legal aid service. We are developing statements of policy for all the decisions we take. Those policies will provide a foundation for guidance for the profession. Once we have completed this consultation, we will develop and publish guidance for those preparing accounts and separate guidance for our assessment staff.
4. We want your views on what form of guidance would best support those doing legal aid work so that there is clarity about what can be paid for under legal aid and what level and type of supporting information is required with accounts.
5. We also want to hear your views about the overarching policy, and the more detailed policies which we are not proposing to change at this stage. We are interested though in any possible unintended consequences that you might see which impact on the services available for people, including any impacts linked to a client’s protected characteristics.

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# **Why are we consulting?**

1. Preparing and assessing accounts is a difficult and time consuming task, especially in those legal areas where there are likely to be lengthy time and line accounts: that is accounts with separate charges for most individual interactions and items of work on a case. Sometimes our assessment results in us deciding to reduce a charge or disallow it in its entirety – a process known as abatement. We know from feedback that such abatements are frustrating for the professions. This consultation is the start of a process that will see us more clearly stating our policies and guidance for those preparing accounts and those assessing those accounts. This process has also seen us reviewing our approach to assessment and, where we think change is necessary and possible within the current statutory framework, we are consulting on our proposals.
2. We want to make more transparent how decisions are taken in the assessment process, the factors we consider and the information we need in assessing accounts. Increased transparency will create an improved, user focussed and simplified process. We hope that this will help solicitors and advocates to frame accounts that are more likely to be paid in full, first time, thereby reducing some of the delay and frustration associated with the process. We can’t change the feeing system set out in regulations and recognise that some of it is complex and will inevitably continue to be a source of some frustrations. But by being clearer about what we do, how and why, we hope to smooth the operation of the system for the benefit of the profession and our own staff.
3. As a public body our powers, functions and duties are set out in the legal aid legislation. That legislation defines precisely how some elements of the legal aid regime must operate but SLAB is also given some discretion in relation to the operation of other elements. That discretion can be broad, or can be focused by tests, factors or criteria contained in regulations. In either case, how we apply our discretion is a matter of policy, developed by us and for which we are accountable. Both the exercise of discretion in the form of individual decisions, and the operational policies that underpin those decisions, are always subject to the wider provisions and principles of administrative law such as, for example, that decision making must be rational and proportionate. One area with a degree of discretion where we have developed policy relates to the operation of some components of accounts assessment.
4. In this paper, we are setting out for the first time the overarching policy that frames our approach to the assessment of accounts. This is not a new policy, but the way we are expressing it is new. The paper also sets out several proposals in relation to the application of that general policy to specific aspects of work or charges that feature in legal aid accounts. We propose to change our policy for the assessment of these types of charges. We are seeking views both on the overarching policy and on the more specific changes we are proposing.

# **Background to SLAB**

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

## How the legal aid system works

1. Ministers in the Scottish Government:
   * + Decide legal aid policy.
     + Set the rules for legal aid.
     + Decide the level and structure of fees to be paid to the legal profession.
2. The Scottish Parliament makes and changes legislation – including the fees to be paid and the tests for assessing accounts. These tests are then applied to every single case.
3. The Government makes a budgetary provision for legal aid. It is an uncapped provision; the amount spent on legal aid is demand led. This means there is no restriction on grants or payments of legal aid simply because the budget has been or will be exceeded. SLAB does not hold this budget to distribute; we draw down funds from Government on a monthly basis to be able to pay the accounts received and assessed. In doing so we confirm to Government that the accounts we will use those funds to pay have been properly assessed according to the rules set for us.
4. The Scottish Government established a Legal Aid Payment Advisory Panel[[3]](#footnote-4) in 2019 to advise on an evidence-based approach for review of payment structures and fee levels for legal aid services. The panel has now reported and Scottish Government will take forward the next steps to develop a mechanism for setting and reviewing payments. We welcome the government’s commitment to review how and at what level legal aid is paid and have a clear interest in a more coherent structure with straightforward payment approval processes for review. Until a new system is established, SLAB will continue to assess and pay the existing range of accounts and individual charges that are set. This consultation is part of our approach to try and make the current system as efficient a process for the professions as is possible within current frameworks.

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

1. We have been working with government colleagues to agree a programme of work that can give effect to some of the themes set out in “An independent strategic review of legal aid in Scotland”[[4]](#footnote-5) and the Scottish Government’s recent consultation[[5]](#footnote-6) in advance of any changes that Government may decide to take forward through new legislation.
2. There was strong support in the consultation for simplification of the current system, whilst maintaining the current broad scope of legal aid. Changes to the statutory framework, including regulations, are for the Scottish Government and, ultimately, the Scottish Parliament. We have been focussing on simplifying what we can within the existing statutory framework. It is clear from feedback from solicitors that an in-depth review of accounts assessment is required to clarify and simplify where we can. We are doing this through the Guidance on the Administration of Legal Aid (GALA) project.

# **The GALA project**

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

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

1. In some areas we are setting down our current policy and will review it in due course. Other areas are subject to in depth review, to consider what changes might be possible within our current statutory framework that might simplify the system. Accounts assessment is one of those areas we reviewed in detail to understand whether changes in our approach were necessary or could be beneficial.
2. More information about the GALA project can be found on our website.[[6]](#footnote-7)

# **Background to accounts assessment**

1. On average we assess more than 200,000 accounts per year. In 2019-20 we authorised and made payments totalling £123 million to 733 firms of solicitors and 247 advocates. In 2019-20 the value of abatements was 6% of the total claimed. We engage regularly with firms to assist them to better understand our accounts assessment process, what can and can’t be paid and what information we need to enable us to pay the charges claimed. We know that by working with solicitors and advocates in this way we can reduce abatement levels resulting in them being paid for more of the work they do, and often more quickly.

## The statutory framework for accounts assessment

1. SLAB’s role in accounts assessment is to decide how much to pay for work undertaken or commissioned by a solicitor or advocate on a particular case, within a framework set by the Act and regulations. The statutory framework has two key elements. The first is the taxation standard that SLAB is required to apply – the third-party paying standard. The second is the table of fees that applies to an area of work. There are multiple tables of fees: with fees for specific aid types and different fee rates and structures in place at different time periods.
2. SLAB is a public sector third-party responsible for assessing and paying a solicitor-client account for an assisted person. The appropriate taxation standard takes into account the interests of the third party (in essence, the public purse) in the assessment of the account. See appendix E for extracts from the legal authorities on the third-party paying taxation standard. We are therefore required to balance the interests of the public, the assisted person, and the solicitor.
3. In a private client relationship, a client will be liable to pay for all work they instructed, whether the work was necessary, reasonable or the most economical way to tackle the issue. In a publicly funded solicitor client relationship, the public interest is in balancing the needs of the client who is eligible for help with the public interest that only work that meets the third party paying taxation standard is paid.
4. The taxation standard engages assessment of whether an activity took place, the extent to which there was due regard to economy and whether the charge is reasonable. The key test in accounts assessment is the reasonableness of a charge. That test rests on an acceptance that the activity took place and incorporates an assessment that the work was necessary and carried out with due regard to economy. Depending on the table of fees which applies, the assessment can vary from an assessment of whether each item in an account is reasonable – each phone call, letter or time spent reviewing documents – to the much more straightforward assessment of whether a fixed payment for the whole case or a block of work meets the requirements of that fee as set out in the regulations.

# **Our** **Approach to accounts assessment**

## Approach to reasonableness in the taxation standard

1. We have discretion about how to approach the assessment of reasonableness in the taxation standard. How we assess reasonableness is at the heart of the accounts process. We are interested in feedback on the current policy position (as set out on the page 11), especially if that impacts on our equalities or corporate parenting duties. Your views on how the policy works in practice will also assist us to frame our decision makers’ guidance and external guidance, as well as identify any areas for further review.
2. The legislation guides how and to what extent we assess reasonableness in each aid type. The regulations set out in large part how to assess standard, block and inclusive fees, so the assessment is simply that those charges are in line with what is prescribed by legislation. If a charge is not in line with the prescribed fee, it will be modified, where possible, to bring it in line, failing which, it will not be allowed. There is no room in the legislation to assess a charge as reasonable where this is not covered by the grant of legal aid or advice and assistance. For standard, block or fixed fees, regulations stipulate to a great extent what is a usual and accepted charge for a particular type of case.
3. For detailed fees, outwith the general limits set by legislation on the items which are chargeable (e.g. letters, meetings, etc.), our policy guides the decision-making process. Our intention is to set out clearly in decision makers’ guidance how we assess the reasonableness of a charge, including how we undertake the assessment of the amount of work being appropriate given the facts and circumstances of the case.

Text Box 1: SLAB's approach to accounts assessment

1. Our policy is that we will assess both the reasonableness of having undertaken a work item, and the reasonableness of the amount charged for that work item. We will pay as reasonable a charge where the solicitor or advocate has provided information upon which we can reasonably assess that:
2. the work was actually done and
3. the work was appropriate to do given the facts and circumstances of the case and
4. that the amount of work was appropriate given the facts and circumstances of the case and
5. that the work is not a duplication of other activity within the case or linked cases.
6. Our policy is that different factors bear upon our decision making depending on whether a charge is ‘usual’ or ‘unusual’.
7. Our policy is that a charge is ‘usual’ if it accords with historical precedent, currently accepted practice or patterns of charging for the particular area of work, particular case, or work item. The particular area of work is bounded by case type and, where applicable, court or tribunal procedure.
8. Our policy is that where a charge is ‘usual’ we require a narrative justification for the charge and, where the fee is payable with a reference to the duration of the charge, we will assess whether this was an appropriate amount of time or effort actually spent on a work item.
9. Where a charge is within a usual range, the factors we will assess if the charge is reasonable are:
10. if the activity was necessary
11. whether the activity related to useful or relevant advancement of the case
12. whether other more economical or cost efficient means of carrying out the work could have been employed
13. Our policy is that a charge is unusual if it does not accord with historical precedent, currently accepted practice or patterns of charging for the particular area of work, particular case, or work item.
14. If a charge is ‘unusual’, the factors we will use to determine whether the charge is reasonable will include the usual factors above and also:
15. the particular complexity of the matter or the difficulty or novelty of the questions raised for the particular area of work
16. the skill, effort, specialised knowledge and responsibility involved for the particular area of work
17. whether the client’s particular vulnerabilities impacted on work required
18. For a charge in an unusual range, the solicitor and counsel require to provide additional evidence either in terms of a detailed narrative or documentation that supports the claim.

[Cite your source here.]

1. There are key elements to note in relation to our policy.
   * All decision-making is reliant on evidence that the charge is reasonable.
   * Our decision making is informed by an understanding of ‘usual’ or ‘unusual’ charges. For example, it may be reasonable to see lengthier meetings in a permanence case, compared to a more straightforward child contact case.
   * A charge which is usual (type and/or cost) requires to be assessed as reasonable on the evidence available, but is unlikely to require lengthy or additional detail to assist with that assessment.
   * An unusual charge (type and/or cost) requires evidence to justify an assessment to pay. Decision makers are limited by the information made available to them through the account narrative or documents provided with the account.
   * Decision makers will look for evidence to support a charge in an account in our application system such as prior approvals, the account narrative and any supporting documents.
   * Decision makers will take into account their experience of what to look for based on their knowledge of the case type and corresponding client circumstance.
2. We make payment of all the charges we have assessed as payable and ask for further information on charges we have not been able to assess as payable. This is the abatement process. It allows us to make payment as soon as we are satisfied that payment can be made whilst holding back payment for charges which require further evidence (as well as those that are simply not payable at all in accordance with the relevant regulations). The process of seeking more information can be time consuming and frustrating; a frustration which we think can be avoided if it is clearer at the point of submitting an account how much and what quality of information will be required.
3. We do not hold up payment of the full account until we are satisfied on all charges, as this process can result in lengthy negotiations. We are reviewing how we treat smaller abatements on accounts to ensure our approach is cost effective.
4. Where we cannot reach agreement on disputed individual items we will try, where appropriate, to reach an accommodation by way of a global settlement at a fair and reasonable level, to avoid the cost, time and uncertainty associated with taxation on all parties.
5. Our policy recognises that charges which are usual can change over time, either through shifts in the patterns of charging for particular work items or case types, professional practice, client expectations or changes in wider Auditor taxation practice.

## Assessing the reasonableness of specific work items or fees in the taxation standard

1. Our policy for assessing reasonableness varies within these general principles depending on the particular work item or the amount of discretion available within a particular table of fees.
2. For meetings in time and line accounts, aside from how we frame ‘unusual’, we apply the same tests as in the general reasonableness policy. Our assessment of a meeting and/or corresponding charge being ‘unusual’ will include whether it is a meeting that may not usually be necessary, part of a series of meetings that took place in quick succession or is particularly lengthy.
3. For letters in detailed accounts, our assessment includes the same key tests as the general reasonableness policy. The main areas of difference are: that we define formal and non-formal content as a start point to our assessment; that a letter, email or text message must be sent if it is to be assessed; and in how we frame ‘unusual’. The letters policy is appended for review and comment.
4. Moving away from detailed accounts, we have appended the policy statement on the assessment of claims by counsel in civil and children’s legal aid for review and comment. The policy focusses only on those areas of the fee table where we have discretion.

### Reasonableness: SLAB’s statutory duties (equalities impact, corporate parenting)

1. As part of our equalities impact assessment we are considering whether the assessment of reasonableness in the taxation standard has any positive or negative potential impacts on legally aided clients. Our assessment is that the factor specifically addressing the vulnerabilities of the client (7f in text box on page 11) allows our decision-makers to take into account the impact of a particular client’s characteristics on the work needed in a case.
2. Additionally, as our decision-making is informed by an understanding of ‘usual’ and ‘unusual’ charges, this allows us to more generally take into account the impact of protected characteristics. For example, in asylum cases where clients are likely to be vulnerable or an interpreter will be engaged, it may be reasonable to see lengthier meetings than in other areas. There will be other areas of work where we see similar impacts which can be accommodated in the current charging structure.
3. Although we are not proposing any change at this stage, we are interested in your views on whether there may be positive changes we could make to our policy.

#### Question 1

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

SLAB should include additional factors

SLAB should remove one or more of the factors

SLAB should continue with the current set of factors

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

#### Question 2

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

#### Question 3

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

#### Question 4

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

Yes, No

Please provide the reason(s) for your answer.

#### Question 5

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

#### Question 6

How useful is seeing the policy statements as an underpinning for future guidance?

Please provide reasons for your response.

#### Question 7

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

#### Question 8

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

# Travel Policy changes proposed

1. We are intending to make a range of positive changes to several travel related accounts policies. Our intention is to bring greater consistency across those aid types where we can apply discretion and align travel rates with legal aid and external benchmarks. The changes are:
   * Outlays related to travel and associated expenses
   * Travel to court
   * Overnight travel

## Outlays related to travel and associated expenses

1. This policy covers the cost of travel and associated expenses, covering mileage, accommodation, subsistence, public transport, travel by air, parking charges, breakfast, and evening meals.

Text Box 2: Rate for accommodation and associated expenses set by regulation

There is one rate set by regulation, which is for counsel in civil, children’s and criminal cases, setting a rate as an outlay up to the amount of £108.15 for “Payment of necessary accommodation and associated subsistence per day”.

1. Most assessments of travel costs are at our discretion. Only travel and subsistence rates for counsel are set by regulation. For all other travel and subsistence claims we can choose to assess each claim on a case-by-case basis or we can set a standard maximum rate for most accounts which can only be breached on an exception basis. A standard maximum rate allows users of the legal aid system to have certainty over receiving payment, if other conditions are met (such as the need to travel).
2. SLAB’s payment rate for mileage is now below the allowance set by HMRC. We have received inquiries in the past as to whether SLAB’s travel and accommodation rates will change in line with periodic fee increases announced by the Scottish Government. We have not previously done so for rates within our discretion, but the Scottish Government has extended the two recent increases in fee rates (in 2019 and 2021) to the accommodation and subsistence rate for counsel.
3. We propose to adjust our policy so that:
   * All accommodation and subsistence rates will be capped at a standard maximum rate of £108.15 per day, whereas at present the rates we allow vary between £80 - £100 for overnight stay or with no standard rate set. The new standard maximum rate covers accommodation, breakfast, evening meal and subsistence. This provides parity with the maximum rate set by regulation for counsel, so that all providers will be subject to the same rate. By establishing this link, our intention is that all relevant rates will be uprated in line with any future increases in the rate set by regulation for counsel.
   * All other rates will be brought into line and capped at the highest maximum rate currently available in our guidance, such as staying with friends at £25 and standard class public transport or air fare costs. We will uprate all relevant rates in line with any future increases in the rate set by regulation for counsel.
   * The mileage rate for all users will be increased to 45p per mile to match the HMRC allowance.[[7]](#footnote-8)
4. Each of the above will be a cap on the rate paid, but exceptions can be made where we have discretion, for example for ordinary witnesses where a reasonable adjustment will not be covered by other schemes available to fund these type of costs, such as the Access to Work scheme.
5. By suggesting this approach we are taking the highest rates available in regulations and benchmarking against those. This is consistent with a position where we intend to provide equal treatment for all users and providers of legal aid and where we are content that costs up to the Scottish Government prescribed rate and the other maximum rates available appear reasonable. Linking our maximum standard rates to the rate allowed in the regulations for counsel and to the HMRC allowance means our rates will keep pace with changes elsewhere.

### SLAB’s statutory duties (equalities impact, corporate parenting)

1. We will make payment where a reasonable adjustment is required that falls to SLAB to fund. More information about where we consider it appropriate for reasonable adjustments to be funded by the Legal Aid Fund can be found in the section “SLAB’s approach to funding adjustments”.

#### Question 9

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

## Fees for travel to court

1. Where we can, we propose to standardise our approach across all aid types.
2. Those areas where we cannot change the current approach are:
   * In criminal legal aid, or where ABWOR is provided in connection with a summary criminal matter or in terms of section 19, 30 AND 36(1) (a) of the Criminal Justice (Scotland) Act 2016 or Paragraph 29 or 36 of schedule 8 of the Terrorism Act 2000 Act, where time necessarily spent travelling to and from court is only allowable where the court is not in a town or place where the solicitor has a place of business.
   * Summary criminal fixed payment including relevant ABWOR cases with core fixed payments. The regulations make no provision for payment of fees for travel as separate charges: SLAB has no power to change this, so it is not a matter of SLAB policy.
   * Civil block fee cases. These cases have different rules on travel set by regulation and only allow for travel where travel is 10 miles in each direction.
   * Summary cause cases where there are no prescribed fees for travel and so travel charges are not permitted.
   * Counsels’ fees payable in terms of schedule 2 of the Criminal Fees Regulations or Schedule 4 of the Civil Fees Regulations which prescribe specific provisions in respect of travel.
3. We do have discretion in setting a policy for solicitor travel costs for local court/hearing centre for children’s, civil and in various types of ABWOR cases. Taking into account changes in auditor practice around allowing travel to a local court, and a general aim to simplify the system where we can, we want to align as far as possible the approach to payment for travel to court.
4. We propose:
   * To allow a charge, subject to the usual test of reasonableness, for travel to local and non-local court where it is not proscribed by regulations
   * We will continue to allow travel to a non-local court by the nominated solicitor where there is a substantive hearing. For formal or routine procedural hearings the solicitor may, depending on the circumstances, be invited to clarify why a local solicitor could not have been instructed, due regard being had to economy. Where a local agent is instructed they should be as local to the court as possible.

SLAB’s statutory duties (equalities impact, corporate parenting)

1. Our assessment is that our policy results in no negative impact on equality groups or in respect of our corporate parenting duties. The policy allows for a solicitor’s travel to a substantive hearing – including those at which a client may be expected to attend and therefore we consider this takes into account client vulnerabilities.

#### Question 10

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

## Overnight travel for solicitors and advocates

1. We allow payment of fees, where appropriate, for overnight travel as a usual charge, subject to the test of reasonableness. This is a clarification of our position.

### SLAB’s statutory duties (equalities impact, corporate parenting)

1. Our assessment is that there is no impact on equality groups or in respect of our corporate parenting duties. There may be beneficial impacts for island communities as some overnight travel may be required.

#### Question 11

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

# Language interpreting and translation: Policy changes proposed

1. We have reviewed our language interpreting and translation policies, where we have a defined set of standard rates and terms for spoken languages[[8]](#footnote-9) and where British Sign Language (BSL) is covered by our general outlays policy.
2. Our standard hourly rates for spoken language interpreters appear in general to be competitive when compared to the Scottish Government’s framework for the public sector, as well as to the Legal Aid Agency (LAA) rates. SLAB maintains a register of spoken language interpreters and translators who are willing to work at SLAB’s standard rates. Our data shows that new interpreters continue to join [the register](https://www.slab.org.uk/app/uploads/2019/05/Register-of-interpreters.pdf). At present we do not track who leaves the register. Issues raised by interpreters with us are around getting payment from solicitors. SLAB has no authority to pay interpreters directly.
3. Our review found that concerns about the SLAB rates tend to be about the rates available for interpreters in rarely encountered spoken languages. Generally at the moment, if a claim is received above the standard rate, the cost is restricted to standard rates and terms. Although we can override the standard rate, we understand that solicitors will be concerned about incurring a charge that exceeds the standard rate, which may mean that they would not get full reimbursement. We are proposing a change that will make our external guidance and internal practice more consistent on how to get approval for a higher rate than the standard. We anticipate that this will be of most use for rarely encountered spoken languages. This would provide a level of assurance that interpreter costs higher than our standard costs will be met, if all other tests are met.
4. We propose that where a rate above the standard is needed:
   * accounts staff can manage that process for legal aid cases by providing a letter of comfort to the solicitor – to cover instances such as a rarely encountered spoken language, or if rates otherwise available in a particular instance are above the standard.
   * in advice and assistance or ABWOR cases, where an increase in authorised expenditure is needed for anticipated work including outlays, we will provide external guidance that higher rates can be authorised by applications staff in similar circumstances, as per legal aid cases.
5. We will clarify that solicitors can claim interim payments, including for outlays, which allow solicitors to make timely payments to interpreters. *[[9]](#footnote-10)*
6. We will keep a record of those leaving the spoken language interpreting register to give more information about supply available at SLAB’s rates, so that we can review this policy at a future date.
7. We found that the BSL rates set by LAA and in Police Scotland’s framework are higher than for spoken language, reflecting previous work by SLAB when seeking to identify a standard rate and terms for BSL interpreting on a similar basis to our spoken language interpreting policy. For BSL interpreters, the 2019 landscape review[[10]](#footnote-11) identified a general fragility in supply and availability of interpreters across Scotland.
8. We propose to continue to assess claims for BSL interpreters on the same basis as other outlays, which will allow the widest range of choice possible for solicitors, subject to the statutory test of reasonableness, given what we know of the restricted supply in the market.

### SLAB’s statutory duties (equalities impact, corporate parenting)

1. We identified through our equality impact assessment that positive impacts for equality groups could be gained from promoting the availability of interim payments to interpreters, providing clear guidance and factors for paying a rate above the standard spoken language interpreting rate, and providing some assurance to solicitors making a payment higher than the set rate.

#### Question 12

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

# SLAB’s approach to funding adjustments from the Legal Aid Fund

1. We have considered carefully who can be funded for adjustments from the Legal Aid Fund. Our principle is to allow funding where the person is not able to access funding from other schemes, such as the Access to Work Scheme,[[11]](#footnote-12) and/or where there are professional standard obligations on the person or their employer that need to be fulfilled generally in carrying out their work in a legal aid case. Our position is that we can fund clients, ordinary witnesses and professional witnesses, but that it is not reasonable or proportionate for the Legal Aid Fund to fund adjustments for solicitors, counsel, experts or their staff as other public funding is available.
2. The current legislative framework for legal aid can mean that people with disabilities who need additional communication aids to engage with their solicitor may find that they pay an increased cost in either contributions or clawback. This runs counter to the principle that a disabled person ought not to pay for their own adjustments. A similar argument can be made for those people needing a spoken language interpreter.
3. Similarly, in civil sheriff court (defended) block fees provision is made for an additional fee that can be related to the vulnerabilities of the client. This allows fairer remuneration for the solicitor for work done but may add cost for the person being assisted.
4. We have previously highlighted this difficulty in our response to the Scottish Government’s consultation on legal aid reform.[[12]](#footnote-13) We intend to explore whether we can address this issue in whole or part by way of policy change in forthcoming work looking at payments due from the assisted person at the end of their case, whether from clawback or contributions. We will consult on any proposed changes.

#### Question 13

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

Completely agree

Partially agree

Completely disagree

Please provide the reason(s) for your answer.

# Guidance on the submission of accounts

## Potential options for guidance

1. We have developed and published policy statements, decision makers’ guidance and legal aid guidance for a number of aspects of criminal legal assistance applications.[[13]](#footnote-14)
2. Your views are sought on whether and how a revised set of information for accounts assessment, in particular revised legal aid guidance following the criminal legal assistance applications model, would meet your needs for accounts assessment.
3. Areas with published information in the revised format include:
   * Summary criminal ABWOR – interests of justice test ([policy statement and decision makers’ guidance](https://policydmg.slab.org.uk/decision/summary-criminal-abwor-interests-of-justice-test/); [legal aid guidance](https://www.slab.org.uk/guidance/commencement-and-provision-of-abwor/))
   * Summary criminal legal aid – interests of justice test ([policy statement and decision makers’ guidance](https://policydmg.slab.org.uk/decision/summary-criminal-interests-of-justice-test/); [legal aid guidance](https://www.slab.org.uk/guidance/applying-for-legal-aid-in-summary-proceedings/))
   * Special urgency criminal appeals ([policy statement and decision makers’ guidance](https://policydmg.slab.org.uk/decision/special-urgency-criminal-appeals/); [legal aid guidance](https://www.slab.org.uk/guidance/availability-of-special-urgency-for-criminal-appeals-2/))

#### Question 14

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?

#### Question 15

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

Please provide reasons for your response.

# Responding to this consultation

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

### Deadline

1. Consultation on the proposed changes runs for a six week period from 24 September 2021. Please ensure any responses are submitted to us by 5pm on 4 November 2021.

### How to respond

##### Online

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

##### By email

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

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

1. Steven Carrie, Senior Technical Specialist, Accounts Assessment, [carriest@slab.org.uk](mailto:carriest@slab.org.uk)

# **Appendix A: consultation questionnaire**

You can also download the questionnaire below as a fillable fields [Word version](https://www.slab.org.uk/app/uploads/2021/09/Consultation-Questionnaire-Accounts-assessment.docx).

## Respondent information

Name:

Email address:

Are you responding as an individual or an organisation?

Please enter your organisation's name:

SLAB would like your permission to publish your consultation response. Please indicate your publishing preference:

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 questions

#### Question 1

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

SLAB should include additional factors

SLAB should remove one or more of the factors

SLAB should continue with the current set of factors

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

#### Question 2

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

#### Question 3

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

#### Question 4

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

Yes, No

Please provide the reason(s) for your answer.

#### Question 5

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

#### Question 6

How useful is seeing the policy statements as an underpinning for future guidance?

Please provide reasons for your response.

#### Question 7

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

#### Question 8

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

#### Question 9

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

#### Question 10

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

#### Question 11

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

#### Question 12

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

#### Question 13

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

Completely agree

Partially agree

Completely disagree

Please provide the reason(s) for your answer.

#### Question 14

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?

#### Question 15

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

Please provide reasons for your response.

#### Question 16

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

# **Appendix B: Summary of stakeholder discussions**

1. We held a number of stakeholder discussions in July and August 2021 with solicitors, counsel, auditors of court and law accountants. The discussions focussed on reasonableness in the taxation standard. The aim of the discussions was to help us to understand whether amendments to the policy statement were needed.
2. Stakeholders were generally positive about the policy statements they reviewed, with some noting explicitly that it covered all they would expect and that it should assist in making transparent the accounts assessment process.
3. Some stakeholders identified that the statement on reasonableness in the taxation standard reflected the two key elements of reasonableness- is the work reasonable and is the charge reasonable?
4. There was discussion about the underlying meaning of the public interest as part of the third party paying section and whether the public interest is distinct from a general public interest that clients receive advice and representation as delivered by the professionals. The importance of the third party paying taxation standard was discussed in this context, as it is less generous than a private feeing agent and client standard.
5. There were some questions over the scope of the reasonableness policy statement, as it mainly focusses on the application of the policy to detailed fees. The policy statement could be amended to more clearly identify how other forms of fees were assessed.
6. Stakeholders also raised issues over how SLAB would apply the usual and unusual distinction. Whilst this was thought to be a positive approach to identifying where additional evidence might be required, there were concerns about how it would work in practice. For example, participants raised questions about whether it could mean cementing ways of working that have become ‘usual’ during the pandemic but would not be desirable to continue, or that in a case type where longer meetings are the norm, they would be assessed as not being justified against the ‘usual’ criteria. The development of the detailed Decision Makers Guidance (DMG) and external guidance would set out how the policy would be put into practice and provide accountability for how SLAB is delivering the policy.
7. There were points raised about issues to do with payment where SLAB did not have discretion, for example in paying twice for preparation in a criminal solemn block fee case. In this example and for other aid types where block or fixed fees are in place, there are exceptional case provisions that allow payment on a detailed fee basis to take account of additional work being needed. This highlighted how the DMG and especially external guidance would need to be very clear on where SLAB has discretion or not.
8. All stakeholders were positive about engaging on a semi-regular basis to assist SLAB in keeping up to date on evolving practice, to inform our assessment of ‘usual’ and ‘unusual’.

# **Appendix C: Example policy statements**

## Policy 1: Assessment of reasonableness in the taxation standard

## Key decision(s) this policy relates to.

The decision to be made is how much to pay for work claimed on an account by a solicitor or counsel. This can be to pay in full, pay part of the account or pay nothing on the account.

## Do we have discretion?

SLAB does not have discretion over which fee table is associated with each of these aid types. SLAB is required to assess every item in an account to ensure it has been properly incurred.

SLAB’s discretion in relation to how much to pay against a fee table varies by aid type. In areas with block or fixed fees, there is limited, in some cases very limited, discretion as the parameters for assessing the reasonableness of a charge are mainly set by regulation. The payment regimes with limited discretion are:

* Schedules 3-6 of the Advice and Assistance (Scotland) Regulations 1996;
* Schedules 2, 4 and 6 of the Civil Legal Aid (Scotland) Fees Regulations 1989;
* Schedule 1, Part 2 and Schedule 2 of the Criminal Legal Aid (Scotland) Fees Regulations 1989; and
* Schedules 1, 1A and 1B of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999

For those areas with detailed fees, SLAB has wide discretion in how to apply the taxation standard.

## What is SLAB’s policy?

Between aid types there are differently worded ways to apply the taxation standard of “agent and client, third party paying”. SLAB applies the taxation standard in a common way across all aid types.

Our policy is that the reasonableness in the taxation standard policy statement will be used for any charge that is out with the coverage of the sub-policies that have been developed for particular types of charges or fee types, as well as for overall case assessment.

Our policy is that we will assess both the reasonableness of having undertaken a work item, and the reasonableness of the amount charged for that work item. We will pay as reasonable a charge where the solicitor or counsel has provided information upon which we can reasonably assess that:

1. the work was actually done and
2. the work was appropriate to do given the facts and circumstances of the case and
3. that the amount of work was appropriate given the facts and circumstances of the case and
4. that the work is not a duplication of other activity within the case or linked cases

Our policy is that different factors bear upon our decision making depending on whether a charge is ‘usual’ or ‘unusual’.

Our policy is that a charge is ‘usual’ if it accords with historical precedent, currently accepted practice or patterns of charging for the particular area of work, particular case, or work item. The particular area of work is bounded by case type and, where applicable, court or tribunal procedure.

Our policy is that where a charge is ‘usual’ we require a narrative justification for the charge and that this was an appropriate amount of time or effort actually spent on a work item.

Where a charge is within a usual range, the factors we will assess if the charge is reasonable are:

1. if the activity was necessary
2. whether the activity related to useful or relevant advancement of the case
3. whether other more economical or cost efficient means of carrying out the work could have been employed

Our policy is that a charge is unusual if it doesn’t accord with historical precedent, currently accepted practice or patterns of charging for the particular area of work, particular case, or work item.

If a charge is ‘unusual’, the factors we will use to determine whether the charge is reasonable will include the usual factors above and also:

1. the particular complexity of the matter or the difficulty or novelty of the questions raised for the particular area of work
2. the skill, effort, specialised knowledge and responsibility involved for the particular area of work
3. whether the client’s particular vulnerabilities impacted on work required

For a charge in an unusual range, the solicitor or counsel requires to provide additional evidence either in terms of a detailed narrative or documentation that supports the claim.

## Cost effectiveness assessment [current policy under review]

Where an individual charge is not precluded by statute, but nevertheless appears on the information available not to be justified, SLAB will assess whether it is cost effective to abate the entry or to enter into negotiations, having regard to the overall value of the disputed item and the total account. Any charge, either in whole or in part, that is specifically excluded by statute must be restricted.

## Negotiation and review

Our policy is that we will provide opportunities for negotiation between a solicitor or counsel and assessment officer if a charge is not assessed as meeting our threshold for payment in full. If the provision of additional information by the solicitor or counsel does not resolve matters, this may be escalated to more senior members of staff as and when necessary for consideration.

Our policy is to assess any new information and that already provided against the same factors as at the first submission.

Where negotiation does not resolve the issue, a further review of the decision will be undertaken, mindful that any matter in dispute may require to be considered by the relevant Auditor of Court in a diet of taxation if agreement cannot be reached.

Our policy is to assess all the information already provided against the same factors as at the first submission and with an additional factor of:

any other cogent reason.

Where negotiation and review on individual charges does not result in a settlement, SLAB will assess on a whole case basis, where the sums in dispute and the overall value of the claim allow such an approach as appropriate, what fair and reasonable global sum can be offered.

## Prior approval

Where prior approval is in place for unusual or unusually large expenditure, our policy is that we will pay as reasonable a charge where the solicitor has provided information upon which we can reasonably assess that:

1. the work was actually done and
2. that the work is not a duplication of other activity within the case or linked cases

Where prior approval has been sought and given, our policy is that the factors we will assess if the amount of charge is unreasonable are:

1. whether the charges or scope of work depart from the approval given
2. if elements of the activity are unnecessary

## Extract from Policy 2: Assessment of meetings in the taxation standard

Aside from how we frame ‘unusual’, we apply the same tests as in the general reasonableness policy to our assessment of meetings. Our assessment of a meeting and/or corresponding charge being ‘unusual’ will include whether it is a meeting that may not usually be necessary, part of a series of meetings that took place in quick succession or is particularly lengthy.

## Extract from Policy 3: Assessment of letters in the taxation standard

Our assessment of letters in the taxation standard includes the same key tests as the general reasonableness policy. The main areas of difference are: that we define formal and non-formal content as a start point to our assessment; that a letter, email or text message must be sent if it is to be assessed, and; in the how we frame ‘unusual’.

## What is SLAB’s policy?

SLAB’s definition of what constitutes a letter includes email and text messages, where appropriate.

The factors we take into account in assessing whether letter content is non-formal include:

* routine or pro forma content,
* content which requires little skill or thought to prepare, or
* content which does not require legal expertise or specialised knowledge in its preparation.

The factors we take into account in assessing whether letter content is non-formal include:

* where content requires case specific drafting (other than that required to address the letter), or/ and
* Where content requires legal skills or expertise, or other specialised knowledge.

Letters may contain a mix of formal and non-formal content, such as where a pro forma letter or template has been used. Where this occurs, we assess the formal content and the non-formal content separately.

Our policy is that we will assess both the reasonableness of having written a letter and the reasonableness of the amount charged for that work item. We will pay as reasonable a charge where the solicitor has provided information upon which we can reasonably assess that:

1. the letter was actually drafted and sent and
2. that the length was appropriate given the facts and circumstances of the case and/ or
3. that the content was appropriate to provide given the facts and circumstances of the case and
4. that the work is not a duplication of other activity within the case or linked cases

In making an assessment that the letter charge is a reasonable one, we have regard to whether the letter charge is usual or unusual.

Our policy is that a charge is ‘usual’ if it accords with historical precedent, currently accepted practice or patterns of charging for the particular area of work. The particular area of work is bounded by case type and, where applicable, court or tribunal procedure.

Our policy is that where a charge is ‘usual’ we require a narrative justification for the writing of the letter and that this is an appropriate charge for the letter.

Where a charge is within a usual range, the factors we will assess if the charge is reasonable are:

1. if the letter was necessary
2. whether the letter related to useful or relevant advancement of the case
3. whether other more economical or cost efficient means of carrying out the work could have been employed

If a charge is ‘unusual’ – it is a particularly lengthy letter, a confirmatory letter, a reminder letter to the client or other parties involved in the case - the factors we will assess if the charge is reasonable will include those above and also:

1. the particular complexity of the matter or the difficulty or novelty of the questions raised for the particular area of work
2. the skill, effort, specialised knowledge and responsibility involved for the particular area of work
3. whether the client’s particular vulnerabilities impacted on work required

For a charge in an unusual range, the solicitor requires to provide additional evidence either in terms of a detailed narrative or documentation that supports the claim.

## Policy 4: Assessment of claims by counsel in civil and children’s legal aid

## Key decision(s) this policy relates to.

The decision to be made is how much to pay for work claimed by counsel in civil and children’s legal aid.

The possible outcomes of this decision are:

* The fees are payable in full
* The fees are payable in part
* The fees are not payable.

The assessment of an account for counsel fees will also involve any travel and outlays charges. Decisions on travel and outlays charges are covered by separate policy statements.

## Do we have discretion?

SLAB does not have discretion over which fee table, or where no table exists the basis of how the fee is to be calculated, associated with each of these aid types. SLAB is required to assess every item in an account to ensure it has been properly incurred.

SLAB is responsible for applying the taxation standard to all accounts, including those where fees are prescribed. Civil and children’s counsel fees comprise both standard fee tables, fees within a range or have a limit on the amount which is payable and work where there is no prescribed fee.

SLAB has discretion to determine how much to pay on charges that are prescribed within a range by a fee table.

SLAB has wide discretion when it comes to determining whether a charge is reasonable, and if so how much to pay for that charge where there is no prescribed fee.

SLAB also has discretion when it comes to assessing a range of charges where the regulations do not provide a set fee, or where case and client context interact with whether the charge is reasonable or not. The following are areas of the regulations in which SLAB is given discretion:

1. The regulations prescribe fees for most work undertaken in specific courts (regulations 10(1)). Where legal aid work is undertaken for proceedings in courts specified in regulation 10(1), SLAB has discretion to determine whether the charges are reasonable and limited discretion with reference to schedule 4 on the amounts to pay on those charges.
2. Regulation 10(2) for work in proceedings in particular courts are to be assessed at 90% of what would be allowed for expenses between solicitor and client, third party paying. There are, in the main, no private/non-legal aid fees that SLAB can refer to and as a result SLAB has discretion to determine what fee to use as a base for the 90%.
3. Where Schedule 4 does not prescribe a fee for any class of proceedings or any item of work, SLAB have a wide discretion and statutory obligation to allow such fee as appears to be appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general levels of fees in the Tables of Fees.
4. The regulations require counsel to provide ‘cause shown’ to justify certain charges laid out in schedule 4, and the definition or benchmark for what can be considered acceptable evidence of cause is not defined, and as a result SLAB has discretion to set this benchmark.
5. The regulations set criteria for the circumstances in which an additional fee for preparation will be payable in connection with a proof, debate or like hearing, and SLAB has discretion when applying some of these factors. Further, SLAB must determine what time engaged in preparation where an additional charge is being applied was reasonable and proportionate to the circumstances of the case.
6. Where the fee table prescribes a possible fee range for a work item, the regulations set out factors on which counsel must justify a higher fee than the minimum prescribed. SLAB has discretion in assessing this justification against those factors, not of all of which are defined.
7. Where a claim is made in respects of costs in respect of any necessary accommodation and subsistence this is chargeable as an outlay and SLAB has discretion to allow the amount payable up to the level specified in the respective Table of Fees. Similarly SLAB has limited discretion as to the amounts that are payable in respect of any outlays incurred in respect of travel between any destinations.

## What is SLAB’s policy?

Between aid types there are differently worded ways to apply the taxation standard of “agent and client, third party paying”. SLAB applies the taxation standard in a common way across all aid types.

SLAB’s policy where there is no prescribed fee, where there is a range of fees, higher fees allowable, additional preparation charges or where SLAB must assess cause shown is to is to pay as reasonable a charge where counsel has provided information upon which we can reasonably assess that:

1. the work was actually done and an outlay has been incurred and
2. the work was appropriate to do given the facts and circumstances of the case and
3. that the amount of work was appropriate given the facts and circumstances of the case and
4. that the work is not a duplication of other activity within the case or linked cases

Our policy is that different factors bear upon our decision making depending on whether a charge is ‘usual’ or ‘unusual’.

Where a charge is ‘usual’ we require a narrative justification for the charge and that this was an appropriate amount of time or effort actually spent on a work item.

For a charge in an unusual range, the solicitor and counsel requires to provide additional evidence either in terms of a detailed narrative or documentation that supports the claim.

Where a charge is within a usual range, the factors we will assess if the charge is reasonable are:

1. if the activity was necessary
2. whether the activity related to useful or relevant advancement of the case
3. whether other more economical or cost efficient means of carrying out the work could have been employed

If a charge is ‘unusual’, the factors we will use to determine whether the charge is reasonable will include the usual factors above and also:

1. the particular complexity of the matter or the difficulty or novelty of the questions raised for the particular area of work
2. the skill, effort, specialised knowledge and responsibility involved for the particular area of work
3. whether the client’s particular vulnerabilities impacted on work required

## No prescribed fee – regulation 10(1):

Our policy is that a charge is ‘usual’ under regulation 10(1) where it aligns with the general level of fees set in schedule 4 for cases covered by this schedule, the general level of fees set by previous taxation decisions for similar charges, as well as historical precedent, currently accepted practice or patterns of charging for the particular area of work, particular case, or work item. The overriding aim of the exercise is to provide reasonable remuneration for the work.[[14]](#footnote-15) The particular area of work is bounded by case type and, where applicable, court or tribunal procedure.

## No prescribed fee – regulation 10(2)

Our policy is that a charge is ‘usual’ under regulation 10(2) where it aligns with the general level of fees set by previous taxation decisions for similar charges prior to 2011, as well as historical precedent, currently accepted practice or patterns of charging for the particular area of work, particular case, or work item. The particular area of work is bounded by case type and, where applicable, court or tribunal procedure.

For proceedings in the United Kingdom Supreme Court SLAB will apply the UK Supreme Courts *Practice Direction – Costs[[15]](#footnote-16)* to determine the reasonable amount payable on these charges.

# **Appendix D: Full list of all policies**

1. Court duty
2. Identity parades
3. Civil counsel fees
4. Criminal counsel fees
5. Travel
6. Civil block
7. Summary legal aid
8. Criminal ABWOR
9. Additional fees
10. Photocopying
11. Aggregation
12. Apportionment
13. Waiting
14. Exceptional case status for civil
15. Solemn block
16. Research
17. Written representations replace physical hearing (due to Covid19)
18. Lunch
19. Summary legal aid time and line
20. Appeals
21. Prison opt out
22. Interim payments
23. Post-conviction exceptional case status
24. Section 19 claims
25. Administrative work
26. Parent policy
27. Reasonableness
28. Outlays
29. Letters
30. Perusal
31. Meetings
32. Preparation
33. Framing
34. Precognitions
35. Couriers
36. Criminal Justice Scotland Act, Counter-Terrorism and Border Security

# **Appendix E: Authorities on the application of the third party paying taxation standard**

## Hood v Gordon (1896) 23 R. 675

On 28th February 1896 the Auditor in taxing the respondent's account of expenses disallowed the fees paid to a third counsel employed during the preliminary procedure and at the trial of the election petition.

…

LORD KYLLACHY.—I see no reason to doubt that the principle which we must follow in this case is that established is the case of Walker v. Waterlow, and also in the case of the Wigtown Burghs. That principle is that while the taxation must, as prescribed by the statute, be as between agent and client, yet as the expenses in a case like this have to be paid, not by the client, but by a third party, the principle of taxation, though not indeed identical with that between party and party, must yet be different from that applied in the ordinary case of agent and client. That being the principle, I think it can hardly be disputed that, except as between agent and client in the ordinary sense, fees to three counsel are not as a rule allowed. There may indeed be cases in which three counsel are allowed—cases in which it would be reasonable for an agent, without any authority from his client, to employ three counsel. But except in such exceptional cases, the rule, both in England and Scotland, is that two counsel only should be allowed. Now, I do not consider that the present case was so exceptional as to justify a departure from the general rule, and I am therefore of opinion that the report of the Auditor, with the deductions he has made, should be approved.

LORD MCLAREN.—I agree with your Lordship that we ought to follow the practice established by the Courts in England, especially when it is considered that there has necessarily been a much larger experience of the working of this statute in England than in Scotland. On the merits of the question my view is that when a statute authorises the taxation of expenses as between agent and client, what is given is the expenses which a prudent man (sic) of business, without special instructions from his client, would incur in the knowledge that his account would be taxed. Now, I do not think that a prudent man of business, dealing with a case which presents no special features of difficulty or importance, but which is very like the ordinary run of cases that are sent to proof in the ordinary jurisdiction of the Court, would take on himself the responsibility of employing three counsel, especially as he can always protect himself by employing two of the most eminent counsel who may be willing to undertake the duty. I therefore agree with your Lordship that the Auditor's report should be approved.

Expenses in the Supreme and Sheriffs Courts of Scotland by James Hastings

4. Solicitor and client, where third party is a fund

(a) Where fund held by another litigant

The basis of taxation is the same as for third party paying.

(b) Where fund held or about to be taken charge of by the client

This basis of taxation is the same as client paying, except that any expenses unreasonably or extravagantly incurred or unreasonable in amount are disallowed, the benefit of any doubt being given to the receiving party. The process rule does not apply.

(c) Where the legal aid fund is paying

This basis is the same as (b) except that the benefit of any doubt is given to the paying party and not the receiving party and any unusual expenses which might not be recovered on a party and party basis, must be sanctioned by the paying authority.

# **Appendix F: Glossary of terms**

Aid type – the specific rules around applications and accounts for contempt, criminal, civil and children’s cases.

Block fee or Inclusive fee – a prescribed fee for all work done in connection with a defined stage in the proceedings. An account will normally consist of multiple block fees.

Standard fee – Prescribed fees for an item of work (for example, attendance at a diet of proof or trial, consultations, drafting of documents, and so on).

Fixed fee – a single fee payable for the majority of work undertaken in that case, for example conduct of a summary criminal case; a limited number of ‘add-on’ fixed payments for additional work may be payable.

Time and line or Detailed fee – based on an itemised break-down of each item of work done in the proceedings, which may be time or task-based.

Legal Aid Fund or the Fund - The budget from which legal aid is paid and which is administered by SLAB.

SLAB – Scottish Legal Aid Board, which has the statutory functions of securing that legal aid and advice and assistance are available, and of administering the Legal Aid Fund in Scotland.

Account narrative – a short description of the work undertaken and why

The Act – Legal Aid (Scotland) Act 1986.

Fee – payment for work done in-house by a solicitor’s firm or by counsel.

Outlay – a payment to a third party for a service.

Statute – an act of parliament and associated regulations.

Primary legislation – an act of parliament.

Regulations – legislation made by a person or body under authority contained in primary legislation.

Legislation – acts of parliament and regulations.

Statutory framework - acts of parliament and regulations, sitting within a broader context of administrative and case law.

Taxation standard – this refers to the rules which an auditor of court will apply to assess what charges to allow on an account that is sent to them for consideration

Abatement – where payment is not made on a claimed amount, through SLAB either reducing or disallowing a charge.

Legal aid – public funding available to support people with legal problems.

Legal aid guidance – advice and information provided on SLAB’s website that is aimed at assisting solicitors and counsel to submit all relevant information to support applications and accounts.

Decision makers’ guidance – the process for SLAB’s internal decision makers to follow.

Policy statement – where SLAB has discretion within the statutory framework, policy provides a framework for decision making.

Solicitor – provide legal advice and representation directly to clients and are regulated by the Law Society of Scotland. A solicitor cannot provide representation in the High Court, Court of Session, Sheriff Appeal Court or the Supreme Court, unless they are a solicitor advocate.

Advocate or Counsel – provide legal advice and representation in complex cases. They can provide representation in the High Court, Court of Session, Sheriff Appeal Court and the Supreme Court. They are regulated by the Faculty of Advocates.

Solicitor advocate – solicitors who have been granted the right to provide representation in the High Court, Court of Session, Sheriff Appeal Court and the Supreme Court.

1. <https://www.slab.org.uk/corporate-information/what-we-do/> [↑](#footnote-ref-2)
2. The Legal Aid (Scotland) Act 1986, available at <https://www.legislation.gov.uk/ukpga/1986/47/contents> [↑](#footnote-ref-3)
3. <https://www.gov.scot/groups/legal-aid-advisory-panel/> [↑](#footnote-ref-4)
4. The report can be found at- <https://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/Topics/archive/reviews/legal-aid-review> [↑](#footnote-ref-5)
5. <https://www.gov.scot/publications/legal-aid-reform-scotland-consultation-response/> [↑](#footnote-ref-6)
6. <https://www.slab.org.uk/news/legal-aid-framework-project-publishes-first-policies-and-decision-makers-guidance/> [↑](#footnote-ref-7)
7. All users includes solicitors, solicitor’s clerks, counsel, interpreters, witnesses and others paid for their travel through the Legal Aid Fund [↑](#footnote-ref-8)
8. <https://www.slab.org.uk/guidance/legal-aid-accounts-payment-for-interpreters/> [↑](#footnote-ref-9)
9. Subject to the total cost being above £100 for advice and assistance or £150 for any other aid type. [↑](#footnote-ref-10)
10. <http://bslscotlandact2015.scot/wp-content/uploads/2019/11/Landscape-Review-2019-Executive-Summary.pdf> [↑](#footnote-ref-11)
11. <https://www.gov.uk/access-to-work> [↑](#footnote-ref-12)
12. <https://www.slab.org.uk/app/uploads/2019/10/SLAB-response-to-Scottish-government-consultation-on-legal-aid.pdf> [↑](#footnote-ref-13)
13. <https://policydmg.slab.org.uk/> [↑](#footnote-ref-14)
14. [Inner House [2021] CSIH 3 XA75/16](https://www.scotcourts.gov.uk/search-judgments/advanced?judgmentsType=court-of-session-judgments&caseTitle=&caseReferenceNumber=&opinionDate=1-21-2021&transferDate=&filterResponses=No&resultLimit=10) [↑](#footnote-ref-15)
15. https://www.supremecourt.uk/procedures/practice-direction-13.html [↑](#footnote-ref-16)