

PROTOCOL

Between

THE SCOTTISH LEGAL AID BOARD

And

THE FACULTY OF ADVOCATES

This protocol (“the Protocol”) is an agreement between The Scottish Legal Aid Board (“SLAB”) and the Faculty of Advocates on behalf of its members relating to the submission of interim and final fee claims to SLAB.

It shall be effective from 1 October 2022 and shall apply to SLAB and all members of the Faculty of Advocates in relation to cases where legal aid has been granted (or if legal aid was refused, where work was validly undertaken under special urgency provisions).

The Protocol applies to all claims for payment by members of the Faculty of Advocates in legal aid cases other than:

- (i) Interim claims lodged prior to 1 October 2022 – these claims are and shall be made and processed in accordance with the existing arrangements which apply otherwise through regulatory or previously agreed mechanisms; and
- (ii) Cases where counsel has provided services instructed by a solicitor under advice and assistance – in such cases claims continue to be the responsibility and liability of the instructing solicitor to whom any and all claims should be sent.

The Protocol supersedes prior protocols and arrangements relating to claims for payment by member of the Faculty of Advocates other than where prior arrangements are specifically preserved by the terms of this document.

The parties HEREBY AGREE

CLAIMS FOR PAYMENT

A INTERIM CLAIMS

All Legal Aid Types

1. An interim claim may be submitted no earlier than the date three months following the date on which the Board gave notice in writing of the grant of legal aid. A second or subsequent interim claim may be submitted at intervals of not less than three months after the date of the immediately preceding claim in that case.
2. An interim claim may not be made where:
 - (a) the proceedings, or

(b) to the knowledge or reasonable belief of counsel, their involvement in the case

have/has concluded.

3. Where an interim claim is made, counsel will thereafter provide SLAB with such information as from time to time they may reasonably require in relation to the administration (including checking and review) of interim claims.

Standard Declaration

4. By submitting an interim claim counsel will be held to have adopted and made the standard interim claim declaration in relation to the claim detailed in Appendix 1 to the Protocol.

Civil Legal Aid

5. By lodging an interim claim counsel acknowledges and accepts that they will be expected to lodge a final claim in the case and that if they do not so lodge a final claim the relevant provisions in relation to overpayment and refund (see below) may or will be engaged.
6. Interim claims in civil cases will be submitted in accordance with the following provisions:
 - Claims will be submitted by email by FSL to civilfaculty@slab.org.uk;
 - The amount of any payment that will become eligible for payment and earned during the period covered by the claim by counsel under this protocol shall be:-
 - 100% of the prescribed fees; or
 - The base fee where the work relates to a fee within a range; and
 - During the relevant period, no other fees, including preparation will become eligible for payment until the conclusion of the proceedings and the submission of the solicitor's and counsel's final account.
 - Final claims must be submitted in tandem with the solicitors account within four months of the conclusion of proceedings.

Criminal Legal Aid and Children's Legal Aid

7. Interim claims in criminal legal aid cases will be submitted in accordance with the following provisions:
 - Claims will be submitted by email by FSL to faculty@slab.org.uk ;

- The amount of any payment that will become eligible for payment and earned during the period covered by the claim by counsel under this protocol shall be the sum as assessed by SLAB in accordance with regulation 10(1) of the Criminal Legal Aid (Scotland)(Fees) Regulations 1989;
 - Final claims must be submitted within four months of the conclusion of proceedings.
8. Interim claims in children’s legal aid cases will be submitted in accordance with the following provisions:
- Claims will be submitted by email by FSL to faculty@slab.org.uk ;
 - The amount of any payment that will become eligible for payment and earned during the period covered by the claim by counsel under this protocol shall be the sum as assessed by SLAB in accordance with regulation 10(1) of the Civil Legal Aid (Scotland)(Fees) Regulations 1989;
 - Final claims must be submitted within four months of the conclusion of proceedings.
9. (1) This paragraph applies to any criminal or children’s legal aid case where one or more interim claims is lodged by counsel and paid by SLAB.
- (2) Within four months of the first of the dates referred to in subparagraph (3) to occur, counsel will:
- (a) lodge a final claim with SLAB; or
 - (b) advise SLAB that they do not wish to make any further claim beyond any earlier interim claim(s) in the case.
- (3) The dates referred to in paragraph (2) are:
- (a) The date of conclusion of the case; or
 - (b) The date of conclusion of counsel’s involvement in the case where the proceedings have not concluded.
- (4) Where the time-period for compliance with the relevant option under subparagraph (2) above has passed, and no claim or notification has been submitted to SLAB, counsel will nonetheless provide a relevant final claim or notification, as the case may be, within three months of being called upon to do so by SLAB.

B FINAL CLAIMS

Claims where the final claim is or was lodged with SLAB prior to 1 October 2022

10. The parties agree to explore options for provisions and terms of agreement which may be useful in relation to such claims and may as consequence enter further agreement in relation to such claims.
11. In the meantime, all such claims will be administered in accordance with arrangements in place prior to this protocol and agreement, and this protocol does not affect any such claims. The parties agree that prior agreements or protocols in so far as these are in effect shall subsist in relation to these claims.

Claims where the final claim is lodged with SLAB on or after 1 October 2022

12. A final claim should be lodged in any case where an interim claim has been made unless the case is a criminal or children's legal aid case in which notification under paragraph 9(2)(b) has been given.
13. Final claims in legal aid cases should be submitted within the following time periods:

Criminal legal aid cases:	Submitted to SLAB within four months of completion of the proceedings or counsel's involvement in the proceedings.
Children's legal aid cases:	Submitted to SLAB within four months of completion of the proceedings or counsel's involvement in the proceedings.
Civil legal aid cases:	Submitted to the instructing solicitor within such period as allows the solicitor to submit their account within four months of completion of the proceedings.
14. Upon receipt of a final claim SLAB will complete such assessment as is possible on the information lodged and held within ten working days, and will then issue an offer of payment and/or information request.
15. Paragraphs 16 to 21 apply where following receipt of a final claim from counsel SLAB issues any of the following:
 - (a) An offer of payment
 - (b) An offer of payment with a request for further information to support any further payment
 - (c) A request for information in relation to a final claim either where no offer is being made on the information originally submitted (an "information request") or more generally
 - (d) A nil-offer e.g. where no payment appears to be due from the Fund

In this paragraph “offer” includes any amended or confirmatory offer of payment issued by SLAB (both terms as further explained in paragraph 17 below).

16. Where counsel seeks to respond substantively to an offer (including a nil-offer) or information request to provide information or comments counsel shall do so as soon as practicable.
17. Upon receipt of further information or comments from counsel SLAB will respond within ten working days. SLAB will issue an amended offer (where the offered figure has changed from a prior offer), a confirmatory offer (where there is no change) or a further information request.
18. Subject to paragraphs 19 and 20 where a period of (a) three months elapses following the issue of an offer and/or information request by SLAB or (b) such longer period as may be agreed with SLAB in writing provided it is so agreed before the expiry of the said three months, (hereafter “the relevant period”) without substantive response from counsel (or on their behalf), counsel will be deemed to have accepted the amount so offered or that no payment is due where no offer (or a nil-offer) has been made.
19. Paragraph 18 does not apply where counsel within the relevant period intimates an intention to lodge their account for taxation and thereafter lodges their account with the relevant auditor no later than the date three months after the expiry of the relevant period.
20. Notwithstanding any deemed acceptance by counsel arising as a consequence of paragraph 18, SLAB may at any point up to the date five years following the date of lodging a final claim reassess any claim and payment where information becomes available which establishes that the information supplied to support the claim was incorrect or that there is otherwise material error, inaccuracy or any misrepresentation of any nature by counsel, or those acting on their behalf, in the submission of the claim.
21. The relevant period as defined in paragraph 18 may be extended after it has expired only in exceptional circumstances and by written agreement between SLAB and counsel.

OTHER PROVISIONS

Overpayment and Refund

Overpayment of Interim Claims

22. Where an interim claim or claims have been made in a case to which paragraph 12 applies, and no final account is lodged within four months of the conclusion of the

case or the conclusion of counsel's involvement of the case SLAB will upon determining that a final account has not been lodged, issue a notification to counsel to lodge a final account, albeit late. The time period for lodging the final account will be extended by one month. Where a final account is so lodged, the claim will be dealt with in accordance with the provisions for final accounts above. Where no final account is lodged SLAB will carry out an assessment on the information it holds to determine whether the sum paid out the Fund by way of interim payments exceeds the sum that would be payable under a final account on the information available.

23. Where SLAB determines that the sum paid out of the Fund by way of interim claims exceeds the sum that would be payable under a final account it shall issue a notice specifying that overpaid amount and seeking refund (a "notice of overpayment"). The provisions (below) in relation to refund and recovery will then be engaged in relation to that amount.

Other Overpayment

24. Where following payment of a final claim on offer, or otherwise, information or investigation then leads SLAB to assess that there has been overpayment it will issue a notice of overpayment. The provisions (below) in relation to refund and recovery will then be engaged in relation to that amount.

Refund and Recovery of Overpayment and Procedure for Representations

25. Where SLAB issues a notice of overpayment any representations or challenge to the assessment of overpayment should be lodged with SLAB within one month of the date of the notice. This period may be extended by written agreement provided it is so agreed before the expiry of the one-month period. Where the overpayment is accepted in representations (or to the extent it is accepted) or no representations are lodged, SLAB will proceed in accordance with paragraphs 26 and 27. Where the assessment of overpayment is disputed (or to the extent it is disputed), SLAB will seek to resolve the matter by investigation and negotiation. Where resolution does not appear possible SLAB will issue notification of that position and refer the case to the escalation process referred to in paragraph 29.
26. Where overpayment is accepted or deemed to be accepted by the failure to lodge representations in response to a notice of overpayment SLAB will consider any reasonable proposal to refund the overpayment.
27. If there is no reasonable proposal to refund the overpayment, SLAB will deduct the sum in accordance with its Policy and Procedure for Recovery of Payments and Overpayments (separate Policy).

Escalation and Dispute Resolution

28. By written agreement between SLAB and counsel (or those representing counsel) in any case or cases specifically identified, the time-periods and other provisions of this agreement may be dis-applied where it is convenient or expedient to the resolution of matters, and the parties may agree.

29. Where (a) SLAB or The Faculty of Advocates or individual counsel identify significant areas of disagreement or dispute in relation to fee claims and the operation of the Protocol, or (b) provided for in the Protocol, issues shall be referred to the Chief Executive Officer of the Faculty of Advocates the Senior Accounts Specialist with SLAB for the purposes of discussion options for resolution. In the event of unavailability of one of the designated persons, the body represented may appoint a substitute.

Signed on behalf of the Scottish Legal Aid Board



Sgd Colin Lancaster, Chief Executive

Date28/09/2022.....

Signed on behalf of the Faculty of Advocates



SgdLynne Forisky, Head Of Members Services

Date30/09/2022.....

APPENDIX 1

STANDARD INTERIM CLAIM DECLARATION BY COUNSEL

- A. I wish to make an interim claim in terms of section 33ZB of the Legal Aid (Scotland) Act 1986.
- B. I declare:
- (i) that the amount claimed is charged in accordance with the fee regulations and notes on the operation of the regulations, and is for work done and chargeable as an interim claim not previously claimed in the case; and
 - (ii) that the sum claimed, together with any prior interim payments, does not exceed the sum I would expect to be paid if my involvement in the case was now complete and I submitted a final legal aid claim.
- C. I confirm to the best of my knowledge that the case has not concluded.
- D. I acknowledge that the involvement of more than one counsel in the case may in certain circumstances affect the level of fee payable to me and require adjustment before or at the final account stage.
- E. I undertake that I will provide SLAB with such information as from time to time they may reasonably require in relation to the administration (including checking and review) of interim claims and in due course I will either (a) lodge a final claim or (b) advise SLAB that I do not wish to make any further claim beyond any earlier interim claim(s) in the case in accordance with whichever of the following applies:
- (i) Upon conclusion of the case, within the prescribed time period for doing so;
 - (ii) Upon conclusion of my involvement in the case, where arrangements exist for the assessment of a final claim prior to the conclusion of the proceedings, and the proceedings have not concluded; or
 - (iii) Where neither (i) nor (ii) applies, or if they applied but the time for compliance has passed, if called upon to do so by SLAB.
- F. I understand that:
- (i) upon assessment of the final claim I lodge in due course any surplus in the aggregate total of interim claims over the sum finally determined as payable per the final account will constitute overpayment and will be repayable;
 - (ii) in cases where more than one counsel has been instructed such as where there has been a change of counsel acting, there may require to be apportionment or allocation of certain fees at the final account stage, and any adjustments may or will constitute overpayment which will be repayable;

- (iii) where in the absence of a final claim as a consequence of a failure to lodge one SLAB is not satisfied that it can or could make a final determination of an amount payable in the case greater or equal to the aggregate total of interim claims paid in the case, or to the extent that it cannot do so, all or part of the sums paid as interim claim may or will constitute overpayments and any such overpayment will be repayable; and
- (iv) where any sums are repayable, they may be recovered by SLAB by any of the steps available to it.