



Law Society
of Scotland

Consultation Response

Consultation on the Scottish Legal Aid Board Code of Practice in Relation to Criminal Legal Assistance

April 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Law Society welcomes the opportunity to consider and respond to the Scottish Legal Aid Board consultation on the Draft Code of Practice in Relation to Criminal Legal Assistance. This response has been prepared on behalf of the Law Society by members of our Criminal Legal Aid Committee.

The Law Society has the following comments to put forward for consideration.

Background

The Code of Practice for Criminal Legal Assistance was introduced in April 1998, was revised with the introduction of summary fixed payments in 1999 and has remained unchanged since¹. The Scottish Legal Aid Board ("SLAB") states in its consultation document that it is "*keen to get away from the idea that revisions to the Code are a once in a generation occurrence, and move towards a position where changes to professional practice can either be reflected in, or be brought about by, more frequent revision of the Code*"².

Notwithstanding the importance of consistency and standards of public service delivery and the importance to all justice stakeholders of delivering the regulatory objectives established by the Legal Services (Scotland) Act 2010 around access to justice, the rule of law and the public interest, the SLAB stance as set out in the Draft Code of Practice raises a number of questions including whether SLAB is best placed to reflect on changes to professional practice for criminal matters. There is significant concern that the Draft Code of Practice impacts and impinges upon many areas of professional practice which fall within the regulatory regime undertaken by the Law Society of Scotland.

¹ The statutory provisions permitting a Code of Practice were inserted by the Crime and Punishment Act 1997

² [SLAB consultation on changes to the Code of Practice in relation to Criminal Legal Assistance](#), 6 February 2017

Also, though charged with a statutory obligation to review and make changes to the Code of Practice, SLAB has not chosen to do so in almost twenty years. However keen SLAB is to get away from the idea that revisions to the Code are a once in a generation occurrence, the Law Society, practitioners, courts, judiciary and other stakeholders are already dealing with changes to professional practice on a continuous basis.

Work on a revised Code of Practice has been progressing since at least November 2014³, independent of any Law Society consultation or involvement, the draft Code of Practice was published on 6 February 2017 and the consultation on the draft Code of Practice closes on 18 April 2017⁴. Following this consultation, the Minister for Community Safety and Legal Affairs can approve the Code of Practice, with or without modification. No regulations are required. SLAB has stated the intention that this Code of Practice is introduced in time for the implementation of Part 1 of the Criminal Justice (Scotland) Act 2016, which is anticipated on 20 July 2017.

Consultations should be informative and provide respondents with enough information to ensure that those consulted understand the issues and can give informed responses, particularly, as is the case here, where proposals could have an impact on the solicitor/client relationship, access to justice, solicitor business and employment, or which give rise to equality considerations. In particular SLAB has not set out how it would exercise its statutory powers, nor has it articulated the process to be adopted in incidents of alleged non-compliance, nor is there any reference to the statutory process. Section 25D of the 1986 Act, for instance, empowers SLAB to deregister a solicitor or firm in the event of current non-compliance or previous breach "in a material regard". The Draft Code makes no reference to this statutory framework and provides no information on what may constitute material regard.

In addition, the Society's Criminal Legal Aid Committee is currently in discussion with the Scottish Government and SLAB in respect of the legal aid fee for Part I of the Criminal Justice (Scotland) Act 2016 which introduces a number of changes to the provision of police station advice. At the date of submission there is no agreement on the legal aid fee.

On the 14 March 2017 in light of the ongoing discussions in respect of the fee of Part I of 2016 Act, the Committee wrote to the Board to ask that they 1) extend the deadline for all respondents to the consultation and 2) delay the implementation of the revised Code of Practice pending conclusion of the discussions on the fee. On the 21st March 2017, the Committee wrote to Minister for Community Safety and Legal Affairs to raise this issue⁵.

The Law Society strongly believes such a suspension and delay of implementation of the Code would allow the profession the opportunity to have a meaningful and informed discussion about the proposed legal aid fees for Part I of the 2016 Act. This is important to preserve the integrity of the criminal legal aid system. In

³ [Minute of meeting of the Scottish Legal Aid Board](#), Monday 3 November 2014

⁴ The consultation process for the Code of Practice is contained at s25A of the Legal Aid (Scotland) Act 1986

⁵ [Letter from Ian Moir, Convener of the Law Society of Scotland Criminal Legal Aid Committee to the Minister for Community, Safety and Legal Affairs dated 21st March 2017](#)

the absence of a decision about the proposed fees, it will be difficult to provide a full and informed response to certain significant elements of the SLAB consultation.

Finally, SLAB ought to publish any Impact Assessments, in particular Equality Impact Assessments undertaken of the revised Draft Code, particularly given the potential employment law implications, and equality issues.

Whilst the Law Society notes that the Scottish Legal Aid Board has a statutory power to prepare and consult on a draft Code of Practice, and the Minister has a statutory power to modify, approve and specify the date that the draft Code comes into force, following consideration of the Draft Code of Practice, the Law Society has significant concerns and cannot recommend that members accept the Code as currently drafted. The Law Society would welcome the opportunity to engage with the Scottish Legal Aid Board to explore the creation of a Code once the fee structure for commencement of Part I of the Criminal Justice (Scotland) Act 2016 has been determined.

Specific Questions

The Society wishes to respond to the following specific questions as follows: -

Part A – Introduction, Principles and Definitions

1. Do you agree with the structure of the new Code?

Introduction and Context

Despite the statement in the Consultation document that “[t]here are no major changes in terms of day to day requirements for solicitors undertaking the work”⁶, the Law Society is of the view that the changes proposed in the Draft Code are major, and fundamentally alter the way in which solicitors provide criminal legal assistance and interact with SLAB. What was once a short concise document is now lengthy, contradictory and over burdensome, and in some instances could be viewed as a means of transferring the statutory duties that sit with the SLAB onto the solicitor. This, in turn, could have a detrimental impact upon the client in the conduct of their defence in a criminal case.

The Law Society has had sight of the response submitted by the Society of Solicitors in the Supreme Courts of Scotland (SSC). In particular, we agree with the SSC’s point that “*the Board has produced no*

⁶ [SLAB consultation on changes to the Code of Practice in relation to Criminal Legal Assistance](#), 6 February 2017 at paragraphs 14-16.

evidence that there are actual defects or deficiencies in the present operation of the Code, or that its requirements are regularly flouted".

The Draft Code does not appear to take account of the fact that there has been no increase in legal aid fees since the introduction of the original Code of Practice, and in fact there have been various cuts in fees as noted on the Society's Briefing paper titled "Legal Aid In Scotland" from June 2016⁷.

Status of the Code of Practice

SLAB states in the consultation document that "*solicitors who wish to deliver publicly funded legal services in criminal cases require to be registered, and registration is conditional upon compliance with the Code of Practice*".

The statutory authority for the Code of Practice is limited to solicitors (including those holding higher rights of audience) and firms. There is no equivalent Code of Practice for advocates or, for instance, expert witnesses. Even within these statutory limitations, there is a significant issue around competition and client choice between solicitor advocates and advocates. There is a requirement at section 4.3 of the draft Code of Practice for the firm to maintain a quality assurance policy. One of the suggested indicators of compliance is that the policy "*incorporates a statement of the firm's scope of work. It includes a description of the types of case, if any, the firm will not undertake whether for reason of capacity, resources, competence, availability or otherwise. A firm only accepts instructions for cases within its stated scope of work.*" There are no similar provisions for advocates or their stables, where instruction is accepted on the basis of reasonable professional judgement around competence, availability and the overall framework of regulatory obligations. For example section 1.5 raises a conflict between the fact that a solicitor exercising rights of audience in the higher courts will be subject to more extensive regulation than an advocate appearing in the same case would not be subject to i.e. time recording.

The ultimate sanction for failure to comply with the Code of Practice is deregistration from publically funded criminal legal assistance, as provided at section 25D of the Legal Aid (Scotland) Act 1986. The duty on SLAB is to "*investigate the matter in such manner as it thinks fit, and shall give the firm or solicitor concerned an opportunity to make representations*". Following investigation, if SLAB considers the firm or the registered solicitor currently non-compliant with the Code of Practice, it can deregister either or both. Even if the firm or solicitor is currently compliant, should SLAB be satisfied that either "*has not complied with the code in a material regard*", this can result in deregistration. The draft Code of Practice, designed to illustrate the exercise of statutory powers, makes no reference whatsoever to these powers, provides no description of what a "*material regard*" breach constitutes, no offer of the "*opportunity to make*

⁷ [Briefing from the Law Society of Scotland, "Legal Assistance in Scotland" dated June 2016, at Appendix - Fee Cuts to Criminal Legal Assistance Fees from 2011 to date](#)

representations”, no mention of referral to the Court of Session and no certainty to practitioners providing a 24/7/365 service to clients.

The Code of Practice places a number of unreasonably open-ended requirements on practitioners, such as *“duty solicitors must comply with any special arrangements made by SLAB to facilitate the operation of the duty schemes, the courts and police station advice”* (section 7.1.12 of the draft Code of Practice). No definition of what *“special”* might involve or whether failure to comply might constitute *“material regard”* is offered for work that is often already carried out at short notice, at anti-social hours, in an adversarial environment, at a distance from the solicitor’s workplace or home. We want to maintain and improve standards of criminal defence to some of the most vulnerable people in society. However, because of the open-ended requirements and the severity of the sanction, we believe that the potential for deregistration engages human rights around restrictions to practice. The draft Code of Practice is silent around these issues, and as such, we believe it requires further consideration. Further, we believe that a consultation on a Code of Practice that outlines obligations without any reference to the sanctions required by statute is a deficient consultation.

Further at Section 1.6 the draft code sets out a number of Principles underlying the Code of Practice, in particular the Draft Code states: *“Solicitors delivering criminal legal assistance must display high standards of professionalism and act independently, honestly, ethically and with integrity both directly in relation to the delivery of criminal legal assistance and otherwise.”* The phrase *“and otherwise”* is ambiguous and requires some clarification (and may even raise issues around vires). If high standards were not maintained, for instance, in privately funded criminal work or indeed in other areas of practice, would this have any relevance to the Code of Practice?

As part of the overall regulatory framework for publicly funded criminal legal assistance, and independent of any SLAB intervention, the provisions of the Code of Practice could also be considered in any complaint to the Scottish Legal Complaints Commission on conduct or service grounds. We believe that certain sections of the draft Code contravene the Law Society’s guidance, and indeed common regulatory practice across adversarial jurisdictions, for instance at section 7.8 around representation of co-accused. It is appropriate for SLAB to determine reasonable and proportionate standards by which publicly funded legal assistance should be provided. We do not consider that this should cut across established safeguards for criminal defence designed to prevent miscarriage of justice.

Principles

The principles that SLAB establishes in its draft Code of Practice are, largely, commendable. However there are four issues around these principles that merit further consideration: first, around the overall powers of SLAB under this Code of Practice; second, around respect for the reasonable exercise of professional judgment by practitioners; third, around mutuality of obligations under the Code of Practice; and fourth, around the high degree of overlap between the Code of Practice and the wider regulatory framework for solicitors.

1. The overall powers of SLAB under this Code of Practice

Though this will not cure the defective drafting of a number of the provisions of the Code, such as the open-ended obligation for duty solicitors to “*comply with any special arrangements*” or for solicitors to “*engage with SLAB in the exercise of any of its functions or otherwise*” (section 4.8), we believe that SLAB should state that any Code of Practice provisions, or determinations around compliance of these, will be exercised within the *vires* of the Legal Aid (Scotland) Act 1986 and within the bounds of sound public decision-making: legal, fair, rational and in particular and in light of some very open-ended obligations, proportionality in SLAB’s approach to managing regulatory risk. This should be uncontentious; doing no more than restating the public law obligations that SLAB is already required to meet.

For example, the principle of proportionality should be reflected in the opening paragraphs under Section 1 “Introduction, Principles and Definitions”. It ought to be recognised that the obligations established are reasonably required to meet the desired objectives.

As a further example, reference to the public law obligations would clarify the requirement that solicitors “*display high standards of professionalism and act independently, honestly, ethically and with integrity both directly in relation to the delivery of criminal legal assistance and otherwise*”. It plainly falls outside the statutory authority of the Code of Practice to determine standards out with publically funded cases. The standards required by the Law Society, however, do require such standards, irrespective of the funding of the case – or even if pro bono – a point which will be considered below.

Firms, solicitors and their staff are required to meet the terms of the Code of Practice (section 1.4) and there is a question around whether delivery of the required objectives requires some consideration of the extra-regulatory factors that might apply, for instance, to advocates or to experts.

The current Draft Code raises a question of transparency. As noted above, it is unclear what would happen in the event of non-compliance. The Code is not clear whether non-compliance would trigger formal deregistration processes or some other outcome. Section 25D of the 1986 Act, for instance, empowers SLAB to deregister a solicitor or firm in the event of current non-compliance or previous breach “*in a material regard*”. The Draft Code makes no reference to this statutory framework and no information on what may constitute material regard.

The process described at Section 2.2.4 could, in certain circumstance be challenging. For example, there may be situations in which a firm restructures into a single partner entity. A refused change of nominated compliance manager would likely result in deregistration by default. As such, simply providing reasons without the opportunity for hearing or review may not be sufficient for human rights purposes. Also, for these single partner entities, rejecting a nominated compliance partner might be perceived as a means of circumventing the more formal process of deregistration.

2. Respect for the reasonable exercise of professional judgment by practitioners

The Code of Practice should include a statement respecting the exercise of reasonable professional judgment, within the parameters of the Legal Aid (Scotland) Act 1986. We do not believe that a number of the provisions currently do so. There are, for instance, requirements for firms to specify their scope of work, to refuse instruction in cases outside that scope of work and to have referral arrangements in place for work outside scope (at section 4.3.3 complex fraud cases in the sheriff court and sheriff court cases which involve child witnesses are suggested as examples). It may not be clear at the police station what charge, if any, may be made. A VIPER parade may be arranged. A plea of guilty may be tendered. Evidence may be agreed with the prosecution before trial. There are a large range of different case outcomes to which solicitors turn their professional judgment to, and the mechanistic and overly prescriptive approach suggested by SLAB fails to respect that judgment. Again, these standards of professional judgment are already regulated. As the Society of Solicitors in the Supreme Courts of Scotland (SSC) noted, *“the imperative “must” appears no fewer than 116 occasions. Non-compliance with an imperative may expressly have severe consequences for a practitioner and it therefore seems essential that those matters where compliance is mandatory should not impact upon the professional decision-making of the solicitor”*.

3. Mutuality of obligations under the Code of Practice

The Code of Practice is unilateral in its obligations. There are requirements for solicitors to respond *“timeously and fully to all correspondence and communications with SLAB”* (section 2.2.1) or to *“demonstrate that their solicitors and other staff are competent and in the effective use of information and communications technology”* in order to interact with SLAB, Crown Office, Scottish Courts and Tribunals Service and others (section 3.11). Such obligations are dependent, for instance, on similarly timeous and comprehensive communications from SLAB, or on other justice agencies delivering reasonably accessible systems with which to interact through technology.

Solicitors are placed under an obligation of *“engaging with SLAB in the exercise of any of its functions”*⁸. This is a very broad requirement and some qualification around reasonableness will be required. The Code ought to recognise that obligations should only be imposed in so far as justifiable, reasonable and practicable in an adversarial system. Further there is no recognition of reciprocity in SLAB’s engagement with practitioners and firms.

⁸ At the third bullet point under section 1.6 of the Draft Code of Practice.

4. The high degree of overlap between the Code of Practice and the wider regulatory framework for solicitors

We have a significant concern around the overlap between the draft Code of Practice and the pre-existing and well understood regulatory framework under which solicitors operate. The Law Society's Rules and Guidance⁹ are applicable, as well as the Code of Conduct for Criminal Work¹⁰. It is questioned whether SLAB should seek to reiterate or reproduce these in a Code of Practice: repetition risks misinterpretation. For instance, returning to the example in the draft Code of Practice where it is stated that solicitors must "*display high standards of professionalism and act independently, honestly, ethically and with integrity both directly in relation to the delivery of criminal legal assistance and otherwise,*" these standards are already maintained within the Law Society's rules applicable to all solicitors, covering both publicly funded and privately paid criminal defence work and indeed all services provided by solicitors. There is also extensive guidance around the standards of service and conduct required by solicitors. Indeed, for a Code of Practice that overlaps so extensively across the standards required by solicitors, it is unusual that there are only four minor mentions of the standards required from their professional body: first, a reference to CPD in the format required by the Law Society (section 3.8); second, the retention of paper files for Law Society inspection (section 5.2.7); third, around the required format for transfer of files (section 7.3.1); and fourth, around presentation of Law Society issued identification for clients in custody (section 7.4.2).

Professional standards are not the only area of overlap. SLAB looks, for instance, to reiterate the obligations for solicitors and firms under the Equality Act 2010 (section 4.5).

We firmly believe that a more proportionate, helpful, consistent, clear and comprehensible approach to the Code of Practice would be for SLAB to articulate what it reasonably and proportionately requires over and above the existing regulatory framework for legal services. This will also help to future-proof the Code of Practice, in the event that it remains unchanged for a further generation.

As a general comment, when considered as a whole there are contradictions within the obligations and statements made in the revised Draft Code and parts do not sit easily with one another. These will be addressed specifically below. In respect of Definitions, on occasion the terminology used throughout the document is inconsistent. For example, the term "*Compliance Partner*" is used at the sub-heading at section 2 and the "Compliance manager" is used elsewhere in the document.

2. Do you find it helpful for the new Code to set out indicators of compliance?

[These indicators are in the Code at – 4.3.3, 4.5, 4.7, 4.8, 4.9, 5.2.8, 6.2, 6.4.5, 7.1.10, 7.4.2, 7.6.3 and 7.8]

The Draft Code states "*The status of the indicators is that they illustrate how solicitors and firms can comply, and demonstrate ongoing compliance, with the Code. Solicitors and firms are free to choose other*

⁹ [Rules and Guidance of the Law Society of Scotland](#)

¹⁰ [Section F Division A - Code of Conduct for Criminal Work](#)

approaches if otherwise in compliance with the Code. A solicitor or firm departing from the indicators may however face difficulty establishing compliance with the Code in the event of an issue arising in relation to suspected or apparent non-compliance. Separately, a failure to follow the indicators which, had they been followed, would have achieved Code compliance, may be referred to in any procedures relating to registration or exclusion. It is for these various reasons that adherence to the indicators is strongly recommended.” (Section 1.5 at page 5).

As stated at question 1 above, the current Draft Code raises a question of transparency. It is unclear what would happen in the event of non-compliance, and the failure to meet the criteria set out in the Indicators of Compliance. The Code is not clear whether non-compliance would trigger formal deregistration processes or some other outcome. Section 25D of the 1986 Act, for instance, empowers SLAB to deregister a solicitor or firm in the event of current non-compliance or previous breach “*in a material regard*”. The Draft Code makes no reference to this statutory framework and no information on what may constitute material regard

A number of the Indicators of Compliance make additional requirements of solicitors, many of which are unfunded. In addition, from a usability perspective there are a number of inconsistencies within the Indicators of Compliance that create confusion. For example, Section 6.2 at the Indicator of Compliance paragraphs (c) and (e) are contradictory, paragraph (c) states that “*applications must be submitted in accordance with the time limits specified in the regulations*” whilst paragraph (e) states the solicitor should “*ensure that applications are submitted in good time*”. Section 6.2 at the Indicator of Compliance paragraph (f) does not recognise the reciprocity between the solicitor/firm and SLAB. It raises a question as to why there is a duty upon a solicitor to monitor refusal by SLAB relating to applications for Legal Assistance. This is a task that is not being paid. We question whether this information is available from Legal Aid online system. It would be helpful if SLAB would provide contact details of a solicitor at the board who can be spoken to about the repeated refusals of sanction especially when refusal of sanction may cause the solicitor professional difficulties in the conduct of an individual’s criminal defence (Section 6.2 (h)).

The Indicator of Compliance at Section 5.2.8(c) is contradictory as it seems to be at odds with how Board pay for travel generally, which is from the place of work rather than home address of the solicitor. There appears to be some conflict within the Draft Code and actual rates paid. In terms of the Indicator of compliance at Section 5.2.8(h), SLAB has repeatedly made representations that perusals should not be done of number of sheets, yet the Draft Code suggests that perusals are chargeable on basis of number of sheets of pages. Some of the current rates are payable on a time perused basis.

Part B – The Providers of Criminal Legal Assistance

3. (a) Do you agree that solicitors providing criminal legal assistance should be expected to conduct a minimum number of cases in any one practising certificate year?

How should a case be defined? For example, should this be a grant of criminal legal aid or ABWOR as a nominated solicitor?

As previously stated, prior to publication of the consultation on the revised Draft Code of Practice, SLAB did not engage with the Law Society staff or Society's Committees in respect of the proposed changes, and in particular there was no engagement in relation to the changes in respect of the or the minimum CPD requirement or the minimum number of criminal cases conducted in a year. Section 3 of the revised Draft Code of Practice imposes a substantial change in requirements for solicitors providing criminal legal assistance. SLAB has not provided any evidence or rationale to support these changes other than a general statement in the consultation document that "*there is a real risk that solicitors may be ill-equipped to deal with whichever of the range of client or case situations that could be presented in the event they are called upon to represent a criminal client*"¹¹. In absence of this information it is incredibly difficult to provide specific answers to all of the questions posed.

By way of background, the Law Society's Continuing Professional Development (CPD) requirements for all solicitors can be accessed via the website¹². Solicitors and Registered European Lawyers (REL) are required to undertake a minimum of 20 hours CPD in each practice year. Of those minimum 20 hours, a minimum of 15 must be verifiable CPD. Up to 5 hours may be by private study.

Section 3.2 of the Draft Code states: "*A solicitor's practice must reflect an up to date knowledge and understanding of the law, procedures and relevant legal aid legislation, regulations, guidance and guidelines, including taxation guidelines, the Code, legal aid online terms and conditions of use and the firm's own system of management and administration.*" This is a wide in scope and requires a huge amount of information to certify up-to-date knowledge and understanding of those matters listed. As a result of section 3.2 being unqualified, the entirety of section 3.2 contradicts the last sentence of section 3.3 as currently drafted.

Section 3.4 seems to "regulate" solicitors before the Code applies. We suggest that a solicitor must have complied with the Society's requirements. The Code is silent around practitioners who have been on a break from practice, for example solicitors on maternity leave or parental leave and as no Impact Assessment has been published, it is unclear whether SLAB considered these issues. Section 3.4 requires that solicitors complete 15 hours of relevant CPD in the practising year prior to joining the register of criminal legal assistance. This is a threefold increase from the requirements of the current Code. Further the requirement at Section 3.5 to complete 15 hours of CPD in 6 months appears excessive, especially when compared to the current Law Society requirement of 20 hours in a practising year, of which 5 hours can be self-study.

We note that for those practitioners included on the register of criminal legal assistance, the revised Draft Code proposes an increase in the minimum number of CPD hours from 5 every two years to 5 every year (section 3.6).

¹¹ [SLAB consultation on changes to the Code of Practice in relation to Criminal Legal Assistance](#), 6 February 2017 at paragraph 21.

¹² [the Law Society of Scotland CPD Requirements and Guidance](#)

Section 3.7 the Draft Code introduces a new requirement for solicitors once registered to conduct 12 cases in any practicing certificate year. It would be useful for the Society to understand the Board's evidential basis and rationale in support of this proposed change. For example, what are the skills and competencies are to be demonstrated in these cases? If SLAB has evidence or concerns about where solicitors may be failing in this area e.g. following peer review or audit or in respect of court advocacy, then this ought to be shared with the Law Society.

As noted by the Society of Solicitors in the Supreme Court in Scotland, there is no definition of what "conducts" means. In order to provide a full response, it would be helpful to understand if SLAB views all cases as equally useful to professional development. A solicitor appearing in 12 cases and pleading not guilty at a pleading diet would appear to comply with this obligation, whereas conduct of 11 serious trials would not. Assuming SLAB does view all cases as equally useful to professional development it seems odd that a solicitor who did one case in a year would have to undertake as many alternative CPD hours as someone who did eleven cases in a year.

The minimum case requirement lacks flexibility and does not recognise that some practitioners may be involved one very lengthy complex case, or a lengthy, serious High Court cases which have the effect of reducing the number of appearances in court. For example, what if a solicitor is involved in one year long fraud case or a practitioner is involved in the preparation of a lengthy and complex High Court case which has the effect of taking the individual out of appearing in court?

Not all criminal legal assistance solicitors provide criminal legal advice on a full time basis. A minimum case threshold coupled with an onerous minimum CPD requirement could be overly burdensome, and fail to recognise a mixed practice, therefore having a disproportionate impact on those practitioners, for example, in rural areas. We would be interested in any analysis SLAB has carried out in respect of the impact of the proposed new requirements in rural areas, as this in turn could impact upon an individual's ability to access a solicitor who is registered to carry out criminal legal assistance. We note that a similar Code of Practice exists for Children's Hearings; if similar requirements were made of practitioners as regards Children's Hearing obligations then the amount of CPD hours undertaken would be excessive. There ought to be a balance between the proportionate number of hours and the professional experience gained. The requirements in the Draft Code do not appear to recognise the transferable skills that solicitors may gain in other areas of practice, for example civil litigation or client interviews.

As a whole, section 3 is silent on the implications for a solicitor who is ill and has been absent from work, or of solicitors on maternity, paternity or adoption leave. SLAB ought to publish any Equality Impact Assessment (EQIA) in relation to these specific proposed changes to the Draft Code of Practice.

Section 3 makes reference to a "*relevant course*" which is undefined. This gives rise to a decision about what is considered a "*relevant course*". For example, would coaching and mentoring count? Would distance study? Would tutoring on criminal law in the Diploma? Would sitting in as part of Higher Rights training count? Would presenting on relevant courses count (and if so, would preparation time count)? Do solicitors get to decide what is relevant? If a dispute between the solicitor and SLAB arises about what constitutes a "*relevant course*", there is a further question around how this would be addressed and

resolved. The Code is silent as to process and remedy. Is there going to be a list of authorised providers? Who is doing the authorising?

Section 3.8 states that “A solicitor must keep a record of relevant courses attended by him. A solicitor can meet this requirement by highlighting the relevant courses on the record of their Continuing Professional Development required by the Law Society of Scotland.” This then raises a question about how this will be monitored and who will monitor. For example, is SLAB intending to do a CPD audit/annual sample each year? There would be significant costs and resource implications for the Law Society if there were an expectation that the Law Society would carry out monitoring.

Finally, we note the comments of the Society of Solicitors in the Supreme Courts of Scotland (SSC) in relation to the minimum case requirements and mandatory CPD alternative, in particular their point around *vires* of the new proposals.

The Law Society would welcome the opportunity of further discussion with SLAB around the proposed changes to the minimum case and CPD requirements for solicitors providing criminal legal assistance.

4. (a) Where solicitors do not conduct the minimum requirement, do you consider that additional CPD is a sufficient substitute?

Please see our answer to Question 3 (a) above.

(b) If yes, what amount of CPD directly relevant to the provision of criminal legal assistance would be required?

What form should this CPD take? For example, should this be organised courses rather than self-study?

Please see our answer to Question 3 (a) above.

(c) If you answered no to 4(a), please suggest how SLAB should ensure that solicitors are equipped to represent clients:

We refer to our answer at Questions 1 and 3(a) above. As noted we have concerns about the many provisions in the Draft Code which when read as a whole does not recognise the existing regulatory framework and professional obligations incumbent upon solicitors, and professional discretion afforded to the solicitor to undertake and conduct their work.

5. Do you think that there are any other ways which a solicitor could show an appropriate level of competence in conducting criminal cases, if she/he has not had a substantial involvement in the preparation and/or met the minimum requirements?

If yes, please suggest other ways competence could be demonstrated:

Please see our answer to Question 3 (a) above.

Part C – The Provision of Criminal Legal Assistance

6. Do you agree that the Code should include specific requirements (paragraphs 7.1.1 to 7.12) relating to Court and Police Station duty work?

No, we do not consider that the Code of Practice is an appropriate place for these requirements to be included.

As previously stated, returning to the example in the draft Code of Practice where it is stated that solicitors must “*display high standards of professionalism and act independently, honestly, ethically and with integrity both directly in relation to the delivery of criminal legal assistance and otherwise,*” these standards are already maintained within the Law Society’s rules applicable to all solicitors, covering both publically funded and privately paid criminal defence work and indeed all services provided by solicitors. There is also extensive guidance around the standards of service and conduct required by solicitors.

In addition, the Society has produced in the past an advice and information paper on Police Station Interviews for solicitors, and is currently reviewing this paper to determine whether any updates are required in light of the changes introduced by Part I of the 2016 Act¹³.

7. Do you consider that the specific requirements for duty solicitors are appropriate?

The court and police duty schemes are included within the draft Code of Practice. We do not consider that this is an appropriate place for these requirements to be included. A number of solicitors and firms do not participate in these schemes.

The 2016 Act will extend the right of access to legal advice for suspects held at a police station:

- This will include persons held at a police station, whether interviewed or not.
- This will include attendance at the police interview, whereas the Criminal Procedure (Legal Aid, Detention and Appeals) Act 2010 permitted a “private consultation” with a solicitor; solicitor attendance at an interview was common practice though not explicit in the previous legislation.

¹³ [Police Station Interviews - Advice and Information from the Law Society of Scotland](#)

- This will include mandatory personal attendance for children up to 16, young people between 16 and 18 subject to a supervision order (including interim) and vulnerable adults (section 33 of the 2016 Act).

The extension will increase the number of requests for advice made to the SLAB Solicitor Contact Line and in cases involving a named or duty solicitor, to the wider profession. The Financial Memorandum to the legislation forecast the additional number of requests:

Scenario	Total people seeking legal advice
53.6% take-up for interviews; 20% take-up for non-interviews	22,224+32,672=54,896
53.6% take-up for interviews; 35% take-up for non-interviews	22,224+57,176=79,400
53.6% take-up for interviews; 53.6% take-up for non-interviews	22,224+87,561=109,785

On the basis of these scenarios, the increase in numbers of requests for advice would be 2.5 times more, 3.5 times more or 5 times more respectively, with the Scottish Government believing the middle estimate most likely.

The level of remuneration available for this work also highlights the challenge of delivering adequate service within the fee structure available. Expenditure on police station advice by private practitioners in 2014-15 was around £425,000. This constituted around 0.5% of the overall expenditure on criminal legal assistance, which was around £85.0m. As previously stated, the Society's Criminal Legal Aid Committee is currently in discussion with the Scottish Government and SLAB in respect of the legal aid fee for the provision of Police Station Advice. At the date of submission there is no agreement on the legal aid fee. We note that Part 1 of the Act commences in approximately 3 months. We note that 2016 Act was introduced as a Bill in the Scottish Parliament on 21st June 2013. The Bill received Royal Assent on 21st January 2016. Part I is expected to commence on 20th July 2017. The fee proposal was provided to the Law Society on 6th March 2017.

By electing to provide criminal legal assistance, the Draft Code states that solicitors accept that remuneration will be in accordance with prevailing fee structures and rates provided in the relevant regulations (Section 4). Therefore the Draft Code must be viewed in light of the legal aid fee (for example the requirements of Section 7.2.1 and 7.1.20) and this is why we have repeatedly requested that implementation of the Draft Code be delayed pending outcome of the ongoing legal aid fee discussions.

We have the following specific comments to make in respect of Section 7 of the Draft Code of Practice: -

As a general comment section 7 makes a number of requirements of solicitors to undertake work where no legal aid fee is proposed, for example Section 7.1.5 requires a written a written plan for alternative arrangements and there is no justification provided why this is required. Section 7.1.6 is an example of SLAB seeking to transfer their statutory duty to the solicitor without a fee payable to the solicitor. The Society is opposed to both requirements as being overly onerous and there being no proposed legal aid fee payable for carrying out the work. Section 7.1.11 seems to contradict the requirements made of solicitors at section 7.1.5 and 7.1.6. Paragraph 7.1.7 does not take account of the Solicitor Contact Line in the process.

It has always been the position that SLAB would consult with the local bar associations: if this arrangement is not changing then, this engagement should be reflected at Section 7.1.1.

The Draft Code requires the duty solicitor to comply with “*special arrangements made by SLAB*” (section 7.1.12). This is undefined and there is no qualification, it ought to be reasonable and within the anticipation of the person who is going to be asked to travel, for example.

Section 7.1.13 seeks to impose a new requirement for a duty solicitor to maintain an additional record of work with no corresponding provision in the proposal for the Part I fee to cover this duty.

In respect of Police Station Advice attendances, in absence of an agreed fee, we submit that it is inappropriate for the Board to impose a condition (Section 7.1.14). Further, and in any event, any obligation ought to be subject to reasonableness requirements. In addition, we understand that on occasion, solicitors from the PDSO have been unable to attend and that private practitioners have been asked to cover these cases.

Section 7.1.3 states, “*Non-compliance with this section of the Code relating to duty criminal legal assistance may lead to exclusion of a solicitor from duty criminal legal assistance arrangements, or preclude future inclusion. This may or may not also affect a solicitor’s on-going inclusion on the criminal legal assistance register depending on the circumstances.*” It would be helpful to clarify in what circumstances removal from duty would be the sanction for non-compliance and in which circumstances it would be removal from the register. For example, when read with section 7.2.3, it could be implied that a solicitor could be in breach of the Draft Code if they failed to answer their telephone whilst on police duty.

Taken as a whole the provisions under section 7.1 require solicitors to be available 24/7 (for example see Section 7.1.10 and Section 7.1.18), for rates that are paid on a case by case basis, for proposed rates that are wholly inadequate. There are a number of significant challenges around compliance with this section of the draft Code of Practice including, in particular, the one hour time limit within which the solicitor must attend at a police station (Section 7.1.17). This already presents challenges in more rural parts of Scotland and we also understand, with the budget challenges for Police Scotland seeing reduction in the police estate’s custody capacity that some suspects will be brought to a custody suite far from their usual location, which would present huge challenges for nominated solicitors. There is a concern that this could impact negatively on individuals requesting and accessing the advice of a solicitor at the police station, particularly in rural areas.

The Draft Code states that if solicitors on the police duty scheme “*make excessive use*” of the fallback provisions to make alternative arrangements to cover police duty work can be held in breach of the Code (Section 7.1.9): “*excessive use*” is undefined and it is unclear how SLAB may interpret this provision. If such a sanction is to be included then practitioners must be given notice. This may again raise issues around rural provision, where practitioners could be on duty for a significant proportion of the year.

The requirements for duty solicitors to report on their involvement in cases referred by the Solicitor Contact Line must be subject to a reasonableness requirement around SLAB’s ability to request and specify reporting (section 7.1.16). Currently the Draft Code requires solicitors to provide excessive coverage, the Society are aware of that certain practitioners are concerned about quality of life, the impact on part time employees, solicitors with family and caring responsibilities, and compliance with the Working Time Regulations. Whilst the current volumes of requests for advice at police stations may not engage the provisions of the Working Time Regulations, the volumes anticipated by the Government along with the onerous provisions within the Draft Code of Practice could engage the provisions of the Working Time Regulations and Minimum Wage Regulations. From a professional practice perspective, a number of our members have expressed concern about compliance with the terms of the Draft Code and being able to appear in court the following day (See Section 7.1.18).

The Letter of Rights is provided by the police¹⁴ (Section 7.1.19). Section 5 of the Criminal Justice (Scotland) Act 2016 creates a duty to provide the information contained within the Letter of Rights upon the police. An obligation for solicitors to check that a client has received the Letter of Rights is a requirement which is overly bureaucratic. In respect of both Section 7.1.19 and 7.1.20, it would be helpful to understand the perceived issue that the Draft Code is seeking to address, along with any evidence in support of why these provisions are sought. The provisions should be subject to a reasonableness requirement, for example recognizing that the police, on occasion, fail to provide timely information to the solicitor.

Section 7.2.2 is an example of the Board moving their statutory duties to solicitor and seeks to establish a mandatory requirement for a solicitor to attend where an individual is arrested on a warrant where legal aid is already in place. In terms of the current fee proposal, the attendance would be without specific additional remuneration.

Section 7.3.2 presents a challenge where the outgoing solicitor is not known by the incoming solicitor, further there is a concern with such a prescriptive timescale for transfer of the file which ought to be subject to a reasonableness requirement.

The first sentence within Section 7.3.3 does not make sense when read with the remainder of the paragraph and it is not clear in which circumstances this could arise. The paragraph suggests there is no transfer of agency and then goes on to describe the obligation arising under a transfer of agency: “*A client*

¹⁴ [Letter of Rights](#) and see EU Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings and The Right to Information (Suspects and Accused Persons) (Scotland) Regulations 2014.

may, after instructing a solicitor under criminal legal assistance in relation to certain work, choose to instruct another solicitor in relation to other work in the same case in circumstances which do not involve transfer of criminal legal assistance. The circumstances may require urgent delivery of papers to enable to incoming solicitor properly to conduct the case, and a prior solicitor receiving notification of a mandate to deliver papers in such circumstances must do so urgently.”

In terms of the provisions around meeting with clients (Section 7.4.1), secure video conferencing has an implied cost.

It is the decision of the client as to the witnesses called in his defence, if a solicitor fails to call a witness as per instruction he opens himself up to a potential disciplinary offence and Anderson appeal¹⁵ (Section 7.5.1). Section 7.5.2 ought to be clear that this is limited to defence witnesses, as it is not a matter for defence solicitors to keep Crown witnesses informed and up to date.

In respect of the provisions related to the instruction of expert witnesses (Section 7.6.1), we have repeatedly asked SLAB to engage in relation to the employment of expert witnesses and provide practitioners with a list of witnesses they are prepared to pay for in respect of certain fields of expertise. This would avoid repeated applications being made in cases and would save time for all involved. The instruction and agreement or otherwise of the evidence of an expert witness is a matter for the solicitor to determine in consultation with the client, it should not be an automatic requirement that evidence is agreed (Section 7.6.2).

The condition at Section 7.7.1 must fit with the requirements of the Act of Adjournal Rule 9A.3A(2)(c). We note that the Board is requiring that the solicitor write to the client, and query whether this would be deemed work actually necessary and reasonably undertaken.

Conflict of interest (Section 7.8 and the associated indicator of compliance) is a regulatory issue dealt with the Law Society Rule B2.1¹⁶ and the Code of Conduct for Criminal Work¹⁷.

In order to decide if matters are irrelevant the solicitor must first read the material. In this regard, the requirements of Section 4.1.2(m) conflict with requirement at Section 7.9 which appears to discourage perusal of material which is irrelevant. Section 7.9 suggests that in complex cases and costly cases a plan must be produced to manage cost, and to avoid the perusal of any material which is irrelevant. We note there has been no proposed fee for completion of what could be a lengthy and time consuming task undertaken by the solicitor. This could raise issues around the division of labour between instructing solcitors and solicitor advocates/advocates in this regards we note the position of the Faculty of

¹⁵ Anderson v HMA 1996 SCCR 114

¹⁶ [Rule B2.1: Conflict of Interest - Law Society of Scotland Rules](#)

¹⁷ [Section F Division A - Code of Conduct for Criminal Work](#)

Advocates¹⁸. Further failure to conduct the case appropriately and in line with the client instructions could lead to an Anderson appeal¹⁹.

Please suggest any other specific requirements which should be included here?

None.

General Matters

8. Do you consider that there are any matters not covered in this draft new Code of Practice which need to be included?

We reiterate our view that the draft Code requires further detail around the process to be adopted in the event of non-compliance.

9. Do you consider that there are matters included in this draft Code which should not be required?

Yes, please see our general comments contained at the response to question 10 below.

10. Do you have other views on the proposed Code of Practice that are not covered in the specific questions, please provide details:

We have the following further comments to make: -

A. Remuneration

The draft Code of Practice states, “a solicitor must prepare and conduct work to the standard of a reasonably competent solicitor by carrying out professionally, promptly and expeditiously all work that is actually, necessarily and reasonably undertaken with due regard to economy” (section 4.1.1). The effective

¹⁸ <http://www.advocates.org.uk/media/2354/final-faculty-response-23-march-2017.pdf>

¹⁹ Anderson v HMA 1996 SCCR 114

discharge of these obligations is contingent on adequate remuneration from public funds. The articulation of the Code of Practice requirements around remuneration is, however, problematic.

The Society is concerned with the requirements at Sections 4.2.3 to 4.2.7. It is a particular concern that SLAB feels it necessary to make specific provision around “*any components of work in relation to which there might otherwise be an apparent absence of specific fee provision*” (section 4.2.4). It would be helpful for SLAB to clarify which components of work under the current fee regime there appears to be an apparent absence of specific fee provision.

The Legal Aid (Scotland) Act 1986 predates the enactment of the Human Rights Act 1998 and establishment of the Scottish Parliament, which create a human rights framework in which public bodies and Scottish Ministers must act in accordance with Convention Rights. There have been cases in which the compatibility of the legal aid remuneration structure has been challenged on human rights grounds²⁰. These provisions could have the effect of preventing proper challenges within the court environment, of diluting the equality of arms in an adversarial system and curbing the independence of the bar to consider and raise appropriate challenges in their clients defence.

The obligations of the draft Code of Practice appear to preclude such challenges. As mentioned above, paragraph 4.2.4 states, “*By electing to provide criminal legal assistance, solicitors understand and accept that the fees payable overall in any given case, whether charged on a detailed basis or otherwise, include remuneration for any components of work in relation to which there might otherwise be an apparent absence of specific fee provision.*” Indeed, in the supplementary guidance issued by SLAB on 31 March 2017, it was stated that “*it is inappropriate... for a solicitor to seek to use the circumstances of any given case to challenge the fee payable, for example by way of a compatibility minute*”. Clarification on the grounds for considering this inappropriate would be helpful, including whether such challenges would be considered breaches of the draft Code which could lead to deregistration.

We take a different approach and believe that the draft Code of Practice should recognise and include a provision stating that nothing included in the requirements around remuneration limits the ability to challenge the compatibility of the fee structure with Convention Rights or the ability for the solicitor to seek determination through taxation. Indeed, we would suggest that as part of the principles overall, SLAB may wish to state that all provisions of the Code of Practice are intended to be in accordance with Convention Rights and will be disapplied if determined otherwise. This provision should be uncontentious, going no further than stating extant obligations.

As with elsewhere in the Code of Practice, we do not believe that it is helpful or appropriate for SLAB to establish obligations around withdrawal from acting that fall within the wider regulatory framework and the reasonable professional judgment of a solicitor (Section 4.2.6).

²⁰ For instance, *HMA v McCrossan* [2013] HCJAC 95

There are a number of matters within the Draft Code imposing requirements where there is no proposed legal aid fee, for example there are a number of references to recording of the use of text messages (would these be paid for at the letter rate?). Section 3.10 imposes a requirement that the firm must have appropriate equipment and resource available. This raises an important issue of financing this equipment, particularly as there has not been a legal aid fee increase since 1993, and in fact some fees have been cut²¹.

B. Competence – Standards of Conduct and Service

In addition to the requirements under section 3, the Code of Practice requires work to be conducted to “*the standard of a reasonably competent solicitor*”. As noted above, the Code of Practice further requires firms to indicate their scope of work, “*a description of the types of case, if any, the firm will not undertake whether for reason of capacity, resources, competence, availability or otherwise*” (Section 4.3.3). Some of the reasons for excluding work from scope do not seem to be particularly clear. It may be reasonable for a firm based in Inverness to state that it does not conduct extradition work. It is unclear from the terms of the Code of Practice whether, for instance, a firm based in Edinburgh would require to state that it would not undertake extradition work if its solicitor specializing in this area happened to be on holiday, working on other cases “*or otherwise*”.

The level of specify that SLAB may require around a statement of the scope of work may not be helpful to prospective or current clients of a firm (Section 4.3.3). It is also unclear what referral arrangements for areas outside the firm’s stated scope of work would be considered appropriate. SLAB may want to clarify, for instance, whether referral to the Law Society would be considered acceptable or whether specific referral to a firm that does, for instance, courts martial work would be required.

Section 3.9 requires all staff within the registered firm to know the act and regulations. This could have a wide application and extend to solicitors not on the register and support staff, who are not giving advice and are not authorised to give legal advice.

There are concerns that SLAB is making requirements of solicitors that cannot be fulfilled in the current working conditions ((Section 3.11) (e.g. limitations around the availability of court wifi)). There may be certain circumstances where it is appropriate for the solicitor to meet with the client when taking important information in the case.

In general the Law Society notes that the requirements within section 4 create more onerous obligations for solicitors (section 4.1.1 for example). More importantly many of the matters contained within Section

²¹ [Briefing from the Law Society of Scotland, "Legal Assistance in Scotland" dated June 2016, at Appendix - Fee Cuts to Criminal Legal Assistance Fees from 2011 to date.](#)

4.1.2 are matters for the discretion of the solicitor and not to be directed by the Board, we refer to the submission of the Society of Solicitors in the Supreme Courts of Scotland in this regard.

In respect of Section 4.1.2(e) we understand that the issue SLAB refers to here is section 196 of the Criminal Procedure (Scotland) Act 1995, which is duplicated at Section 4.1.2 (f). Reference should be at the first opportunity or the appropriate diet, and if only appropriate given the clients position as regards to the case. Again, in this regard we refer to the submission of the Society of Solicitors in the Supreme Courts of Scotland.

Many clients meetings are instigated by the solicitor e.g. the receipt of disclosure by the Crown. This is a matter which ought to be left to the discretion of the solicitor in consultation with the client, as to whether these meetings are carried out in person or via video link, as it is important that the relationship between the client and solicitor is not undermined (Section 4.1.2(i)). Breakdown in the relationship can result in further and further cost to the public cost by transfer to another solicitor.

We note that the legislation quoted at Section 4.1.2(l) places a duty on the court and police to ensure interpreters are available for the accused, and does not place a duty on the solicitor.

In respect of section 4.1.2(n) there is a question as to why this is necessary if there are clear handwritten notes on the file. There is no payment for this work within the fixed fee structure which has been cut over the years from £515 to £485 in Sheriff Court cases, and the equivalent cut has been imposed in Justice of the Peace cases.

The provision at Section 4.1.2(k) may require clarification, whilst the solicitor may be aware of the overriding principle of due regard to economy, and the Board will have to clarify what “*demonstrably justifiable*” means. SLAB ought to recognise that applying for sanction is a long and complex process due to the regulations that the Board impose upon the solicitor. The Society for some time has been raising with the Board a more structured way to sanction and appoint expert witnesses (Section 4.1.2(p)).

Finally, it might be that SLAB is not granting legal aid on the basis that legal aid does not cover certain types of case or areas of work. The courts have found that such scenarios might be incompatible with ECHR and gaps regulations have been filled to ensure that accused persons can get access to representation – e.g. *PF (Edinburgh) v Jamie Marshall* (2012) and *HMA v McCrossan and Wilson* (2013).

Section 4.4. seems to suggest that solicitors require a PVG. We note this is currently requirement for solicitors practising on the children duty plan, however if SLAB has proposal to expand this process this ought to be discussed with the Law Society.

SLAB looks, for instance, to reiterate the obligations for solicitors and firms under the Equality Act 2010 (section 4.5). It might be more helpful to specify the duties on service providers under the Equality Act 2010.

In respect of the data protection provisions at Section 4.6, it would be helpful to qualify with reference to the requirements of the Legal Aid (Scotland) Act 1986 which would take precedence. Further does the current Legal Aid Online system support end to end encryption?

With regards to the provisions around standard of professional service and formation of the solicitor/client relationship (Section 4.7), there are matters covered by the existing regulatory regime and it would be helpful to understand what SLAB requires over and above existing requirements.

Section 4.8 on the Relationship & Cooperation with SLAB ought to be qualified by reference to the principles of proportionality, reasonableness and foreseeability. Mutuality of obligation is not recognised. Solicitors have the right to be paid accurately and to query accounts, for instance, which could create additional administration. The Indicator of Compliance raises a question as to how can a solicitor assess what would over-use SLAB staff resources? Further the solicitors dependency on third parties action ought to be recognized: members tell us they are frequently kept waiting for hours at police stations to participate in police interviews. In relation to prison visits, solicitors have no control over the move of prisoner and the information provided by Scottish Prison Service is not always intimated to the solicitor, this results in it being difficult to locate a client and make appointments timeously.

Accordingly the provisions do not recognise contingency on third parties and could benefit for requirements around reasonableness, recognising the context of an adversarial criminal justice system (see Section 4.1.2(q)). As a further example, often witnesses appear on the Crown disclosure are not cited by the Crown and this information becomes available at a late stage (see Section 4.1.2(o)), the reference to “*good time*” may require qualification.

The provisions at section 4.1.2(b) are silent on potential issues of communication with clients in custody. Individuals can be moved around the prison estate at short notice, this can pose challenges when writing to a client, letters can take a long time to reach an individual, even when booking appointments to meet in person this can be an issue as the client may be moved without intimation to the solicitor. Defence practitioners members advise that it is proving difficult to engage with prosecutors outside the court forum and the telephone system results in solicitors being kept waiting for length periods, e.g. for solicitors having difficulty complying with the First Diet managed meeting as no procurators fiscal are available to speak to them (Section 4.1.2(j)).

Section 4.10 in respect of Targets could benefit from some additional clarity, for example it would be useful to clarify whether some fairly common targets (such as billable hours) fall outside this requirement.

C. Section 5: Systems for management and administration

There is a general concern that a number of the requirements within Section 5 are administratively burdensome and time consuming, for example the retrospective amendments to timesheets (Section 5.1.4). For example, if SLAB is concerned about potential for “double charging” then it would helpful to see the evidence in support of any additional requirements. It is unclear why time recording is necessary if the case is paid for by means of a fixed fee. A solicitor who is engaged in a particularly complex activity in preparation of a their clients defence, should not be distracted by additional tasks which are administratively burdensome. Finally in respect of the position of solicitor advocates, we understand this not a requirement made upon Faculty of Advocates.

In respect of the production of the last three years timesheets, the Society suggests a longer period of notice is provided of 7 working days with the standard of obligation being one of reasonable practicability (Section 5.1.7).

The requirement at Section 5.2.2 raises an issue of proportionality, it is over burdensome and is potentially work for which a solicitor will not be paid. When the Draft Code refers to conversations, telephones texts or emails or other matters, would the solicitor be able to seek payment at a letter rate, with any matters being recorded on the file as relevant progress of the case (Section 5.2.2)?

In terms of section 5.3.1 can SLAB clarify if they are suggesting that a solicitor must collect contributions?

In respect of the provisions around Corrective action, the Draft Code there is reference to “third parties” being able to identify non-compliance with the Code. It’s unclear who the third parties could be and this term must be defined to provide transparency (Section 5.6.1).

The sanction for non-compliance is not articulated within the Draft Code (Section 5.6.4); presumably there is some sort of sanction if corrective action is unsuccessful. Does SLAB have a policy that sets out the degree of non-compliance that might see such action being triggered?

D. Section 6 - General Aspects and Process

As a general comment, the requirements contained within Section 6 of the Draft Code are administratively burdensome and where overly prescriptive ought to be qualified. For example, the details of the Legal Aid board are already on service copy of the complaint (Section 6.2).

Section 6.3 ought to recognise that it may not always be possible to readily access the online system and solicitors may only be able to give the best indication available. For example, the location of where the client is held can impact on the ability to determine. If a person is in custody and the solicitor has no wifi access, how can solicitor tell client what the contribution is supposed to be? The Draft Code must recognise that the solicitor reserves right to take any fee to taxation (Section 6.4.2).

The current legal aid system is overcomplicated with many rates and it is unsurprising that some solicitors may, on occasion, get the rates wrong. This is an example of how rates are outdated and not fit for purpose, in the circumstances the requirements at section 6.4.4 should be subject to a reasonableness requirement.

The Indicator of Compliance at pages 26-27 at paragraph (d) the drafting ought to be amended to recognise that “*unless solicitor has taken all reasonable steps to establish the financial eligibility of the applicant*”. Paragraph (f) ought to be amended to reflect that this is only applicable “*when the solicitor becomes aware of the overpayment*”.

E. Employment Law issues

In terms of transparency and of providing Equality Impact Assessments should be provided by the Board and published.

Currently the Draft Code requires solicitors to provide excessive coverage, the Society are aware of that certain practitioners are concerned about quality of life, the impact on part time employees, solicitors with family and caring responsibilities, and compliance with the Working Time Regulations. Whilst the current volumes of requests for advice at police stations may not engage the provisions of the Working Time Regulations, the volumes anticipated by the Government along with the onerous provisions within the Draft Code of Practice could engage the provisions of the Working Time Regulations and Minimum Wage Regulations. From a professional practice perspective, a number of our members have expressed concern about compliance with the onerous terms of the Draft Code and being able to appear in court the following day (See Section 7.1.18).

F. Conclusion

Whilst we note that the Scottish Legal Aid Board has a statutory power to prepare and consult on a draft Code of Practice, and the Minister has a statutory power to modify, approve and specify the date that the draft Code comes into force, following consideration of the Draft Code of Practice, we have significant concerns and cannot recommend that members accept the Code as currently drafted. We would welcome the opportunity to engage with the Scottish Legal Aid Board to explore the creation of a Code once the fee structure for commencement of Part I of the Criminal Justice (Scotland) Act 2016 has been determined.

For further information, please contact:

Andrew Alexander
External Relations
Law Society of Scotland
DD: 0131 226 8886
andrewalexander@lawscot.org.uk