

Consultation Response

Consultation on Legal Aid Reform Regulations

November 2025

Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Civil and Criminal Legal Aid Committees, and Mental Health and Disability Sub-Committee, welcome the opportunity to consider and respond to the Scottish Government's consultation: Legal Aid Reform Regulations. The committees have the following comments to put forward for consideration.

Criminal Legal Aid

Legal Aid and Assistance by Way of Representation (Scotland) Regulations 2025

9. Do you agree with the proposal that Assistance by Way of Representation (ABWOR) should be abolished for summary criminal prosecution cases?

Yes

No

No view

10. Please comment on your answer particularly if you do not agree.

No further comments.

11. Do you agree with the proposal for a simplified and more inclusive approach to establish summary legal aid as the core form of legal aid available for all cases?

Yes

No

No view

12. Please comment on your answer particularly if you do not agree.

No further comments.

13. Do you agree with the proposal to remove the exclusivity of duty solicitors in summary custody cases to support free availability of solicitor of choice to any client?

Yes

No

No view

14. Please comment on your answer particularly if you do not agree.

No further comments.

15. Do you agree with the proposal that the financial eligibility test for summary criminal procedure cases will be the undue hardship test?

Yes

No

No view

16. Please comment on your answer particularly if you do not agree.

No further comments.

17. Do you agree with the proposal to widen eligibility for applicants by introducing automatic legal aid for guilty pleas from custody and undertakings?

Yes

No

No view

18. Please comment on your answer particularly if you do not agree.

No further comments.

Criminal Legal Aid (Scotland) Amendment Regulations 2025

19. Do you agree with the proposal to align the preparation fee for cases resolved by a guilty plea at any diet prior to the trial with the s76 preparation fee?

Yes

No

No view

20. Please comment on your answer particularly if you do not agree.

No further comments.

Civil Legal Aid

21. Do you agree with the proposal to replace detailed fees with block fees for adults with incapacity cases?

Yes

No

No view

22. Please comment on your answer particularly if you do not agree.

Adults with incapacity (AWI) cases are not suitable for block fees. The new fee structure appears to have been presented without properly reflecting the wide variation in complexity and workload across AWI applications.

We spoke with a number of AWI solicitors who offer legal aid to clients, to gain insight on current practises, case loads and fees for AWI cases. It was clear from those discussions that block fees would not work.

For this reason, and others outlined below, our preference is for the status quo to remain over either option.

Inadequate Remuneration

It is the experience of some of the practitioners we have heard from that a typical fee for an initial, undefended guardianship application is, in many cases, likely to exceed the new proposed fixed fee.

In opposed applications, or applications where there is additional, judicial scrutiny - such as cases where the Sheriff continues matters for amendment, or for the appointment of a safeguarder - the fee due to practitioners is invariably higher than that offered by the proposed fixed fee. These would involve cases, for example, where:

- additional expert reports are required,
- the Sheriff has concerns in relation to the application,
- cases are continued for re-service or safeguarder reports, or
- there are complex family dynamics.

The imposition of fixed fees would prevent solicitors from being fairly remunerated for work that has been undertaken.

Where an adult with incapacity requires representation, this often involves multiple, lengthy meetings and perusal of significant amounts of documentation. This way of working is not suitable for a block fee.

Inadequate remuneration has been common a trend in legal aid discourse for many years.

The introduction of civil time recording last year means that every minute worked by practitioners is recorded for the purpose of legal aid accounts. It is unclear why the Scottish Legal Aid Board (SLAB) are of the view that this is not sufficient to ensure that practitioners are being paid fairly for actual work undertaken.

Furthermore, the experiences we have heard from practitioners who also practise within criminal and family law evidenced that block fees rarely remunerate solicitors adequately, to the extent that many firms have had to stop taking on certain types of cases altogether.

Anecdotally, we were also advised that it is increasingly difficult to have exceptional case status granted in other types of work.

AWI legal aid solicitor exodus

We are concerned that the aforementioned block fee experiences of criminal and family law practitioners will be repeated with AWI work, leading to a further decline in the number of available practitioners.

This will have a negative impact on access to justice for some of the most vulnerable members of society. It may lead to a delay in guardianship orders being progressed, which has an impact upon individuals being deprived of their liberty without lawful authority, and being delayed in their discharge from hospital.

Any regulations that have a further negative impact upon the number of practitioners working in this area do not align with the findings and recommendations of the Scottish Mental Health Review¹ nor the United Nations Convention of the Rights of Persons with Disabilities (UNCRPD)² goal of expanding access to representation for vulnerable adults. This comes at a time when, according to the Mental Welfare Commission, Scotland currently has the highest number of guardianships on record³.

Further Clarification Required:

In addition to general concerns, there are a number of issues that the proposals fail to address or which require clarification:

- How renewals and variations are to be treated, when renewals often involve almost identical or even greater work than initial applications. Renewal cases involve careful consideration of whether some powers are no longer needed, or whether additional powers are required, which will often mean a renewal will also involve a variation within the same application. The proposals do not reflect the amount of work being undertaken by a practitioner in a renewal. If the Government does pursue one of these options, we believe the proposed fee for renewals should be in line with an initial application, and that there should be no distinction between the two.
- The current system also increasingly demands unpaid administrative work, such as obtaining detailed time breakdowns from GPs for medical reports, despite these being mandatory for applications and entirely outwith the solicitor's control. The proposals do not sufficiently take this additional work into account.
- It is unclear whether adding an additional guardian under section 62(1)(b) in the same application as a renewal would be treated as a renewal or a new application.
- How exceptional case status will be granted is not adequately covered in the regulations. There will be a number of other unusual situations, even for unopposed cases, that are not adequately remunerated under the proposed block fee system, with no guarantees that exceptional case status will be granted.

These ambiguities risk further confusion and inconsistent treatment between cases.

¹ [Scottish Mental Health Review](#)

² [United Nations Convention of the Rights of Persons with Disabilities \(UNCRPD\)](#)

³ [Highest number of detentions for mental ill health in Scotland, fewest safeguards in a decade | Mental Welfare Commission for Scotland](#)

We understand that the final regulations will provide more detail, and notes will also be provided aimed at clarifying the rules on payment, but we believe this information should be available now. More detail should be provided at this stage, for consideration and consultation, before any final decision is made on these changes.

Timings of the Regulations

The proposals, if implemented, could lead to significant changes in the operation of the current system and remuneration of practitioners. The timing of the tabling of the regulations, and the consultation period, is of concern to us for two primary reasons:

1) Consultation timescales

There appears to be no good reason as to why these changes require to be made with such urgency.

The consultation period of three weeks is not sufficient to consider all avenues of the impact and ramifications of the proposal.

We, along with many other stakeholders, would have benefited from more time to consider the proposed regulations, and the impact they would have on practice and remuneration. More time would have afforded sectoral practitioners greater opportunity to further assist the Scottish Government and SLAB in their deliberations over the proposal.

We recommend these AWI regulations are not taken forward as part of this package of changes so that the sector can fully advise the Scottish Government and SLAB of the unintended consequences that may arise if they are taken forward. The changes proposed in relation to AWI are not analogous to those more straight forward and administrative changes proposed in relation to criminal and children's ABWOR.

2) Scotland-wide Practice Note and UK Supreme Court Ruling

We believe that this is not an appropriate time to introduce changes to AWI legal aid regulations on account of two significant milestones:

- i. The Supreme Court are currently in the process of ruling on the scope of deprivation of liberty⁴, and
- ii. The anticipated introduction of a national Practice Note on AWI cases, that will be rolled out across Scotland when finalised. It is of note that Sheriffs, practitioners and stakeholders have, we understand, been consulting on this significant document for a number of months; this is in stark contrast to the time given on the current consultation.

⁴ [The Reference by the Attorney General for Northern Ireland \(UKSC/2025/0042\)](#)

The Supreme Court ruling on deprivation of liberty is one the most substantial Judicial considerations in this area since *Cheshire West*⁵. We anticipate that the Judgment will impact upon AWI legislation and practice throughout the UK and, by consequence, future cases in Scotland.

Furthermore, the Scotland-wide Practice Note on AWI cases may necessitate changes in how applications and cases are managed going forward; for example, leading to orders being granted for shorter durations with more frequent renewals required. Whilst our information on the development of such a Practice Note is anecdotal at this stage, this approach has already been noted by practitioners since recent appeal cases whereby the Court of Protection in England were critical of Scottish Guardianship orders⁶.

We do not know what changes to standard practice will be made and therefore it is inappropriate to introduce block fees until further information is available, if at all.

We would strongly support postponing any consideration of changes to the regulations until the UK Supreme Court reaches its judgment, and until there is clarity regarding the Scotland-wide Practice Note.

Summary

While block fees may offer a level of administrative simplicity, the proposals do not recognise that AWI applications are complex and that no two are the same. It is our view that they are not appropriate for block fee payments.

If the Scottish Government is to proceed with the block fee proposals, both options need further clarification to ensure that solicitors are fairly remunerated for the work they do and that there are no unintended consequences.

At this we stage, we cannot support either proposal and favour the status quo.

23. Do you prefer Option 1, which retains separate payments for court attendance, travel, and waiting time, or Option 2, which incorporates the first 30 minutes of conduct time and associated travel / waiting into the core fee thus simplifying the payment process further and reducing the need for exceptional case applications?

Option 1

Option 2

No view

⁵ [UKSC 19 \[2014\] P \(by his litigation friend the Official Solicitor\) \(FC\) \(Appellant\) v Cheshire West and Chester Council and another \(Respondents\) - UK Supreme Court](#)

⁶ ['Concerning' — Recognition of Scottish orders in England and lessons for practitioners from Argyll and Bute Council v RF | Law Society of Scotland](#)

24. If you wish, please provide reasons for your answer.

The difference between the two options is relatively marginal, financially, and some cases would favour one model over the other, and vice versa.

However, as stated in our response to the previous question, block fees are not appropriate for AWI legal aid cases; thus, our preference is for the status quo over either option.

Inadequate Remuneration:

Neither option is acceptable as they do not provide sufficient remuneration for preparation time, especially at a subsequent hearing, and are inadequate for any opposed case. Both proposals also fail to remunerate in instances where a case is continued for re-service, or for a safeguarder report, as noted in response to Q22 above.

It is our understanding that safeguarders will be entitled to submit an account for their report as usual, but should they choose to enter the action, they will be subject to the same block fee. This could have a significant impact on how the interests of vulnerable adults are represented.

Furthermore, it was noted that the “no action raised fee” would apply to cases where no warrant is issued, such as in a situation where an adult dies before that stage. The proposed fee is unacceptable as it does not recognise the work involved to raise the action, including co-ordinating and perusing the reports.

Decreasing Access

The Scottish Parliament's Equalities, Human Rights and Civil Justice Committee Inquiry into Civil Legal Assistance in Scotland⁷ showed that the current legal aid system is failing people who need help, and that there are growing legal aid deserts. We have heard from practitioners that individuals are already having great difficulty in accessing solicitors practising in AWI, and that many solicitors are taking the decision not to carry out legal aid work in this area due to the insufficient remuneration. The imposition of unwelcome fixed fees will only create further difficulties in this regard.

The two options do not resolve the more serious underlying problems with the proposal as outlined in response to question 22.

Option 2 would likely be marginally simpler to prepare from an accounting perspective. However, we believe that reform to AWI legal aid should not be an exercise to make administration and payment more straightforward. Changing regulations within the premise of this mindset could lead to negative, unintended consequences in this area of law as outlined throughout our response.

⁷ [Report on the Equalities, Human Rights and Civil Justice Committee inquiry into Civil Legal Assistance in Scotland | Scottish Parliament](#)

Regardless of which option is chosen, block fees could still result in:

- Unequitable remuneration on complex or lengthy cases;
- Increased, non-remunerated administrative burdens, such as correspondence with doctors and SLAB over medical report fees;
- Erosion of practitioner remuneration, similar to the effect seen in criminal and family law;
- Continued failure to recognise the true work involved in renewals, variations, and opposed applications;
- Creation of further legal aid deserts, with fewer practitioners taking on AWI cases on a legal aid basis; in particular, with practitioners refusing to take instructions in any opposed case on the basis that there is significant risk that they will not be properly remunerated. We understand other groups of practitioners have raised similar concerns⁸;
- A significant burden and additional costs being placed on local authorities. Where applicants cannot secure legal representation, they may be unable to proceed and thus local authorities will require to step in to act as guardian.

Furthermore, it will not eradicate abatements, as medical report fees are still routinely queried by SLAB, leading to additional work liaising with busy medical practitioners.

Inadequate Recognition

AWI cases involve one of the most vulnerable groups in society. Even a “routine” case has to be dealt with on its own merits and is not straightforward. There appears to be an assumption that all AWI applications are essentially the same. This is not that case; all applications must be ECHR compliant and take into account the individual circumstances of the adult and applicant(s).

Fundamentally, solicitors should be remunerated for work carried out, but these proposals fail to recognise this, or provide certainty that exceptional case status would be granted where it is merited. It is the experience of practitioners that the seeking of exceptional case status in other areas is complex and rarely granted.

For these reasons, we maintain our opposition to the overall block fee proposal.

As an alternative, we advise that instead of proceeding with block fee proposals, the Scottish Government and SLAB should focus on strengthening the current system to ensure timely and consistent decision-making on solicitors’ accounts, and fair payment for the work undertaken, allowing solicitors to operate their businesses and supporting effective access to justice for this vulnerable client group.

⁸ [Opinion: Proposed legal aid changes would jeopardise adults with incapacity | Scottish Legal News](#)

Children's Legal Aid

25. Do you agree with the proposal to change the eligibility criteria for ABWOR for all children (whether subject or other) by removing all means and merits testing?

Yes

No

No view

26. Please comment on your answer particularly if you do not agree.

No further comments.

27. Do you agree with the proposal to raise the initial limit of authorised expenditure for children's ABWOR from £135 to £550?

Yes

No

No view

28. Please comment on your answer particularly if you do not agree.

No further comments.

29. Do you agree with the proposal to extend the scope of a grant of ABWOR to cover from an instigation hearing to a hearing at which full a Compulsory Supervision Order (CSO) is made?

Yes

No

No view

30. Please comment on your answer particularly if you do not agree.

No further comments.

Further comments

31. Please use this space to provide any further comments you may have on the draft regulations.

No further comments.



For further information, please contact:

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