

*This paper about the drivers for and possible approaches to fee reform has been produced for the Scottish Government's Legal Aid Payment Advisory Panel. It should be read alongside 'SLAB overview paper on market, contracts, grants'.*

### **What does fee reform involve?**

1. There are a range of options in approaching fee reform and permutations are numerous. Steps could be taken either singly or in combination. The basic mechanisms might be seen as:

#### Change fee rates

2. If the change is in the form of an increase, this provides greater remuneration for work, but if not funded by savings elsewhere it results in a direct increased cost. Conversely, a reduction in fees would reduce costs, unless behavioural changes resulted in more work being billed, or more cases undertaken, albeit at lower rates.
3. Changes in rates may also have indirect effects on quality and supply. Concerns have been expressed by some that quality of service may decline if rates were to be reduced: corners may be cut, or less experienced (lower paid) staff may be required to undertake a wider range of work. It is less easy to see how an increase in fees in the absence of enhanced service requirements could lead to an improvement in quality, rather than simply an increase in profitability for providers and cost to the public purse. The risk to quality of a reduction in fee rates can also be mitigated through the use of measures available to SLAB in respect of quality assurance: the Code of Practice and related peer review system.
4. As far as supply is concerned, more suppliers may be encouraged to participate in the market following an increase in fees. This may be a benefit in situations of under supply, but may also exacerbate problems associated with over-supply.

#### Remodel fee tables

5. Remodelling can be undertaken whether with (i) an increased available budget, (ii) a reduced available budget, or (iii) by starting from a cost neutral approach. Remodelling involves changing the basis upon which solicitors are paid. There are two broad approaches to fee payment: detailed fees and inclusive fees (also known as "block" or "fixed" fees).
  - a. Detailed fees involve each discreet piece of work carried out by a solicitor attracting a fee, and the total fees for the case are the sum of these detailed fees.
  - b. Inclusive fees involve payment of a fixed sum of money either for a chapter of a case, or the whole case, no matter what work is carried out. It usually operates on the basis that the inclusive fee represents fair remuneration for an average case, and that while in some cases,

more than average amounts of work are done, in others there is less work, and over the piece, it evens out.

6. Fee tables may also be hybrid tables, in which some work is covered by inclusive fees, and some work is chargeable on a detailed basis. As far as detailed fees are concerned, the advantages are that the feeing is flexible, and individual cases are remunerated at a level directly related to the work done. The disadvantages include that it is administratively more onerous both for the solicitor who has to prepare (at cost) a detailed account, and for SLAB in assessing it, and also that there is greater potential for dispute. There is also some evidence that detailed fees offer no disincentive to unnecessary work being carried out and indeed may encourage it.
7. The advantage of inclusive fees is that they are simple to administer, and cost prediction and budgeting is much easier. The disadvantages are that from the perspective of a given case, they may over-remunerate or under-remunerate, and the latter risk in turn has led to the requirement for inclusive fee models to have an exceptionality clause, usually whereby a solicitor can (where appropriate) elect to claim fees on a detailed basis where the inclusive fee otherwise payable would not provide reasonable remuneration. Achieving the balance of the point where an inclusive fee is wholly inadequate (given that there is supposed to be a “taking the rough with the smooth” approach overall) and an exceptional fee required is not always easy.
8. There is also the corollary of the negative effect mentioned above in relation to detailed fees not disincentivising unnecessary work. With inclusive fees, the fee is more profitable the less work that is done. This may operate as a disincentive to work which may otherwise be considered necessary, and accordingly is a potential negative impact on quality unless steps are taken to assure the quality of work done.
9. To the extent that *unnecessary* work is driven out of the system, there is a benefit to the taxpayer in expenditure terms with no real dis-benefit to the client. In a market scenario where capacity was a problem, driving out unnecessary work would also increase the capacity of each solicitor to undertake more cases. Where work is scarce, however, that spare capacity might be deployed to generate income in other parts of the system that remain on a detailed charging basis.
10. Based on an assessment of the risks and benefits outlined above, the general trend and policy direction has been and remains to move to inclusive fees where possible. SLAB recognises benefits in this administratively; the Law Society are also very keen on this approach.

11. Remodelling is not simply about a change to the detailed/inclusive balance. Remodelling can, through appropriately balancing incentives and disincentives, shape behaviours and therefore the way cases proceed, helping encourage not only fair remuneration and just outcomes but also procedural efficiency, which can benefit the accused, the victim and witnesses and those operating the justice system. In this context the most obvious linkage is to the wider justice system objectives of early resolution of cases where possible, and early preparation/effective management of cases. These are objectives which fee remodelling can support.

#### Change to administrative processes

12. Changes to administrative processes of handling applications for legal aid and claims for payment can make life simpler and ease the resources cost (both for SLAB and solicitors) of dealing with the formalities of getting to point of payment, and in some cases it can directly impact on numbers and levels of claims.
13. There is a resource cost to solicitors preparing accounts and undertaking the fee claim process. Not only is that resource cost significant where detailed fees are applicable (and in turn less significant with a block fee system), but there is a resource cost to SLAB in assessing detailed fee claims. There is both an increased propensity for disputes to arise, and a higher resource cost to the resolution of disputes (whether through informal negotiation or formal taxation), all of which is reduced or avoided altogether with block fees.
14. In that respect simplification can be attractive as a way to reduce bureaucracy, cost and confrontation. However it may separately serve to increase the cost to the Fund in other ways. A complicated procedure made simple can see successful claims made where no claims were made before, or where pitfalls or complexities in the fee claim system have previously resulted in claims failing. In general, such effects should be at the margins and be outweighed by administrative and other benefits, either within the legal aid system or beyond.
15. The two main higher level objectives that have driven the identification of fee reform options have been to streamline legal aid administration (and where streamlining involves simplification, to simplify) and to contribute and support wider criminal justice reforms.