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Dear Convenor,

CIVIL LEGAL AID INQUIRY

Thank you for the opportunity to give evidence to the Committee on 27th May.

I write now to provide the Committee with some further information and clarification in relation to several issues raised by stakeholders (in their written and oral evidence to the Committee and during our own more recent engagement with them) and also matters arising during our own evidence session. I do this for two reasons.

Firstly, while differences of view are of course entirely legitimate, some of the evidence the Committee has seen is based on demonstrable misunderstandings, and it is important that the Committee is aware of these. As referenced in our evidence session, I also gave evidence recently at the Social Justice and Social Security Committee on the financial impacts of women leaving abusive relationships. Discussion at that session also focused on several misunderstandings about the financial eligibility tests and how we apply them.

While the operation of the tests is undoubtedly complex and so can be confusing for both solicitors and their clients, some of the misunderstandings or misplaced assumptions apparent from the evidence provided both to that Committee and the EHRCJ Committee reflect and reinforce perceptions of higher barriers to access or greater inflexibility than may actually exist in practice. Those perceptions may themselves create barriers if either solicitors or potential applicants form the view that there is no point in even applying for legal aid.

While the SJSSC session focused on one aspect of the legal aid system, it is clear from the evidence submitted to EHRCJC that similar misunderstandings can be seen across multiple aspects of the legal aid schemes, both in the perceived impact on applicants and the solicitors undertaking and being paid for the work. There are also significant misunderstandings in the evidence on the means by which changes to the judicare schemes could be achieved. Some respondents, for example, clearly believe that SLAB could do things differently tomorrow if we decided to do so, when in fact legislative change, be it primary or secondary, would be required.

Secondly, as the Committee will have seen from the evidence, the legal aid system has become uncomfortably complicated and bureaucratic over the past 40 years. Our role is not to defend the current system or divert attention from its significant shortcomings. While we believe the Scottish system compares favourably with other judicare systems around the world, and has many strengths on which to build, we are equally clear that even an improved judicare system can only go so far in addressing the concerns expressed to the Committee, many of which SLAB shares.

We agree that some short-term improvements are both desirable and achievable, but are no substitute for longer term structural change. I hope that this distinction was clear from our own evidence, and that the further information in this letter assists the Committee in formulating what we anticipate will be wide-ranging and helpful recommendations.

Due to the clear interest from the Committee in cases involving women leaving abusive relationships, we have given specific attention to this, followed by clarification on more general issues and misunderstandings in the evidence that we have observed.

I would be happy to meet to discuss any of this further if that would help.

Yours sincerely,

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Legal aid briefing – EHRCJ

Committee inquiry

Purpose of this briefing

This briefing sets out for the EHRCJ Committee:

- clarification on a range of issues provided to the Committee in written and oral evidence
- information on the provision of legal aid and grant funding in domestic abuse cases

Contents

Legal aid for cases involving domestic abuse	2
Other legal aid funding for cases involving domestic abuse.....	3
Availability of solicitors for domestic abuse cases.....	4
Eligibility for legal assistance.....	5
Assessment of accounts	6
The ‘double audit’	9
Legal aid fees.....	10
Outlays on solicitor accounts	12
Wider public interest and joint interest.....	12
Use of Equality Impact Assessments.....	13
Joint working with Law Society of Scotland	14

Legal aid for cases involving domestic abuse

Key issues raised in evidence

- Financial eligibility arrangements are a barrier to women seeking help to leave abusive relationships

Clarification

Treatment of main dwelling

- The regulations state that we must disregard the value of the applicant's interest in their main or only dwelling in which they reside. This means **we do not take it into consideration in our assessment.**

Capital which is part of the claim

- The regulations require us to disregard any capital that is part of the subject matter of dispute between the parties (which is common in family cases). This means **we do not take it into consideration in our assessment.**

Circumstances where the applicant has no access to financial information

- Where evidence such as bank statements are not available or accessible **we have the discretion to grant legal aid without this evidence.**

Trapped income and capital

- If an applicant or their solicitor tells us that their partner prevents them from accessing income or capital, **we can disregard types of income from our assessment and grant legal aid if the applicant has capital over the eligibility threshold.**

Coercive control – debt incurred

- If an applicant or their solicitor tells us that they have discovered there are debts in their name which they were not aware of, then **we can use our discretion to disregard these.**

Other legal aid funding for cases involving domestic abuse

Grant funding

Grant funding provisions in the Legal Aid (Scotland) Act 1986 allow us to fund a range of services or activities, subject to Ministerial decisions on funding levels and programme priorities and durations.

We manage the funding for two services which help women who have experienced gender-based violence. Both services have funding agreements in place to March 2026.

Scottish Women's Rights Centre Legal Project

This service, managed by Rape Crisis Scotland, in partnership with JustRight Scotland, provides help to women needing legal advice and representation for gender-based violence.

It is a nationwide service.

The service employs solicitor staff to provide advice, casework help and representation. The project budget covers the cost of solicitors and case related costs. The Scottish Government provides a separate grant to Rape Crisis Scotland for lay advocacy workers and a project coordinator and funds the delivery of a national helpline. The advocacy workers act as an initial point of contact prior to women receiving help from a project solicitor.

The SLAB funded service focuses on complex legal help after initial triage or advice/advocacy has been delivered by others.

In 2024-25 the project accepted 60 new clients and helped with 247 cases. Clients were helped with issues relating to child contact, the dissolution of a relationship and advice in relation to obtaining a protective order.

Edinburgh Women's Aid Legal Services Project

The service is run by Scottish Women's Aid in partnership with Edinburgh Women's Aid and Baker Gostelow Family Law Ltd and it opened in September 2023.

The service provides early intervention with the funded solicitors providing legal advice and intervention services to women and children living in Edinburgh impacted by domestic abuse. The focus is at the early stage of contact with help rather than at the complex advice end. Activity that would otherwise fall within the scope of the case-by-case legal aid schemes is outside scope of the funded grant.

Legal services delivered by solicitors focus on a wide range of child and family law matters. These include separation, divorce, parental responsibilities and rights, child residence and contact. The service also provides help for complex financial and property issues arising from separation.

Since September 2023 the service has received 356 referrals which has resulted in 263 new clients. The service provides signposting to other law firms for further casework help and representation as this is outside scope of the grant funding.

Scottish Women's Aid National Referral Project

In 2023-24, we started a service between Scottish Women's Aid (SWA) and our Civil Legal Assistance Office (CLAO) to provide SWA with a service to match their clients with solicitors.

This is a national project and takes referrals from SWA offices; helps them narrate information about the client's problem; and refers the case to 10 potential solicitors at a time, giving them the option to take on the case.

We piloted the service for a year and it will continue. We have been able to successfully refer to a solicitor in around two-thirds of cases and gained a valuable insight into the types of cases and locations in which referral has been more challenging. This has potential to be replicated in other areas of work.

We intend to provide advice to the Scottish Government on how the CLAO service can be further developed to achieve the Government's strategic priorities for legal aid. For example, this could include extending the SWA referral approach to other support organisations (such as Law Centres), case types and client groups, and to cover areas of the country not currently served by CLAO's casework services.

Availability of solicitors for domestic abuse cases

Key issues raised in evidence

- Some women have faced challenges finding a solicitor to represent them

Clarification

- Case by case funding (judicare) **does not have specific levers to manage or secure legal aid supply by solicitor firms**. Each solicitor decides whether to take instructions for an individual case from a particular client
- The number of grants of civil legal aid is **higher now than ten years ago**. But the trends differ widely between areas of law (adults with incapacity rising and family law falling) and also by geography
- **There are fewer, but busier, solicitors who are delivering legal aid**. The pattern of supply has seen a shift over the last ten years from there being a large number of solicitors, mostly undertaking only small amounts of legally aided work, to a smaller number of significantly more active solicitors
- In family cases, there has been a 35% reduction in the number of active solicitors, to 510, but with little change in the number of busier solicitors (141 undertaking 16 or more cases per year in 2023-24, compared to 144 in 2014-15). The average and total caseloads of these solicitors have increased (4278 cases at an annual average of 30 each in 2023-24,

compared to 3722 and an average of 26 in 2014-15), driving their share of total activity from 50% to 68%. The proportion of all active civil practitioners who didn't have any family cases increased from 27% in 2014-15, to 36% in 2023-24. We want to do more work with the Law Society and others to understand the reasons for the change in legal aid funded family cases.

- Within the constraints inherent in the system, SLAB has worked successfully with key stakeholders to target interventions in areas where it is perceived to be difficult to gain access to legally aided services i.e. CLAO and Grant Funding (see above section on grant funding). No client of Scottish Women's Aid should have to phone 30 – 50 solicitors to initially find a solicitor, as the Referral Service has been in place for over 18 months to try to find a solicitor on their behalf.

Eligibility for legal assistance

Key issues raised in evidence

- Financial eligibility for civil legal assistance is hard to establish and the system of contributions deters people from seeking legal aid
- SLAB doesn't use the discretion it has in relation to capital, unduly restricting access to justice
- Children are assessed for financial eligibility based on the income of anyone with a legal obligation to maintain them

Clarification

- We stated in our evidence that **a review of the financial eligibility thresholds for all aid types is needed** to ensure that those who should qualify, do so
- **A review of other aspects of financial eligibility tests, including contributions, would also ensure fairness** and we are providing advice to the Scottish Government on this
- Our data from 2022-23 shows that **81% of all civil legal aid grants involved the applicant being 'passported' into legal aid** (i.e. they were automatically deemed financially eligible with no contribution to pay)
- The same data suggests that **the capital thresholds for civil legal aid are not a significant barrier to access**. A small minority (9%) of non-passported applicants had any capital at all. Of these, only 28% were assessed as having a contribution to pay from capital. Very few indeed – 14 individuals in 2022-23, or around 0.1% of all applicants – were found to have capital over the upper capital threshold. All 14 also had a level of income that saw them assessed with a contribution, most had a level of capital that significantly exceeded the threshold and in none of these cases did the solicitor's estimate of the cost of the case suggest that the applicant could not afford to proceed

without legal aid. There was therefore no basis for us to apply our discretion to grant legal aid in any of these cases.

- The case presented in evidence to the Committee is therefore likely to be **one of only a handful of such cases in recent years**, and we did in fact apply our discretion to grant legal aid notwithstanding the applicant's disposable capital exceeding the upper threshold.

- **The level of income contribution is based on affordability**

Disposable income range	Contribution rate
Below £3521	0%
£3522 - £11540	33%
£11541 - £15743	50%
£15744 - £26239	100%
Over £26239	Not eligible

- As an example, somebody with a disposable annual income of £11,500 would be asked to contribute 33% of the costs of their case. Although there will be examples of large contributions being assessed, the average cost of a civil legal aid case in 2023-24 was £3,000. A contribution of £1,000 can be paid back over a period of around three years, interest free.
- Although assessing someone with an obligation to pay aliment for a child is a starting point, the regulations state that **where there is a contrary interest the financial circumstances will not be considered**.
 - If the person with an obligation of aliment is the opponent, then we can disregard them, as they have a contrary interest in the case to that of the child.
 - If they are not the opponent, the solicitor can ask us not to aggregate resources and we will assess this on a case-by-case basis. We would not aggregate in circumstances where:
 - the child no longer has a relationship with their parent and is estranged
 - it is about a protection matter
 - they are seeking a different outcome from the parent

Assessment of accounts

Key issues raised in evidence

- We are overly restrictive about what can be claimed
- the amount of information requested is excessive
- solicitors in commercial firms are not subject to similar controls
- we routinely restrict charges only to reinstate them when challenged.

Clarification

Private party paying vs third party paying

- The **standard of taxation** drives our approach and our **experience suggests that this is not well understood**. The standard of taxation is set out in law passed by Parliament. It is the benchmark against which we are required to assess an account. This is not a SLAB policy decision
- The standard of taxation is different between (a) a solicitor and client where the client is paying and (b) a solicitor and client where a third party (such as SLAB) is paying. This means that **comparisons between the way in which legal aid cases and private fee-paying cases are accounted for are not valid**
- We are obliged to make payment for fees and outlays which are assessed as **reasonable remuneration for work actually, necessarily and reasonably done for conducting the proceedings in a proper manner**. Conducting the proceedings in a proper manner is a clear reference that a solicitor must address the question of cost actively in the way in which fees are incurred
- We are not a party to the proceedings and our assessment officers do not have the same state of knowledge as a solicitor or client would have about the way in which that case has been conducted. When a solicitor accounts for payment of work done, they must provide a narrative sufficient to justify the fee that has been claimed
- **A failure to provide sufficient information is the single most common reason that charges in an account will be restricted**. It is not that we do not believe the work was undertaken as claimed, or that it was necessary or appropriate: we simply have not been given enough information to enable us to form the judgement we are required by law to reach. Very often when further information is provided we are able to determine that the work did indeed meet the taxation standard and so can be paid
- As well as the taxation standard described above, there is also a range of policy, legislation, previous taxation decisions, and what is known to be accepted custom and practice that are all within the mix of the decision-making process
- Legal aid accounting is complex, and we have seen in recent years a **reduction in firms employing dedicated law accountants**

Total accounts assessed and taxation

- **We assess over 200,000 accounts per year across all the legal aid schemes**. A solicitor has only challenged our decision making on accounts through taxation (the process where an independent determination of fees is carried out by the Auditor of court) once in the last 18 months and the last taxation before that was in 2021

Restrictions on accounts

- accounts which are well prepared, with sufficient narrative are less likely to be subject to query or restriction. **Across civil legal assistance, we pay over 80% of accounts submitted by solicitors in full at the first assessment**
- After the first assessment we will sometimes ask for further information that is required to enable us to assess specific parts of the claim is missing (for example forgetting to attach an invoice for a charge), or a solicitor will provide further information to support reinstatement of a charge that has been disallowed or restricted. **Fewer than 10% of accounts go through this 'negotiation' process**
- Once we receive the necessary information, this often allows us to reinstate the work item that has been queried. **The simple absence of supporting information is the single most common reason for the restriction of charges in an account**
- **There are notably fewer restrictions or negotiations in cases in which fixed fees are payable:** as well as being simpler to prepare and submit in the first place, the reduced scope for dispute, disagreement and non-payment is one of the key attractions of such fee models
- Regulation changes in 2022 have resulted in significantly greater use of interim billing arrangements, which allow for **payment throughout the lifetime of a case rather than only at the end**. Interim accounts are paid semi-automatically, with full assessment deferred until the end of the case. This may lead to restrictions being applied to some charges that have already been paid at an earlier stage.
- The increase in interim billing has **improved cashflow**, but the deferral of full assessment until the end of the case may have led to a **perception of more queries** on final accounts.

Training provided for solicitors

- **We offer training to solicitors on the accounts assessment process** and have spoken to the Law Society on previous occasions about assisting us with promoting that. This is not one of our key functions but can be resource intensive. There is no requirement on solicitors or their business support staff to undertake such training, although those that do have told us that they find it very helpful
- **We have published a range of guidance for solicitors on accounts assessment**, including on what we need to be able to assess and pay an account in full on first assessment

<https://www.slab.org.uk/guidance/accounts-common-queries-in-relation-to-the-preparation-and-submission-of-legal-aid-accounts/>

The ‘double audit’

Key issues raised in evidence

- The process of approving a limit of authorised allowing solicitors an expenditure limit or giving prior approval for certain types of work for a case and then checking their accounts once submitted equates to an unnecessary ‘double audit’
- It is within our gift to dispense with front or back-end checks

Clarification

- **The legislation governing advice and assistance sets specific limits on the value of work that can be undertaken without the prior approval of SLAB.** The regulations require a solicitor who anticipates that the cost is likely to exceed the limit to apply to SLAB for an increase in the limit, stating “the reasons for the excess, the likely amount, and giving such other information as may enable the Board to consider and determine the application”. **SLAB cannot decide to dispense with this statutory requirement or apply it retrospectively**
- SLAB provides an extensive series of increase request templates to encompass in a single request the work typically required in a wide range of case types without the need for multiple detailed requests as the case progresses. The aim is to reduce administration
- **Not all solicitors use the templates available**, and not all case types are covered by templates. This is because they work best where a fairly standard process is likely to be followed. **We are currently reviewing the templates, exploring the scope for addition case types to be covered and reviewing the values to ensure they continue to reflect the current position, for example in light of the various increases in fee rates over recent years**
- In civil legal aid, a similar process applies where a solicitor wishes to employ counsel or experts or undertake work of an unusual or unusually expensive nature. **This requirement is set out in the relevant regulations and it is not open to SLAB to ignore it.** The regulations do however **allow us to provide retrospective approval** for the employment of counsel or experts or for unusual work, where there is a **special reason** that this was not sought in advance. **Administrative oversight is not a special reason for this purpose.** The regulations do not allow us to provide retrospective approval for unusually expensive work
- We have created templates for some types of experts to reduce the information we need to be given in advance. We have also created guidance on the thresholds for work being considered unusually expensive, or the circumstances in which the work would be considered unusual

These controls **broadly mirror the kinds of controls put in place by other third-party funders of legal services**, such as insurance companies which will be keen to ensure that the cost of the cases they fund is proportionate to the outcomes sought. They were designed and approved by Parliament to manage the risk to the taxpayer that is inherent in a system with an uncapped budget

- Other third-party funders will also **scrutinise the invoices they receive at the conclusion of a matter to ensure that the costs reflect their expectations as to the extent and efficiency of the service provided**
- **Unwelcome administrative burdens are a tradeoff for the otherwise very wide scope and open-ended case by case nature of the Scottish judicare system**: other models of funding and service provisions come with their own constraints and limitations, but these are more likely to operate at an overall service rather than case or work item level i.e. whether a service is provided at all, is restricted to certain subjects, communities or geographic areas, or is resourced to enable all demands to be met
- Even at a case level, waiting lists, cost limits or restrictions on the amount of time that can be spent with individual clients/patients/customers are **common features of high volume, resource constrained public services** such as GP surgeries, dentists, mental health services, social care etc.
- **The judicare system and its controls are one (far from perfect) way of managing supply, cost and demand**; other models are seen in other public services. Some such models may lend themselves better to the design and delivery of services to address some of the needs described to the committee, many of which the judicare system was never designed to meet, but has sought to accommodate despite perhaps being ill-suited to the task

Legal aid fees

Key issues raised in evidence

- Fees are **inflexible**
- Necessary work that solicitors do is not covered by the fees and goes **unpaid**
- Legal research is **not paid for**

Clarification

- We have been clear that **reform to fees is required**, ideally within the context of a reformed delivery model

- We have noted on numerous occasions the **difficulty in focusing on specific fee levels or what work can be included within a fee** (which is often based on misunderstanding) without looking at issues in the round
- Reform of fees is a **key thread of the Scottish Government's legal aid reform discussion paper** and we will continue to assist them with this work
- It is **not correct to say solicitors don't get paid for either preparation or settlement in block fee cases**. There is a settlement conference/negotiation fee but we recognise that other settlement fees are primarily geared towards achieving a court settlement.
- **Solicitors can make an application for exceptional case status** if the level of negotiation or preparation is unusual to the extent that the block fees do not provide reasonable remuneration. If granted (and most cases are) the solicitor can charge for work done on a detailed basis.
- Legal aid fees are primarily designed to **remunerate actions that are essential to progress the case**. There will be a range of tasks for which no separate fee is chargeable but that are **encompassed in other legal aid fees**. For example, time spent writing up file notes following a meeting is not separately chargeable because this is encompassed in the fee for the meeting.
- Detailed guidance on what can and cannot be charged for is available for solicitors. **Much of this is based on regulation**, and not a question of SLAB policy.
- **Payment for legal research will depend on the context**. Solicitors carrying out work are assumed to have sufficient expertise in the areas of law in which they practice, and researching the law is not usually specific to the immediate matter or case but may be considered part of the overheads of the solicitor in developing their knowledge of that area.
- In line with long-established case law (and specific analogous provisions in the criminal legal aid fee regulations), we have provided **detailed guidance on exceptions to the general rule that legal research is not a valid charge**. Where payment for legal research is sought, the solicitor must provide us with a supporting note setting out why the charge is reasonable, by reference to a novel, developing, unusual or complex point of law that goes beyond the understanding of the substantive and procedural law expected of a competent solicitor practising in that field.

<https://www.slab.org.uk/guidance/research/>

Outlays on solicitor accounts

Key issues raised in evidence

- Solicitors must carry the cost of outlays until the end of the case.

Clarification

- **Solicitors can claim both fees for work that they have done and the cost of outlays they have incurred as a case progresses.** They do not need to wait until the end of the case to make a claim. There is no limit to the number of claims that can be made on a case. The solicitor must provide us with final accounting at the conclusion of the proceedings.
- We [published a reminder](#) to solicitors on their option to do this as recently as November 2024.

Wider public interest and joint interest

Key issues raised in evidence

- The statutory test for legal aid does not adequately consider the wider public interest in making a grant

Clarification

- **We do take wider interest matters into account when assessing applications** and we have published guidance on this

[Strategic impact or wider public interest of the case - Scottish Legal Aid Board](#)

- The solicitor must give us full and accurate information about the value of the claim and the likely case costs. This will allow us to assess whether there is any prospect of financial benefit to the applicant
- Full information should be provided about the nature of the wider interest in the case. The application also needs to address the tests in Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002. **We are bound by law to refuse applications if the applicant has a joint or the same interest with others if we are satisfied that either the applicant would not be seriously prejudiced in their own right if we did not grant legal aid or it would be reasonable for the other people concerned to meet the expenses of the action**

- If an applicant is part of a group bringing similar claims or similar claims have already been brought by others, whether legally aided or not, we need full information about the funding of the other claims and the solicitor will need to **explain clearly the prejudice that would arise if we refused legal aid.**
- **The civil legal assistance scheme is designed for cases which are taken by individuals**, relating to issues in which they have a specific interest. Legal aid is not available to organisations or groups. Regulation 15 is a control which sets out the circumstances in which a person with a joint interest in the matter with other people may be granted legal aid.
- **It is uncommon for legal aid to be refused on the basis of a joint interest**, but it can be relevant in some case types, including some environmental cases.
- **We have been engaging directly with the Environmental Rights Centre for Scotland (through the provision of briefing and meeting in person)** to establish evidence of the position from our respective perspectives and better understand any potential problems.
- **We are aiming to provide advice to the Scottish Government on recommended options (e.g. through refreshed guidance) that may alleviate concerns around how the test is applied** and which may encourage more environmental applications to be made. This could be followed by a full review of our decision making and advice on options available to improve regulations or to take other steps through the various funding tools available e.g. grant funding.

Use of Equality Impact Assessments

Key issues raised in evidence

- SLAB is going through a learning process on its equality impact work and in the future should be using equality impact assessment on such things as integrated service design, workforce planning and upskilling of the legal profession

Clarification

- We are required under the Equality Act (2010) to **consider equality in the discharge of our functions**. A key means by which we do that is through carrying Equality Impact Assessments (EQIAs) of our policies and procedures.
- We entered into a Section 23 agreement with the Equality and Human Rights Commission in July 2021 to better reflect best practice. **The agreement was an action plan** and was not enforcement action. **The action plan was successfully completed by November 2023.**

- **The equality duty applies to the exercise of our statutory functions.** We have published a wide range of EQIAs on our website and will continue to do so as we review our policies.
- The EQIAs cover many aspects of the legal assistance schemes and include significant amounts of evidence about the wider experiences of people with different protected characteristics in accessing or interacting with services generally and how that might impact their interaction with us.
- We have used any research that we are aware of on the **experience of groups in relation to legal services. This is relevant to our functions.**
- **We do not currently have any functions in relation to integrated service design, workforce planning or upskilling of the legal profession:** any suggestion that we have such functions, or that we have failed to appropriately impact assess our approach to such functions, is therefore misguided. Should we be given such functions as part of a reformed legal aid system based on a public service model, we would of course extend our current comprehensive impact assessment approach to the development and implementation of such an expanded role.

Joint working with Law Society of Scotland

Key issues raised in evidence

- SLAB should work more closely with the Law Society of Scotland to develop responses to issues associated with recruitment and retention of solicitors

Clarification

- Under the current legal aid legislation, **SLAB has no powers or functions that relate to the recruitment or retention of solicitors in private practice**
- We do however have a function of **monitoring the availability and accessibility of legal services**. In pursuance of that function, we recently published a [detailed analysis](#) of the provision of civil legal aid services. **The Law Society of Scotland also has a statutory duty to provide us with information to assist us in our monitoring function.**
- We have approached the Society with a view to developing a **collaborative approach** to research and data analysis to support a shared evidence base in relation to the supply of legal aid services. This might include joint research, or approaches to combining the data SLAB holds about patterns of legal aid activity with that held by the Society. This includes

data about the providers of legal aid, and any differences or similarities between them and firms undertaking other areas of work about which we do not hold our own data.

- To date the Society has not taken us up on our requests for meetings to discuss such an approach and has not provided us with any substantive response to requests made in summer 2024 for relevant information held by the Society. We will continue to pursue a collaborative approach as we strongly believe that **decisions about the future of the legal aid system should be informed by robust data and evidence.**