

Legal Aid Reform in Scotland: Consultation

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Contents

Page 1	Ministerial Foreword
Page 3	Glossary of Terms
Page 4	Background to this consultation
Page 9	Part 1 - Foundations for Change
Page 11	i) legal aid has the user voice at its centre
Page 15	ii) legal aid has flexibility to address and adapt to user need
Page 18	iii) Legal aid as a public service
Page 21	Part 2 – The Change Agenda
Page 21	i) Scope and oversight
Page 23	ii) Improving access and targeted interventions
Page 29	iii) Simplicity and Fairness
Page 40	iv) Enhanced Statutory Powers and Best Value
Page 45	Annex A Respondent Form
Page 47	Annex B Consultation Questions
Page 63	Annex C Handling Personal Data
Page 65	Annex D Financial Eligibility

Legal Aid Reform in Scotland: Consultation

Ministerial Foreword



In February 2017 the former Minister for Community Safety and Legal Affairs, Annabelle Ewing, invited Martyn Evans, CEO of the Carnegie Trust, to chair an Independent Strategic Review of Legal Aid in Scotland. Over the following year Martyn Evans, supported by a review group made up of legal and consumer professionals and academics, engaged with a wide-range of stakeholders, including members of the legal profession, representative bodies, the third sector and the public before producing his report and providing his recommendations to Scottish Ministers.

The Chair's report: "[Rethinking Legal Aid](#)", set out a long term vision of a citizen-focused legal aid service in Scotland for all forms of publicly funded legal assistance. That vision is underpinned by a mission to create and sustain public trust and provider confidence in the legal aid system. The report provides us with an opportunity to develop a new statutory framework for a modern, forward-looking and person-centred legal aid service for Scotland. It identified six strategic aims, and consequently 67 recommendations on how that vision could be achieved and how shorter term improvements might be made.

In November 2018 I published the [Scottish Government response](#) to that Review and announced my intention to consult on the basis of those recommendations.

In that response I indicated that I was not persuaded that the Scottish Legal Aid Board should be replaced by a new arm's length body; I do, however, support the suggestion that the powers available to the Board should be made more flexible and coherent. This consultation seeks your views on whether you support such changes. I also welcomed the

recommendation to maintain the wide scope of legal aid and seek your views on this too.

As was stated in my response, the Scottish Government is open to further views on how the report recommendations should be taken forward and this consultation is intentionally broadly set to capture the fullest range of views on the recommendations and what level of reform is supported. In building a user-centred service, it is vital that the user voice is captured at this early stage. The views expressed in response to this consultation will inform decisions as to whether there is the appetite for radical reform of legal aid and the legislative change required to achieve that.

A handwritten signature in black ink, appearing to read 'Ash Denham', written in a cursive style.

Ash Denham
Minister for Community Safety

Glossary of Terms

“CLAO” – Civil Legal Assistance Office, helps clients eligible for legal assistance with civil legal problems. It comprises solicitors and administrative staff employed by SLAB.

“Judicare” – Case-by-case legal aid funding that can be accessed by solicitors.

“Justiciable issue” - matters which raise a legal issue or which, if not resolved earlier, could ultimately result in court action or some other form of legal procedure e.g. tribunal, being initiated.

“Legally aided” – A service supported by payment from the Legal Aid Fund, including judicare, grants and directly employed solicitors.

“Legal Aid Fund” or “the Fund” - The budget from which legal aid is paid and which is administered by SLAB.

“PDSO” – Public Defence Solicitors Office, provides advice and representation in criminal cases to those eligible for criminal legal assistance. Its solicitors and administrative staff are employed by SLAB.

“Primary legislation” – Acts of Parliament and Acts of the Scottish Parliament.

“publicly funded legal assistance” – All advice and representation services funded by the public sector, such as local authority advice providers, advice agencies such as CABx, but also including judicare, grants paid from the Legal Aid Fund and directly employed solicitors (CLAO, PDSO, SCL).

“SCL” – Solicitor Contact Line is staffed 24 hours a day, 7 days a week by solicitors on a duty scheme to provide free advice to persons in police custody.

“SLAB” – Scottish Legal Aid Board, which has the statutory functions of securing that legal aid and advice and assistance are available, and of administering the Legal Aid Fund in Scotland.

“The Act” – Legal Aid (Scotland) Act 1986.

“The Review” – *Rethinking Legal Aid – An Independent Strategic Review*, published in March 2018.

Background to this consultation

The Legal Aid (Scotland) Act 1986 created the Scottish Legal Aid Board, established the legislative basis for SLAB's powers and duties, and provided the structure of the current legal aid system in Scotland. The Act, now in its fourth decade, pre-dates devolution, human rights legislation, and other major reforms to the justice system. Since its introduction the Act, and the secondary legislation supporting it, have been subject to frequent changes in response to emerging domestic and European law that added to the complexity of the system. Over this time, many publicly funded services have undergone significant reform to move towards user-focused systems that plan and deliver services with the user at the forefront of design decisions.

In 2016 the Scottish Government considered that the time was right to review the legal aid system in Scotland and highlighted in the Programme for Government commitment from that year:

“We will engage with the legal profession and others to identify during this year specific measures to reform Scotland’s system of legal aid, maintaining access to public funding for legal advice and representation in both civil and criminal cases alongside measures to expand access to alternative methods of resolving disputes.”

To further reforms, the Scottish Government established an independent review of legal aid in February 2017. That review was taken forward by an independent panel chaired by Martyn Evans, then CEO of Carnegie Trust UK, with the following remit:

“To consider the legal aid system in 21st century Scotland and how best to respond to the changing justice, social, economic, business and technological landscape within which a modern and flexible legal aid system should operate.”

In February 2018 the report *“Rethinking Legal Aid”* was published, a culmination of 12 months of research and evidence gathering by the independent panel and its Chair, Martyn Evans. This report made 67 recommendations that were intended to lead to a modern, flexible and user-focused service.

The Scottish Government response to that report was published in November 2018. That response set out the short and medium term improvements that would be made to the current legal aid system. It

also signalled our willingness to consult on ways in which a new statutory framework could be developed to deliver an improved and person-centred legal aid service for Scotland.

The focus of this consultation therefore is on reforms to design and deliver a legal aid service. For the purposes of this consultation, the term legal aid will be used to cover the range of advice and representation services that are met by the Legal Aid Fund. When grant funding monies (which are also paid through the Legal Aid Fund) are subject to separate consideration, this will be expressly stated. Legal aid is not to be confused with publicly funded legal assistance which covers all funding through the public sector including local authorities.

Legal aid is often a contentious issue, with a wide range of interests and perceptions on how it should operate, and for whom. That is evident in the Review and from the many views that have been expressed since publication. It is important to be clear that a functioning legal aid service is an important element in ensuring access to justice in guaranteeing rights under the European Convention on Human Rights, which is why the Scottish Government supports that the continuing availability of legal aid in a wide range of actions.

The public debate on legal aid often does not focus on the availability, quality or outcomes delivered by these services, but instead turns on issues related to payment to those providing legal services. Further to our commitment in the Scottish Government response we have now established an expert advisory panel to make proposals on an evidence based model to agree and review the structure of the legal aid payment framework. Members from the representative bodies of the legal profession and experts sit on this panel. Therefore, the issue of legal aid fees and the payment framework will be subject to separate and detailed consideration and will not form part of this consultation.

Responding to this consultation

We are inviting responses to this consultation by 19 September 2019.

Please respond to this consultation using the online platform 'Citizen Space' which can be found at: <https://consult.scotland.gov.uk/>.

You can save and return to your responses whilst the consultation is still open. Please ensure that consultation responses are submitted before the closing date.

If you are unable to respond using 'Citizen Space', please send your views and comments either by email to: legalaidreform@gov.scot or by posting a paper copy to: Kieran Burke, Access to Justice Unit, Civil Law and Legal System Division, Justice Directorate, Rm GW 14, Saint Andrew's House, Edinburgh EH1 3DG

However you respond, please complete the Respondent Information Form (see 'Handling your response' below). Responses should reach us by **19 September 2019**

Earlier responses would be welcome.

Handling your response

If you respond using 'Citizen Space', you will be automatically directed to the Respondent Information Form at the start of the questionnaire. This will let us know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public.

If you are unable to respond via 'Citizen Space', please complete and return the **Respondent Information Form** attached to the end of this document. This will ensure that we treat your response appropriately. All respondents need to be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002(2) and would therefore have to consider any request made to it under the 2002 Act for information relating to responses made to this consultation exercise.

If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly. If the response comes from an organisation, we will indicate that the organisation has responded to the consultation.

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, or offensive material, we will make responses available to the public at <http://consult.scotland.gov.uk>. If you use Citizen Space to respond, you will receive a copy of your response by email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them by email to legalaidreform@gov.scot or by hard copy to the address above.

Scottish Government consultation process

Consultation is an essential part of the policy-making process. We will consider the views expressed in response to this consultation along with other available evidence to help inform the Scottish Government's decisions. You can find Scottish Government consultations online: <https://consult.scotland.gov.uk>. Each consultation details the issues under consideration, as well as a way for you to give us your views.

Consultation may also involve seeking views in other ways, such as public meetings.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation.

Depending on the nature of the consultation exercise, the responses received may:

- indicate the need for policy development or review;
- inform the development of a particular policy;
- help decisions to be made between alternative policy proposals; and/or
- be used to finalise legislation before it is implemented.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Part 1 – Foundations for Change

The Review found that the system of legal aid currently operating in Scotland compares very well internationally. Scotland's expenditure on legal aid exceeded €30 per capita (Council of Europe, 2016). In comparison, the average for European countries is €9 and the median is €2 per capita. This makes Scotland one of the highest spending jurisdictions in Europe. The legal aid system in Scotland also maintains a wide scope of eligibility for legal aid in both criminal and civil cases, with very few exclusions in terms of area of law. Most legal aid systems operate with clear budget caps and explicit rationing. In Europe, only Scotland and the Netherlands have an open-ended, uncapped, demand-led provision. Whilst these findings are welcomed by the Scottish Government, it in no way dampens our aspiration to introduce ambitious and positive change.

The Review sets out a long term vision for a citizen-focused service in Scotland, underpinned by a mission to create and sustain public trust and provider confidence in legal aid. It identified that legal aid is often not seen as being a public service. The current system and its legislative framework focuses on what the providers of legally aided services need to do to obtain funding for a case, rather than being a framework which allows for the design and delivery of services which are responsive and flexible to the needs of the user, and provides a means to manage the availability of these services.

The current legal aid system comprises of three components – judicare, grant funded advice services (which can include solicitor services), and directly employed solicitors in SLAB's services delivered via PDSO, SCL and CLAO. Both grant funding and direct services are designed to meet particular needs and deliver outcomes aligned to Government priorities. The vast bulk of the legal aid budget is used to support demand led services delivered by way of judicare through solicitors and, when necessary, the employment of advocates.

The judicare model inserts a third party funder (SLAB) into an existing solicitor/client relationship and controls access to public funds via a range of eligibility tests, pre-approval requirements and tests for payment. It is designed to support the traditional private sector delivery model: the solicitor is free to deliver services where they want, to client groups they choose to serve and case types they choose to deal with.

The Scottish Government supports having a valued public service with the user at its centre. This is, however, a fundamental shift from how legal aid is currently designed, perceived and delivered. Such a shift is consistent with wider developments regarding publicly funded services following the report by the Commission on the future delivery of public services chaired by Dr Campbell Christie, and its recommendations that public services are built around people and communities, their needs, aspirations, capacities and skills.

In this section of the consultation we will consider the general principles that will inform the change agenda to support the vision set out above, namely that legal aid:

- i) has the user voice at its centre;
- ii) has flexibility to address and adapt to user need; and
- iii) should be regarded as a public service.

i) legal aid has the user voice at its centre

The focus of the statutory framework through which legal aid is delivered is on the structures for each aid type and the associated fees. The framework controls access to the legal services that are publicly funded and sets the basis for payment for providing these. In many respects it is possible to consider that the users of the existing system are in fact the legal professionals delivering legally aided services. The Act is principally a vehicle for interaction between solicitors and SLAB; generally the onus is on the solicitor who has decided to progress a case to seek appropriate cover and then for SLAB to be reactive to requests for funding to provide these services. We welcome the opportunity to refocus the statutory framework on the delivery of the needs of those seeking legally aided services; rather than unmanaged and unplanned decisions that are dependent on the providers.

The Review cautioned that there is a lack of direct engagement with user representatives in the policy making process around legal aid, and made specific reference to the lack of engagement by strategic third sector organisations as part of its call for evidence. This is perhaps symptomatic of the user voice being lost in the current system, and supports the need to refocus the approach in legislation to embed this voice and to reflect that it is the needs of those requiring advice and representation that are at the centre of a legal aid service.

This will be a challenge. There is not a unified user voice. Instead, there are a wide range of justiciable issues covered by legal aid and a wide and, at times, disparate geographical spread of service providers. It is not just the voice of current users, but also the voice of potential users or those who have not yet accessed services, that needs to be captured. We recognise that an absence of certain duties, powers and functions within the current statutory framework has resulted in the user voice not being heard and taken into account in the design and delivery of services.

We consider it is important to redress this to help:

1. Identify advice and representation needs of communities, specific groups (including those suffering domestic violence, disabled and ethnic minorities) and individuals, which we would expect to be supported by legally aided services, and that legal aid funding is available to meet these;

2. Direct and target legal services at legal and geographical areas, in line with established priorities, taking into account local provision; and
3. Respond appropriately to external developments and emerging situations.

There are a number of ways in which the user voice can be captured and contribute to delivery and improvement of the service.

Directly

Consumers of legal aid services could be directly engaged through enhanced approaches to quality assurance. Primary legislation could establish a unified system for quality assurance across legally aided solicitor and advice sector services, and focus on incorporating consumer considerations such as taking into account the particular service delivery structures. This would give a more rounded view of the standard of service beyond the technical accuracy of the advice provided and compliance with legal aid process requirements. This could be complemented by the recommendation in the Review that third sector organisations consider endorsing publicly funded legal assistance services which provide a good level of service to their beneficiaries.

Indirectly

Sustained engagement through consumer representatives could also help ensure the user voice is captured and reflected in the delivery of a legal aid service. The Review supported the use of consumer panels and recommended that a consumer interest panel should be established which could enable the user voice to have an input into legal aid governance.

Collaboratively

Better connectivity within the landscape for publicly funded legal assistance may also help to achieve more of a user focus. Currently this is both complex and diverse, with funding arrangements varied and focused on the providers. There is a combination of private providers, employed solicitors, public and third sector organisations receiving public funds from legal aid, central government and local government to provide advice.

The Review sets out a vision for a more integrated service incorporating all forms of publicly funded legal assistance to better address user needs, bolstered by a desire that the private, public and third-sector providers work together and learn from each other at a local level. The Review recommended that representatives of the third-sector advice services and local authorities should be formally involved in the strategic planning and delivery of justice outcomes through membership of the Justice Board, and also recommended that both civil and criminal publicly funded legal services should be based on a local action plan created in partnership with each Community Planning Partnership (CPPs). CPPs rely on the resources and commitment of their partner bodies, such as local authorities, Police Scotland, etc. to deliver on agreed commitments.

We support partnership working and the potential benefits of the above recommendation, but recognise these aspirations may take longer to deliver as the drivers, mechanisms and intended outcomes of funding and service delivery widely vary between both funders and providers.

Questions

- The Review recommends the voice and interest of the user be at the centre of the legal aid system. Do you agree?

Yes

No

Unsure

Please give reasons for your answer.

- How desirable are each of the following ways of embedding the user voice and experience into the design and delivery of a legal aid service, on a scale of 1 – 5 (1 being very undesirable and 5 being very desirable).

1. Direct engagement through enhanced approaches to quality assurance

2. Indirect engagement through consumer panels

3. Collaborative engagement by connectivity across the publicly funded legal assistance landscape.

Please give reasons for your answer

- Partnership working and Community Planning Partnerships (CPPs) help provide local context to user needs. Would you support placing duties on a prescribed list of public sector organisations, to work together in order to help CPPs achieve their goals?

Yes

No

Unsure

Please give reasons for your answer

ii) legal aid has flexibility to address and adapt to user need

The current legal aid system is reliant mainly on the provision of what is known as judicare services by private solicitor firms. In some cases it will be necessary for firms to employ the services of advocates to progress legally aided cases. The strengths of judicare are that it enables a very wide range of access points across the country, covering a broad range of areas of law, and it is able to respond quickly to shifts in expressed user need. However, it has limitations insofar as the services are not consistently available: firms or individual solicitors may, for whatever reason, decide not to take on a particular case or class of cases, or cases in certain geographical areas. Conversely in other areas there may be an oversupply. Capacity in this system is augmented by directly employed PDSO and CLAO solicitors, operating within both criminal and civil law respectively, and grant funding which currently can only target civil and children's legal and advice related services.

The Review recommended that it should be public policy to maintain and fund a mixed model for legal aid - whereby private solicitors would still be engaged - but supported the ability to fund more flexibly and with agility. A range of new, flexible powers to direct and target legal aid services at specific legal and geographical areas of need were set out. These could be used in response to the unmet needs of individuals and communities, where it would be expected that these be met by legal aid funding. Retaining the availability of private solicitors to carry out legal aided work will remain important, even if this engagement will, at times, require to be facilitated in a different way to the current judicare structure.

The mixed model of funding considered included:

- a mix of demand led and targeted funding by way of judicare, public direct employment and grant aided ;
- a mix of solicitor and lay assistance including options for solicitors being embedded within lay advice providers; and
- a mix of method of delivery to include online and telephone as well as direct advice delivery

Where consistency of access is important and not being delivered, other means of funding legal services include grant or contract. The main strengths of a targeted funding model are that this approach has greater scope to provide consistency of access to help for a defined set of problems.

We recognise that the current legal aid statutory framework provides a range of targeted interventions which SLAB can use, under certain conditions, and which vary across civil, criminal and children's legal assistance (some of which that are still to come into force). However, there is an inherent lack of flexibility in the current model to adjust and respond to user needs quickly, and we would welcome views on how best to adapt this.

Questions:

- The Scottish Government supports the recommendation in the Review that provision by publicly-funded private solicitors should continue. Do you consider that there are ways in which the mixed model can be strengthened?

Yes

No

Unsure

Please give reasons for your answer

- Are there specific areas of law, eg domestic violence or disability issues, that the current judicare funding arrangements are serving less well?

Yes

No

Unsure

Please specify which areas and give reasons for your answer

- Are there specific areas of law that might benefit from a more targeted approach to funding solicitor services?

Yes

No

Unsure

Please specify which areas and give reasons for your answer

- Are there certain groups that when accessing legal aid might benefit from a more targeted approach to funding solicitor services?

Yes

No

Unsure

Please specify which groups and give reasons for your answer

- Do you support building additional flexibility into the delivery of legal aid?

Yes

No

Unsure

Please give reasons for your answer

iii) Legal aid as a public service

Legal aid, as a public service, should enable that those who find themselves with justiciable problems can access appropriate advice services and representation if and when required. The availability of such assistance to uphold the rule of law and individual rights benefits all of society, not just those who directly access that assistance. This is recognised by the reference to criminal legal aid in Article 6(3) of the ECHR and in the context of the right to a fair trial in the civil context.

Legal aid is currently reliant on a system in which advice and representation services are delivered primarily by private law firms registered to be paid for work by way of public funds; also by a small number of solicitors employed directly by SLAB; and by a mix of lay advisers and solicitors employed in projects whose associated costs are met by way of grant funding monies administered by SLAB.

There is a predominance of private providers in the system, but it should be borne in mind that not all public services are delivered by public servants. A system that engages with private providers, such as firms of solicitors, is a recognisable model for the delivery of public services, such as GP and dental services, which have high public value. Unlike GP or dental services, the current model of judicare is characterised by an ad-hoc and transaction based relationship between solicitor firms and the funder (SLAB), with no requirement for a solicitor to commit to deliver an agreed level of legally aided services to the public. This model does not lend itself to planning or designing services that respond to emerging needs or to address specific user needs, as would be expected in a public service.

We recognise that those solicitors and advocates who provide legally aided services are undertaking important work: work that facilitates access to justice and helps citizens have opportunities to effectively challenge the state and to seek to uphold their rights. Often legal aid is used to support the most vulnerable members of society and persons at a point of crisis in their lives. Not only is there a personal benefit for those receiving the service, but a real societal and therefore public value to this work in helping to address issues such as homelessness, debt and family breakdown.

The Review recommended that the legal aid system should be considered a public service. This could address some of the negative public perception and media reporting on this essential part of a rights-

based society. While only 2% of the population has been likely to access case by case funding via the Legal Aid Fund in any given year, the availability of legal aid supports the delivery of access to justice and the rule of law, therefore benefiting social cohesion in Scotland as a whole. We agree with the conclusion of the Review that for our legal aid system to achieve its full potential, we must build on its current strengths and recast it as a public service. Re-setting the legal aid system as a public service would help to achieve a better appreciation of its important role to living in a rights-based society.

Building on the conclusions of the Christie Commission¹ and the analysis, findings and recommendations in the Review, we support changes recommended that can move legal aid closer to the public service model. These include:

- A clear focus on the needs of all user groups in the design and delivery of services, including transparency of availability and eligibility;
- A consistency of service across geography and in terms of quality that does not vary over time, except in line with an agreed and managed change process;
- Governance structures that are accountable, transparent, cost-effective, streamlined and efficient;
- A whole system approach, involving cooperation and collaboration where possible across boundaries to achieve stated outcomes; and,
- Includes accessible digital services.

If legal aid is deemed to be a public service then Best Value considerations are engaged, which brings more accountability of the service and outcomes and drive continuous improvement. The Scottish Government wants the wide scope of legal aid to remain available but needs this to be sustainable and therefore Best Value drivers could assist. The current structures do not easily lend themselves to such an approach, but a more user centred and flexible system could.

¹ [Remit of the Christie Commission](#)

Questions

- As currently structured and delivered, do you consider legal aid a public service?

Yes

No

Unsure

Please give reasons for your choice

- Are there changes that you consider would make legal aid function more as a public service ?

Yes

No

Unsure

Please give reasons for your answer

- Are there potential risks to looking at the delivery of legal aid as a public service?

Yes

No

Unsure

Please give reasons for your answer

Part 2 – The Change Agenda

i) Scope and oversight

Part of informing the change agenda is identifying key components of the legal aid system that should be retained. Two features of the existing system are the wide scope of justiciable actions that can be covered by legal aid, and administration and oversight by SLAB.

The Review commended the wide scope of legal aid in Scotland and recognised how favourably this compared to other jurisdictions, most notably England and Wales, where certain categories of case are no longer covered by the legal aid schemes there. During its stakeholder engagement, the Review panel found there to be little support to reduce scope.

We welcomed the recommendation that the current scope of legal aid be maintained and in our response committed to legal aid being available for as wide a range of actions as possible. For the purposes of this question scope refers only to justiciable issues, not financial eligibility.

Questions:

- Are there actions that could be taken by the Scottish Government to help maintain or strengthen the current scope of legal aid?

Yes

No

Unsure

Please give reasons for your choice

- Are there any other aspects of the current scope of legal aid that you think should be reformed?

Yes

No

Unsure

Please give reasons for your choice

The Review recognised the effectiveness and value of the work undertaken by SLAB within the restrictive framework in which it operates, but recommended that a new type of public body be established, with much more strategic powers to drive legal aid provision that meets user need.

We consider that the cost and resource involved in setting up a new organisation could be better directed to achieve improvements in responsiveness and oversight that would help deliver an improved and user focused legal aid service. In our response we stated that such change could be achieved by introducing a new statutory framework within which SLAB would have enhanced powers and duties.

Question:

Are there actions that should be taken by the Scottish Government to help support and strengthen the work of SLAB?

Yes

No

Unsure

Please give reasons for your choice

ii) Improving access and targeted interventions

The wide scope of legal aid is important, but equally as important is facilitating access to services for those who need assistance. The Review recommended that limited financial means, geography, disability or capacity should not be barriers to receiving appropriate assistance and that legal aid be centred around and responsive to the needs of users. In Part 1 we discussed the existing reliance upon judicare provision; here we want to consider what changes could improve that model as well as what changes would enable targeted interventions to be used to best effect.

As discussed elsewhere, one of the key characteristics of judicare is that the solicitor is free to deliver services where they want, to client groups they choose to serve and case types they choose to deal with. It can adapt to emerging demand for specific services at a local level, if providers are able and willing to respond to those demands; however, it does not provide a secure basis for consistency of accessing services across geography or areas of law, nor support a public service model designed and delivered around the needs of users.

The Review recommended establishing clear memoranda of understanding between solicitor firms and SLAB, as an integral part of the relationship between the public funder and solicitor firm providing legally aided services, to assist with the identification of judicare availability and reliability of supply.

The agreement could seek a commitment to take on specific types of cases, serve particular communities, and/or take a minimum number of referrals from a direct referral service. The agreement could also set out what solicitor firms should expect by way of service level standards in return for providing valued work, at times with limited resource. The Review envisaged that such a Memorandum would be a requirement for access to public funding from the Legal Aid Fund.

Judicare is not the only means of delivering legal aid. The current statutory framework does provide a range of targeted interventions which SLAB can use, under certain conditions, to help address potential barriers to receiving assistance. The power to intervene varies across civil, criminal and children's legal assistance and some powers are still to be introduced, such as advice and assistance to be provided by advice agencies. Currently the interventions available depend on how the legal assistance to be provided is classified, and are not standard

across all aid types. In some instances, such as direct employment of solicitors, SLAB can target all types of assistance, whereas in others such as grant funding, powers are restricted to civil and children's advice, assistance and representation. There is variation as to who can access funding under different mechanisms, in terms of solicitors and lay advisers, and also in terms of what can be paid for. Grant funding, for example, can cover both direct advice delivery and also infrastructure grants or funds for training which support delivery of civil assistance.

If there was consistency in the powers available to SLAB to respond to emerging needs and/or to Scottish Government policy priorities, this could allow for flexibility in the future delivery of legal aid services. For example, the National Advisory Council for Women and Girls made a recommendation 'to ensure that women experiencing domestic abuse have sufficient access to expert legal advice and legal aid'. Should access issues be identified for certain user groups, or groups with protected characteristics, then having a broad range targeted interventions available could help to address this, and deliver Government objectives.

Improving the powers available could also allow for more innovation in service delivery. In other jurisdictions legal aid bodies have arrangements to actively provide basic information and advice (including direct referral services) using employed staff, by way of a telephone triage system, with national coverage. This could help address difficulties in securing access to advice experienced by certain user groups and aid early resolution of disputes. In Scotland, a national telephone service for solicitor services already exists to provide free legal advice to persons in police custody, in the form of the SCL; although other helplines are supported by the public sector, this model for large scale provision of legal advice by solicitors has not been replicated.

Amending the statutory framework to achieve consistency and encourage innovation in delivering legal aid could improve access and provide for the potential of a range of targeted interventions. It could also complement the "channel-shift" referenced in the Review, to enable members of the public to be better equipped to resolve issues themselves through reliance upon a trusted medium of advice provision.

Examples of better planned and co-ordinated service provision could encompass:

- a. Consolidation and review of online advice to ensure up-to-date and quality guidance is available;
- b. Triage telephone services to encourage early intervention and appropriate signposting to advice services or referrals to solicitors;
- c. Co-ordinated and targeted funding with providers of formal alternative dispute resolution processes;
- d. Linking or embedding legal resource within the wider third sector; and
- e. The Framework for Public Funding of Advice in Scotland sets out a series of key principles designed to improve the quality of service and positive outcomes experienced by users of advice services, whilst seeking to make best use of resources across the public sector. This is a voluntary code but more formal use of the Framework could be used as a basis for improved co-ordination.

Better planned intervention could also mean exclusive funding arrangements are made available for advisers or solicitors for a specific range of advice for targeted groups or geographical area, for example by way of grant or contract. Exclusive funding arrangements would restrict access to judicare for case types or geographical areas which are covered by a grant or a contract to deliver specified services. In these circumstances funding could be limited to a grant term. Likewise, panel arrangements could support that solicitors need to be registered to provide assistance in certain categories of case, and possibly with particular competence requirements and referral arrangements.

The Review considered that targeted interventions could also help to address the recommendation of the Review to promote the use of mediation by SLAB (and by the legal profession) in family cases, where appropriate to do so. The current low take up of mediation as an option for resolving family disputes, was perceived by the Review to be caused, in part, by variable advice from solicitors and variable levels of mediation service being available.

The Scottish Government recently consulted on whether it should promote ADR in its Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy. Of the respondents 42% were in favour of introducing mediation information and assessment meetings; 35% in favour of better signposting and guidance; 16% suggested other; 9% in favour of no further action and 29% didn't answer the question. There does appear to be support for

enhanced provision of information around the availability of mediation, and in light of these findings it is not thought necessary to consult further on the promotion of mediation at this time.

Questions:

- A more structured relationship between SLAB and legal aid providers could be facilitated by way of a formalised agreement. Do you support a Memorandum of Understanding between solicitor firms and the Scottish Legal Aid Board being a prerequisite for doing legal aided work?

Yes

No

Unsure

Please give reasons for your answer

- What should be contained in a Memorandum of Understanding to strengthen consistency of service and user centred design?
- What risks might a Memorandum of Understanding system have in relation to the legal sector's ability to respond to emerging legal need, if any?
- In principle, do you support a change whereby SLAB would have a standardised range of intervention powers, in statute, across all legal aid types?

Yes

No

Unsure

Please give reasons for your answer

- Should lay advisers be able to access funding through legal aid to provide advice?

Yes

No

Unsure

Please give reasons for your answer

- What are your views on solicitors providing publicly funded legal assistance being located within third sector organisations that have service users with civil legal issues e.g domestic violence, minority groups or disabled groups?
- SLAB could directly employ lay advisers for tasks such as assisting with information and advice provision to aid early resolution, signposting people to information or services, or referring them to services that will meet their needs. Would you support SLAB being allowed to directly employ lay advisers for such purposes?

Yes

No

Unsure

Please give reasons for your answer

- Do you think there would be benefits to having a telephone triage service that provided basic advice and referral assistance?

Yes

No

Unsure

Please give reasons for your answer

- If such a telephone triage service were implemented, what criteria should be used to identify the most appropriate organisation to deliver this service?
- The Review supported a “channel-shift” in signposting, referrals, advice and information from face-to face and telephone to on-line, while ensuring that face-to-face remains for vulnerable groups or those who struggle to access digital technology. Do you agree that such a channel shift should be promoted?

Yes

No

Unsure

Please give reasons for your answer

- Planned intervention could mean exclusive funding using grants for specific advice or geographical areas. Should grants and/or contracts facilitate exclusive funding arrangements to target a specific identified need?

Yes

No

Unsure

Please give reasons for your answer

- Should grants and/or contracts be able to cover all aid types?

Yes

No

Unsure

Please give reasons for your answer

iii) Simplicity and Fairness

The Review highlighted the complexity of the case-by-case funding system and its inconsistent and complicated rules on eligibility, contributions requirements and clawback arrangements. These rules provide the levers for scope (both means and merits tests) and act as the control mechanisms in a demand led system.

The current system is prescriptive, but it was developed to offer protection against arbitrary decision-making and outside interference and to ensure spending is aligned with Parliament's intentions. In many respects complexity has been driven by a desire to achieve fairness. This adds costs of compliance, inflexibility and at times frustrations for those involved in the process, whether the users of legal services or the providers.

We want to make the processes around the judicare model simpler and more transparent for both the users and the providers of legal services. This can be achieved by simplifying the processes around judicare and/or constructing alternative controls and means for embedding accountability for use of public funds in a way that makes it easier to use. Simplification needs to be underpinned by such controls to minimise the risk of the Legal Aid Fund being spent inappropriately and ultimately compromising affordability of the legal aid system.

One way identified by the Review to achieve simplification is the introduction of a single aid type as part of a new statutory framework, with financial eligibility requirements that are consistent and clear. In our response we advised that SLAB and the Law Society of Scotland were working jointly to consider the viability of this recommendation. This work continues and is expected to provide options for the Scottish Government to consider on a single aid type, or a single grant of legal aid, which applies a simplified test when a person first seeks legal aid services.

Underpinning the current aid types are differing financial eligibility tests and merits tests tailored to the type of justiciable issue, the extent of service to be provided and the forum for resolution of that problem. Some aid types are granted by a solicitor and others require SLAB to take decisions on both financial eligibility and whether the circumstances of the case merit public funding.

We envisage a new statutory framework remaining subject to mean and merits tests but for these tests to be simplified and standardised where appropriate. Aligned to this, we support the Review recommendations that the statutory framework should enable consistent and clear criteria for eligibility and fairer rules on contributions and clawback.

Questions:

- Do you agree that the judicare system should be simplified?

Yes

No

Unsure

Please give reasons for your answer

- Should SLAB have more flexibility in operating the system?

Yes

No

Unsure

Please give reasons for your answer

- Flexibility and fairness can trade off against one another. With this in mind:

In which areas do you think it is most important to maintain consistency?

In which areas do you think it is most important to allow more flexibility?

Financial eligibility

Financial eligibility depends on the type of case that is to be funded and the aid type, with evidence required to support the information provided in all cases. To highlight the complexity and variation in the system, detail on the current thresholds and allowances is provided at **Annex D** for context.

It is against this background that we must consider how the Review recommendations can be achieved on consistency in financial eligibility criteria, and for the process of establishing financial eligibility to be as straightforward as possible in the majority of circumstances.

In moving towards a user centred service, predictability of eligibility and transparency of likely cost to the user are key components. Information on means testing is currently publicly available but does not provide a predictable guide to eligibility. One of the benefits sought from a new system could be a single assessment of eligibility, which recognises that most applicants have straightforward financial circumstances, with fixed incomes and easily ascertained savings. There would not be different tests for casework carried out under advice and assistance and civil legal aid, for example.

It would be possible to design a simplified system of checking financial eligibility. Examples of how this could be achieved operationally include substituting actual expenditure with standard allowances relative to the situation of the potential assisted person, or basing eligibility on a simple gross income cap. In both of these examples, verification may only be required for income, and not for expenditure. Rather than retain different financial eligibility tests across different aid types, there could be a simplified financial test for access to advice at first point of contact with a solicitor, with the user then able to access advice, assistance and representation in tribunal, court and/or appeal courts without further financial eligibility tests.

If financial eligibility is simplified, some people who are currently eligible may not be in future, whilst others may benefit by sitting within the financial threshold and find it easier to establish eligibility. In civil legal assistance a broader eligibility could increase the population of people who are able to access advice and assistance, and so obtain early advice, but remove higher earners from the scope of civil legal aid. In addition, if the eligibility for current advice and assistance was to increase markedly under a new system of financial tests, and/or

contributions and clawback were amended, there is a risk that the overall cost of the Legal Aid Fund could become unaffordable.

Fatal Accident Inquiries

Where family members of a deceased person seek their own legal representation to participate as a party to a Fatal Accident Inquiry, civil legal is available subject to the same statutory tests as applications for other types of case. Consideration was given to increasing financial eligibility limits, and removing the reasonableness test for FAI applications, during the passage through Parliament of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016.

However, extending assistance to persons eligible, but with a contribution toward legal fees, was not considered consistent with maintaining the wide scope of matters for which legal aid is available in order to protect access to justice, in times of considerable strain on public funds. There was also concern that such change would mean legal representation at FAIs would become universal, and would consequently become more adversarial, longer and, potentially, more costly.

Recent high profile cases, including the Clutha FAI, and the Review have given cause to re-examine the current legislation with regard to eligibility for families involved in FAIs, and a commitment to do so in this consultation was made.

The balance of issues to be considered are how to support greater equity of engagement in FAIs without having a negative impact on the process itself. A Fatal Accident Inquiry is intended to be a non-adversarial consideration of the facts that led to fatal accident or accidents. A greater number of individual participants and legal representatives would undoubtedly change the nature of FAIs, as was the view taken by Parliament and referenced above. There is also the possibility that a greater number of participants would affect the timescale for holding a Fatal Accident Inquiry.

The impact of the availability of legal aid on the level of participation is a key factor. Currently, eligibility to some forms of legal aid may be constrained where a person has a joint interest with another person as it is assessed on an individual basis. Legal aid in its current form does not allow for the funding of a group of participants who have a common interest in a particular case. For example in Fatal Accident Inquiries,

where there may be a number of interested parties, each party may have their own solicitors, be eligible for legal aid, and be required to pay contributions. The current system does not allow legal aid to manage the public investment (and the cost of any contributions) in such a case by offering or agreeing group coverage to those who have a common interest. This approach may address some of the potential adverse consequences of individual interests being represented separately during a FAI, while allowing interested parties a greater opportunity to have their perspectives represented in the hearing.

It may therefore be proportionate and affordable to put in place arrangements where legal aid for FAIs could be made available on an individual basis when that is appropriate and on a group basis when that is appropriate.

There is also the question of whether financial contributions should be sought for legal aid for FAIs. For the reasons set above, in respect of affordability of a functioning and accessible legal aid system, financial means testing would still be a feature of legal aid for FAIs in the future, either on an individual or group basis. This approach also upholds the principle that those who can afford to contribute to their legal costs should do so.

Questions:

- Do you support a single eligibility assessment at the earliest point in the application process?

Yes

No

Unsure

Please give reasons for your answer

- Are there situations when the continuation of more complex financial calculations would be required?

Yes

No

Unsure

Please give reasons for your answer and identify the situations in which you think this would be necessary (if any).

- Should there be more strictly defined financial thresholds for eligibility?

Yes

No

Unsure

Please give reasons for your answer

- Would you support the availability of funding to those with a common interest in legal proceedings, such as Fatal Accident Inquiries?

Yes

No

Unsure

Please give reasons for your answer, and if you answered 'Yes' provide any views on how this could be managed?

Contributions and Clawback

The cost of legal assistance supported by the Legal Aid Fund can be offset in three ways. The cost of a case may be met, in whole or in part, by an award of expenses in favour of a successful legally aided party. Secondly, further to a financial eligibility assessment, if a person has income or capital over set thresholds, they will be liable to pay a contribution towards the cost of their case. In the third scenario, part or all of any money or property won or kept in a dispute may be taken into account at the end of the case to meet the cost of the legal services provided by the public purse, and this is known as “clawback”.

The operation of contributions and clawback supports Scottish Government legal aid policy that those who can afford to pay towards the costs of their legal services should do so. In order to help maintain wide scope and to ensure fairness, we intend to retain this policy. The Review was broadly supportive of this principle and indeed recommended that the system of contributions for criminal legal assistance should be brought into force.

Contributions

Currently contributions are collected by SLAB in civil and children’s legal aid. The upper limit of those contributions is either the cost of the person’s case or the amount they are assessed as able to pay, calculated in accordance with the statutory rules.

The current contributions system can help support a broad eligibility regime, but the calculation of contributions is complex and finely tuned to individual circumstances. Applicants with superficially similar circumstances, but who might have very different abilities to pay, would therefore have different contributions. In order to reach these decisions, many applicants are required to provide comprehensive financial information and proof of income and outgoings. There are also trade-offs in terms of the cost of administering the system, predictability and perceived fairness. The assessment of financial eligibility and calculation of contributions go hand in hand in the current system. A simpler and more transparent financial eligibility system, as discussed above, could also enable a simpler contributions system. For example, a contributions regime based on gross income rather than disposable income, but accompanied by a higher personal allowance than at present.

Clawback

There are some inconsistencies in the statutory provisions governing the operation of clawback. If property is recovered as a result of a process of negotiation funded by advice & assistance, SLAB has a discretion as to whether clawback is applied. If the property is recovered because of an award or settlement in a court case funded by legal aid, there is no such discretion.

We recognise the complexity around clawback provisions as identified by the Review and its finding that on occasions applying clawback could be considered unfair. Employment Tribunal cases were expressly identified as an example of this. The Review considered that a test could be introduced as to whether clawback should be applied, possibly based on reasonableness and that could take the form of a means or hardship test. We would welcome views on how future provisions could be made simpler and more certain for clients, solicitors and SLAB.

Questions:

- Do you agree that those who can afford to do so should pay a contribution?

Yes

No

Unsure

Please give reasons for your answer

- Would you support the implementation of contributions in criminal legal assistance for those who can afford to pay?

Yes

No

Unsure

Please give reasons for your answer

- The existing contributions regime is complex but highly personalised. Would you support a simplified, more transparent and more accessible contributions system, even if this might risk some of benefits of this personalisation?

Yes

No
Unsure

Please give reasons for your answer

- There are inconsistencies in the operation of clawback. Would you support addressing this by removing discretion to create a more transparent system, even if this might risk some benefits of the flexibility this discretion allows?

Yes
No
Unsure

Please give reasons for your answer

- Would you support that there be a test on whether clawback should apply?

Yes
No
Unsure

Please give reasons for your answer

- Do you hold any other views on how the current system of contributions and clawback could be improved?

Merits test

The merits tests are used to determine if it is reasonable that public funding be granted to someone seeking legal assistance. We consider that the merits tests in place for cases seeking funding through judicial legal aid are broadly set at the correct level, without introducing undue complexity to the system. The Review recommended statutory codification of the merits tests, meaning any changes thereafter would need to be subject to Ministerial approval. SLAB currently publishes detailed and case specific on-line guidance on how the merits tests should be addressed. This achieves flexibility and transparency in the current system which codification may hinder somewhat, however, we welcome views on how any tests could be better aligned or streamlined, whilst maintaining the assurance that funding is directed at appropriate cases.

Within the current system some grants can be made by solicitors, under advice and assistance and ABWOR, whereas other grants are authorised by SLAB, for civil and criminal legal aid. The grant is a gateway into a system that is supported by further controls such as authorised expenditure limits, the need to obtain sanction to incur outlays in certain circumstances, and checks post completion of work when accounts are submitted for payment.

Questions:

- Do you consider the merits tests appropriate and transparent?

Yes

No

Unsure

Please give reasons for your answer

- Merits tests could be applied at defined stages during the lifetime of a grant of legal aid. For example before an appearance is made in civil court proceedings, or on receipt of summary complaint and any following appeal. In principle, do you support the application of a merits test at defined stages during the lifetime of a grant of legal aid?

Yes

No

Unsure

Please give reasons for your answer

- We are aware that in other jurisdictions, such as the Netherlands, applications are submitted under a high trust model and automatically granted, subject only to financial eligibility checks. What are your views on the current balance between a solicitor's ability to grant advice and assistance and the need to seek prior approval from SLAB for funding in other aid types?

Do you think this balance should be shifted, and if so in what direction?

- In general, what controls do you think should be put in place to protect the Legal Aid Fund from inappropriate use?
- Would you support the introduction of any merits test on what is currently the advice and assistance scheme?

iv) Enhanced Statutory Powers and Best Value

The Review recommended that a more flexible and permissive service be developed through a new statutory framework. Such a framework would allow SLAB to respond to changes in needs, changes in the justice system and changes in wider society. However, in a public service this would need to be supported by responsible spending that can demonstrate best value through high standards and quality assured delivery mechanisms.

Delivering such a service could, in part, be achieved by empowering SLAB to operate more strategically. At present, SLAB can advise Ministers on the availability and accessibility of legal services, but the decision on whether any identified problems require legally aided service provision rests with the Scottish Government.

An alternative approach, as outlined in the Review, would be to devolve that decision to SLAB and to local authorities, for example through jointly agreed local action plans subject to statutory guidance and/or requiring Ministerial agreement. Further provision could be made for SLAB to identify advice needs and validate these through an agreed engagement and consultation process, with SLAB having the ability to make use of targeted interventions once the outcome of this process was known, without the need to obtain the agreement of either national or local government.

Any of these options could be supplemented by changes to the composition and structure of SLAB's Board, for example to stipulate the inclusion of consumer, advice sector or local authority representation, whilst all board members would continue to be appointed under public appointment rules.

In considering how to make the system flexible enough to respond to external developments, the Scottish Government will also think about how this can be provided for in a statutory framework, which includes primary legislation and the extent to which this could be provided for in any regulation making powers in secondary legislation. Currently, for example, changes to what can be paid into or out of the Legal Aid Fund requires primary legislative change, whereas others such as such change to court processes or forums that impact on case management may require either primary or secondary legislative change.

Best Value is underpinned by the quality of services that are publicly funded. The existing statutory framework does not provide for a uniform approach to quality assurance; currently there are two public sector systems of quality assurance systems covering services which can be funded by the Legal Aid Fund. The peer review schemes for solicitors focuses on the quality of solicitor work in legally aided cases, and the Scottish National Standards for Information and Advice Providers (SNSIAP) covers advice organisations, across any funding stream, reviewing both the quality of an individual's work and the organisational structures that should support its delivery.

A unified system could embed a user focus through enhanced measures to assure the quality of services, an issue highlighted in the Review. Consumer considerations could take into account the particular service delivery structures required for the funding model used and give a more rounded view beyond technical accuracy of the advice provided and compliance with legal aid requirements. Under enhanced powers, SLAB could be provided with the ability to register and quality assure all those providing legally aided advice and representation, to give effect to the embedding of the consumer voice and best value considerations. This could be complemented by SLAB having powers to adjust the delivery model of legal aid services in response to quality assurance, not just to facilitate access to services. For example, SLAB could engage high scoring providers to deliver legally aided assistance to address an emerging priority need.

Whereas quality assurance can be determined on a cyclical basis, Best Value should be a continuous driver in the delivery of any public service. Therefore other measures that may help to embed Best Value into legal aid should be considered. These include requirements for any organisation that receives payment from the Legal Aid Fund to enter into a service level agreement. This agreement could set out the extent of the service to be offered, express a willingness to take a minimum number of appropriate referrals, make commitments to engaging and working in partnership with stakeholders and the local bar.

Outlays

Outlays also engage Best Value considerations. Case related outlays, which meet the fees for expert witnesses and reports, that are necessary to progress a case, represent a significant cost to the Legal Aid Fund. On average outlays account for around 13% of total payments made by SLAB, and in 2017/18 cost £17,844.00.

Outlays will cover the cost of a range of payments required to progress a case from travel expenses, shorthand writers, sheriff officers and expert witness reports and other specialist reports. Some of these are already standard payments.

Outlay costs are incurred by legal aid providers and are reimbursed by SLAB. This may not occur for some time after an outlay has been met, and can cause cash-flow issues for firms. There are different rules for reimbursement depending on the type of case. The Legal Aid Fund bears the cost of outlays, but each transaction incurred is managed by the solicitor handling the case, subject to controls applied by SLAB. SLAB is a funder of expert witnesses' services and is not a purchaser of services.

The consequence of this is that the controls that are required to engage best value are applied on a case by case basis, and engage consideration of the varied costs for some scarce expert types and others where there is a thriving market and competition between suppliers which can reduce the cost to the public purse.

Outlays can also include payments to others that are not expert witnesses, for example payments to GPs for medical reports. This type of report may be more susceptible to standardised payment rates. Acknowledging that in the current system, SLAB does not purchase services, the review recommended that a preferred suppliers list should be established which would add further controls to manage quality and expenditure but still allow solicitors to choose which of the preferred suppliers to approach.

Questions:

- SLAB could have statutory powers to operate more strategically. Do you support there being statutory processes that allow SLAB to facilitate legal aid delivery in a more flexible and permissive way?

Yes

No

Unsure

Please give reasons for your answer

- What checks or controls would you consider necessary if SLAB had statutory powers to operate more strategically?

- Do you consider changes to the composition and structure of SLAB's Board necessary to help support a more strategic role?

Yes

No

Unsure

Please give reasons for your answer

- Do you support that SLAB should register and quality assure all those providing services paid by the Legal Aid Fund?

Yes

No

Unsure

Please give reasons for your answer

- Do you agree with the Review recommendation that all quality assurance reviews and reports on both lawyers and third sector advice services be published?

Yes

No

Unsure

Please give reasons for your answer

- There are a number of approaches that could achieve greater surety and control over outlays. How desirable on a scale of 1 – 5 (1 being very undesirable and 5 being very desirable) do you find the idea of the statutory framework to give SLAB powers to:

1. fix a preferred supplier list and to set rates for commonly used experts;

2. deal directly with the experts to arrange payment;

3. make payment on the basis of a fixed tables of fees for experts, which must be agreed to when accepting instructions relating to a legal aid client

- Are there types of expert reports and other reports which could be subject to more control than others?

Yes

No

Unsure

Please give reasons for your answer. If yes, what controls should be put in place?

Annex A: Respondent Information Form



Scottish Government
Riaghaltas na h-Alba
gov.scot

Legal Aid Reform in Scotland: Consultation

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:

<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

Annex B: Consultation questions

Part 1 – Foundations for Change

i) legal aid has the user voice at its centre

- The Review recommends the voice and interest of the user be at the centre of the legal aid system. Do you agree?

- Yes
- No
- Unsure

Please give reasons for your answer.

- How desirable are each of the following ways of embedding the user voice and experience into the design and delivery of a legal aid service, on a scale of 1 – 5 (1 being very undesirable and 5 being very desirable).

1. Direct engagement through enhanced approaches to quality assurance
2. Indirect engagement through consumer panels
3. Collaborative engagement by connectivity across the publicly funded legal assistance landscape.

Please give reasons for your answer.

- Partnership working and Community Planning Partnerships (CPPs) help provide local context to user needs. Would you support placing duties on a prescribed list of public sector organisations, to work together in order to help CPPs achieve their goals?

- Yes
- No
- Unsure

Please give reasons for your answer

ii) legal aid has flexibility to address and adapt to user need

- The Scottish Government supports the recommendation in the Review that provision by publicly-funded private solicitors should continue. Do you consider that there are ways in which the mixed model can be strengthened?

- Yes
- No
- Unsure

Please give reasons for your answer

- Are there specific areas of law, eg domestic violence or disability issues, that the current judicare funding arrangements are serving less well?

- Yes
- No
- Unsure

Please specify which areas and give reasons for your answer

- Are there specific areas of law that might benefit from a more targeted approach to funding solicitor services?

- Yes
- No
- Unsure

Please specify which areas and give reasons for your answer

- Are there certain groups that when accessing legal aid might benefit from a more targeted approach to funding solicitor services?

- Yes
- No
- Unsure

Please specify which groups and give reasons for your answer

- Do you support building additional flexibility into the delivery of legal aid?

- Yes
- No
- Unsure

Please give reasons for your answer

iii) Legal aid as a public service

- As currently structured and delivered, do you consider legal aid a public service?

- Yes
- No
- Unsure

Please give reasons for your choice

- Are there changes that you consider would make legal aid function more as a public service?

- Yes
- No
- Unsure

Please give reasons for your answer

- Are there potential risks to looking at the delivery of legal aid as a public service?

- Yes
- No
- Unsure

Please give reasons for your answer

Part 2 – The Change Agenda

i) Scope and oversight

- Are there actions that could be taken by the Scottish Government to help maintain or strengthen the current scope of legal aid?

- Yes
 No
 Unsure

Please give reasons for your choice

- Are there any other aspects of the current scope of legal aid that you think should be reformed?

- Yes
 No
 Unsure

Please give reasons for your choice

- Are there actions that should be taken by the Scottish Government to help support and strengthen the work of SLAB?

- Yes
 No
 Unsure

Please give reasons for your choice

ii) Improving access and targeted interventions

- A more structured relationship between SLAB and legal aid providers could be facilitated by way of a formalised agreement. Do you support a Memorandum of Understanding between solicitor firms and the Scottish Legal Aid Board being a prerequisite for doing legal aided work?

- Yes
 No
 Unsure

Please give reasons for your choice

- What should be contained in a Memorandum of Understanding to strengthen consistency of service and user centred design?

- What risks might a Memorandum of Understanding system have in relation to the legal sector's ability to respond to emerging legal need, if any?

- In principle, do you support a change whereby SLAB would have a standardised range of intervention powers, in statute, across all legal aid types?

- Yes
 No
 Unsure

Please give reasons for your answer

- Should lay advisers be able to access funding through legal aid to provide advice?

- Yes
- No
- Unsure

Please give reasons for your answer

- What are your views on solicitors providing publicly funded legal assistance being located within third sector organisations that have service users with civil legal issues e.g domestic violence, minority groups or disabled groups?

- SLAB could directly employ lay advisers for tasks such as assisting with information and advice provision to aid early resolution, signposting people to information or services, or referring them to services that will meet their needs. Would you support SLAB being allowed to directly employ lay advisers for such purposes

- Yes
- No
- Unsure

Please give reasons for your answer

- Do you think there would be benefits to having a telephone triage service that provided basic advice and referral assistance?

- Yes
- No
- Unsure

Please give reasons for your answer

- If such a telephone triage service were implemented, what criteria should be used to identify the most appropriate organisation to deliver this service?

- The Review supported a “channel-shift” in signposting, referrals, advice and information from face-to face and telephone to on-line, while ensuring that face-to-face remains for vulnerable groups or those who struggle to access digital technology. Do you agree that such a channel shift should be promoted?

- Yes
- No
- Unsure

Please give reasons for your answer

- Planned intervention could mean exclusive funding using grants for specific advice or geographical areas. Should grants and/or contracts facilitate exclusive funding arrangements to target a specific identified need?

- Yes
- No
- Unsure

Please give reasons for your answer

- Should grants and/or contracts be able to cover all aid types?

- Yes
- No
- Unsure

Please give reasons for your answer

iii) Simplicity and Fairness

- Do you agree that the judicare system should be simplified?

- Yes
- No
- Unsure

Please give reasons for your answer

- Should SLAB have more flexibility in operating the system?

- Yes
- No
- Unsure

Please give reasons for your answer

- Flexibility and fairness can trade off against one another. With this in mind:

In which areas do you think it is most important to maintain consistency?

In which areas do you think it is most important to allow more flexibility?

- Do you support a single eligibility assessment at the earliest point in the application process?

- Yes
- No
- Unsure

Please give reasons for your answer

- Are there situations when the continuation of more complex financial calculations would be required?

- Yes
- No
- Unsure

Please give reasons for your answer and identify the situations in which you think this would be necessary (if any).

- Should there be more strictly defined financial thresholds for eligibility?

- Yes
- No
- Unsure

Please give reasons for your answer

- Would you support the availability of funding to those with a common interest in legal proceedings, such as Fatal Accident Inquiries?

- Yes
- No
- Unsure

Please give reasons for your answer, and if you answered 'Yes' provide any views on how this could be managed?

- Do you agree that those who can afford to do so should pay a contribution?

- Yes
- No
- Unsure

Please give reasons for your answer

- Would you support the implementation of contributions in criminal legal assistance for those who can afford to pay?

- Yes
- No
- Unsure

Please give reasons for your answer

- The existing contributions regime is complex but highly personalised. Would you support a simplified, more transparent and more accessible contributions system, even if this might risk some of benefits of this personalisation?

- Yes
- No
- Unsure

Please give reasons for your answer

- There are inconsistencies in the operation of clawback. Would you support addressing this by removing discretion to create a more transparent system, even if this might risk some benefits of the flexibility this discretion allows?

- Yes
- No
- Unsure

Please give reasons for your answer

- Would you support that there be a test on whether clawback should apply?

- Yes
- No
- Unsure

Please give reasons for your answer

Do you hold any other views on how the current system of contributions and clawback could be improved?

- Do you consider the merits tests appropriate and transparent?

- Yes
 No
 Unsure

Please give reasons for your answer

- Merits tests could be applied at defined stages during the lifetime of a grant of legal aid. For example before an appearance is made in civil court proceedings, or on receipt of summary complaint and any following appeal. In principle, do you support the application of a merits test at defined stages during the lifetime of a grant of legal aid?

- Yes
 No
 Unsure

Please give reasons for your answer

- We are aware that in other jurisdictions, such as the Netherlands, applications are submitted under a high trust model and automatically granted, subject only to financial eligibility checks. What are your views on the current balance between a solicitor's ability to grant advice and assistance and the need to seek prior approval from SLAB for funding in other aid types?

Do you think this balance should be shifted, and if so in what direction?

- In general, what controls do you think should be put in place to protect the Legal Aid Fund from inappropriate use?

- Would you support the introduction of any merits test on what is currently the advice and assistance scheme?

iv) Enhanced Statutory Powers and Best Value

- SLAB could have statutory powers to operate more strategically. Do you support there being statutory processes that allow SLAB to facilitate legal aid delivery in a more flexible and permissive way?

- Yes
- No
- Unsure

Please give reasons for your answer

- What checks or controls would you consider necessary if SLAB had statutory powers to operate more strategically?

- Do you consider changes to the composition and structure of SLAB's Board necessary to help support a more strategic role?

- Yes
- No
- Unsure

Please give reasons for your answer

- Do you support that SLAB should register and quality assure all those providing services paid by the Legal Aid Fund?

- Yes
- No
- Unsure

Please give reasons for your answer

- Do you agree with the Review recommendation that all quality assurance reviews and reports on both lawyers and third sector advice services be published?

- Yes
- No
- Unsure

Please give reasons for your answer

- There are a number of approaches that could achieve greater surety and control over outlays. How desirable on a scale of 1 – 5 (1 being very undesirable and 5 being very desirable) do you find the idea of the statutory framework to give SLAB powers to:

1. fix a preferred supplier list and to set rates for commonly used experts;

2. deal directly with the experts to arrange payment;

3. make payment on the basis of a fixed tables of fees for experts, which must be agreed to when accepting instructions relating to a legal aid client

- Are there types of expert reports and other reports which could be subject to more control than others?

Yes

No

Unsure

Please give reasons for your answer. If yes, what controls should be put in place?

Annex C: Handling of Personal data

The data protection legislation is changing and a new Data Protection Bill is progressing through the UK Parliament. It will give you greater powers to protect your own privacy, and place greater responsibility on those processing your data for any purpose. The following is to explain your rights and give you the information you will be entitled to under the new legislation. Please note that this section only refers to your personal data (your name, address and anything that could be used to identify you personally) not the content of your response to the consultation.

The identity of the data controller and contact details of our Data Protection Officer

The Scottish Government is the data controller. The Data Protection Officer for the Scottish Government can be contacted at dpa@gov.scot.

Why we are collecting the data

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes. We may also use it to contact you about related matters.

Legal basis for processing the data

Part 2 of the Data Protection Bill (subject to change before it becomes an Act) provides that as a government department, the Scottish Government may process personal data as necessary for the effective performance of a task carried out in the public interest eg. a consultation.

With whom we will be sharing the data

We will not be sharing personal data outside of the Scottish Government.

Your rights, e.g. access, rectification, erasure

The data we are collecting is your personal data, and you have considerable say over what happens to it. You have the right:

- a) To see what data we have about you
- b) To ask us to stop using your data, but keep it on record

- c) To have all or some of your data deleted or corrected
- d) To lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at <https://ico.org.uk/>, or telephone 0303 123 1113.

Scottish Government will not send your personal data outwith the European Economic Area. This data will not be used for any automated decision making. This data will be stored in a secure government IT system.

Annex D: Financial Eligibility

A client seeking advice and assistance is eligible if they have total disposable income of less than £245 per week and disposable capital under £1,716. A relatively basic assessment is undertaken by the client's solicitor; although there some standard allowances no regard is had to household liabilities.

A client applying for civil legal aid is subject to a more detailed analysis of household earnings, assets, liabilities and certain costs to determine disposable income and disposable capital. The financial eligibility thresholds are more generous, with a client entitled to civil legal aid if disposable income does not exceed £26,239 a year and disposable capital does not exceed £13,017. The assessment is carried out by SLAB.

For both summary and solemn criminal legal aid SLAB will assess financial eligibility on basis of whether the expenses of the case could not be met without undue hardship to the applicant or their dependants. For both aid types the upper threshold for capital is tied to that for advice and assistance, and in summary criminal legal aid the upper threshold of income is linked to that for civil legal aid. If the applicant has a spouse or partner, details of that person's finances must also be provided unless that person is a co-accused, complainer or a Crown witness in the case against the applicant.

Certain types of advice, such as police station advice, and certain kinds of cases, such as applications for adults with incapacity orders, are not subject to a financial assessment.



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