Law Society of Scotland

70 Years 1949-2019

Consultation Response

Legal aid reform in Scotland

19 September 2019

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

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

Our Legal Aid Committee welcomes the opportunity to consider and respond to the Scottish Government consultation, *Legal Aid Reform in Scotland*. We have the following comments to put forward for consideration.

General comments

Our statutory role is to represent the solicitor profession and to represent the public interest in relation to the solicitor profession in Scotland and also to have regard to the regulatory objectives[1]:

- supporting the constitutional principle of the rule of law and the interests of justice;
- protecting and promoting the interests of consumers and the public interest generally;
- promoting access to justice and competition in the provision of legal services;
- promoting an independent, strong, varied and effective legal profession;
- encouraging equal opportunities within the legal profession;
- and promoting and maintaining adherence to the professional principles

Our approach to legal aid is determined by these objectives and by the human rights that are embedded in the devolution settlement under the Scotland Act 1998. We believe that access to justice is a fundamental right, with legal aid crucial in providing that access to people who are otherwise unable to afford it. We believe that lack of means should not prevent a person from enforcing their rights or determining their responsibilities.

One of the great strengths of the current legal aid scheme is that the network of providers of legal aid matches the breadth of the scope of assistance and areas of law that the scheme provides. There are

[1] Legal Services (Scotland) Act 1986, section 1

currently over 500 firms providing criminal legal aid and 600 providing civil legal aid in locations across Scotland, urban and rural. This number is, however, rapidly declining. There has been a decrease of around a quarter of criminal providers in the last five years, and around a fifth of civil providers. There are several factors for this reduction. Declining case numbers undoubtedly play a part, though we see the bureaucracy and complexity of the system and the unsustainability of current remuneration as the main drivers.

The legal aid scheme established by the Legal Aid (Scotland) Act 1986 predates the Human Rights Act 1998, the establishment of the Scottish Parliament, the devolution settlement established by the Scotland Act 1998 and the regulatory objectives established by the Legal Services (Scotland) Act 2010. It has been amended through regulations over time, but has become more complex in doing so, making it difficult to navigate for experienced practitioners and more so for members of the public.

The remuneration arrangements for the scheme, which require regulations to amend often detailed tables of fees, allow no mechanism for periodic review or to recognise the real-terms effect of inflation. As a result, before a 3% increase to fees in April 2019, most fees had not increased in a decade; some for significantly longer. In addition, the outlays required to conduct cases, fees for doctors' reports, sheriff officers, expert witnesses and others – often totalling significantly more than the fees for the solicitor providing the core service - have to be borne by the provider, often carried for a considerable period of time before it is possible to apply for a reimbursement, which itself may be subject to abatement. Consideration of fees does not form part of the consultation, instead being part of the work taken forward by the expert fee panel, but our consultation response reiterates our concerns around the sustainability of funding.

It is on this basis that we support various proposals from the consultation paper, including enhancing the user voice in the legal aid system, developing simpler systems for means and merits tests, fairer contributions and clawback and a coordinated system for outlays. On the same basis, we do not believe that additional statutory powers, or more targeted interventions are required.

Responses to consultation questions

Part 1 – Foundations for Change

i) Legal aid has the user voice at its centre

Question 1. The Review recommends the voice and interest of the user be at the centre of the legal aid system. Do you agree?

Yes. The legal aid system is an essential part of the framework for access to justice in our society. As such, the public interest and voice of the users of legal aid are important factors in the development and operation of legal aid. The needs of both consumers and providers, together with the wider public interest in a proper functioning legal aid system, must be taken into account at all stages.

The experience of those using solicitor services is tested regularly by the Law Society of Scotland. Our most recent survey of the public showed that 90% of those who had used a solicitor in the last five years were satisfied with the service they received, and 56% were very satisfied. This survey does not distinguish between legal aid and non-legal aid services. A 2018 SLAB survey of criminal legal assistance applicants showed that 86% of applicants rated the service received from their solicitor to be good, with 66% saying it was very good.

Because of the breadth of the legal aid system, it may be challenging to develop ways to reflect that breadth in incorporating the user voice in the legal aid system. One recent approach to user voice is around the development of social security experience panels, with around 2,400 members providing views on the system in Scotland, participating through short surveys, or taking part in interviews and workshops, face-to-face, by telephone or online. Such an approach could benefit legal aid, though it would be important to be clear around the scope of such engagement, working out which issues might be addressed by the legal aid system, and which may be issues instead for courts, for tribunals or elsewhere in the justice system. Additionally, SLAB already conducts research with applicants to address challenges and make improvements to the legal aid system. It may be that developing this role, rather than statutory reform, could be a suitable way to approach this issue.

If there is to be wider development of the role of users in the legal aid system, we believe that this should include solicitors, who are also users of the legal aid system. Ensuring that the legal aid system meets their needs is also an important objective.

Question 2. 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.**

We believe that there could be benefits to engagement through consumer panels, though participation in these, as highlighted above, would need to be as broad as the scope of the current system and with a clear understanding around the potential scope of such groups. We believe that collaborative engagement has benefits and is indeed being undertaken currently. Revision of the peer review system to include additional areas for review is an area that we believe would require additional detail and be subject to further consultation.

Question 3. 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?

We are unsure about the benefits of this approach: the CPP model does not readily fit legal aid as a national and universal service; the experience of local planning arrangements for legal aid in England and Wales raised a number of practical challenges; and funding and resource to adequately respond to need at a local authority level can be significant.

The emphasis on Community Planning Partnerships (CPPs) was a key recommendation of the Christie Commission on the future delivery of public services, delivering integrated services that deliver successful outcomes for people in local communities across Scotland, and involving people and organisations at local authority level in the design and delivery of these services[2].

The Christie Commission's report stated, "This integrated approach is vital to the achievement of outcomes for people and communities. Because many services are organised at a local authority level, and because of the democratic accountability of elected councillors, the local authority area level has been identified as

[2] *Commission on the Future Delivery of Public Services*, June 2011 (https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2011/06/commission-future-delivery-public-services/documents/0118638-pdf/0118638-pdf/govscot%3Adocument/0118638.pdf)

the appropriate level for partnership working of this kind." Applying this same process to legal aid raises four questions that the consultation paper does not address:

- The responsibility on government to provide access to justice is a national one and also a universal one, where no-one is left unable to exercise their rights or be held accountable for their responsibilities – it is unclear what kind of local variations would be intended
- Legal aid is not a service organised at local authority level - where there is local planning in the justice system, for instance, criminal justice boards, this is at sheriffdom level
- Democratic accountability at a local level was one of the drivers for recommending wider CPP involvement – it is unclear which additional bodies would be involved in CPP working and how these would be held to account
- It is unclear what kind of integrated service provision is envisaged – for instance, would a legal aid provider be best placed to refer a client to services for addiction, if those issues are being addressed in court proceedings

The use of Community Legal Services Partnerships (CLSPs) for legal aid in England and Wales was an example of such local planning. Introduced in the wake of the Access to Justice Act 1999, each local authority area was to have a CSLP, bringing together the local authority, the Legal Services Commission (at that stage the equivalent to SLAB in England and Wales) and others, to identify local need, to map local provision of services and to create referral networks.

Because of the scale of the jurisdiction, there were over 200 separate partnerships. Because the structure and composition of these was not specified by statute or regulation, there was significant variation between local authority areas (though supporting this network was assisted by the Legal Services Commission having 12 regional offices with around 1,000 staff distributed between them in 2001-02).

The initial progress of these CLSPs was mixed. As the National Audit Office (NAO) stated, "The main driver in the progress of the partnerships seems to be the commitment of local authorities. Some local authorities have been supportive and have played a key role in making progress. Staff at the [Legal Services] Commission told us that other local authorities had been less enthusiastic, or had to contend with other priorities[3]." The NAO found providers were disillusioned, particularly at the slow progress being made in shaping local services.

The Ministry of Justice was also critical of the practical impact of CLSPs, stating in 2009, "In spite of the opportunity that CLSPs had to make service provision more responsive to local need, many proved not to increase access to advice for clients. Indeed, the Citizens Advice report *Geography of Advice* identified "advice deserts" opening up during the time the Legal Services Commission facilitated CLSPs. Their report points to "the growth of advice deserts in various parts of the country and major geographical

[3] National Audit Office, *Community Legal Service: the introduction of contracting*, November 2002 (https://www.nao.org.uk/wp-content/uploads/2002/11/020389.pdf)

inconsistencies in service provision".[4] The MoJ also highlighted that those CLSPs that had made "most difference" had been led by the most active local providers.

There was a pilot of CLSPs in Scotland in 2003, involving four areas – Glasgow West, Fife, Edinburgh and Argyll & Bute – though this initiative did not progress beyond this trial stage. The evaluation from the pilot provided mixed findings, with pilot participants surveyed on a before and after basis[5]:

- 94% of respondents had worked in partnership before, with 44% stating that such work, in their experience, was always worthwhile
- 81% of respondents had expected improvement in planning and coordination at the start of the pilot and 49% considered this achieved by the end
- 50% of respondents had expected greater innovation and 26% considered this achieved
- 86% of respondents had expected greater joint working and 80% considered this achieved

The CLSP pilot was not progressed by the Scottish Executive at that stage. Developing a CPP model was recommended by the Scottish Government in its recent landscape review of publicly funded advice, though the findings of that review did note, "While there was evidence of support for improved referral within local authority areas, there was little appetite detected for the kind of needs-based planning and co-ordination process trialled in 2003 [as part of the CLSP pilot], using population surveys and mapping of supply to inform the development of an action plan.[6]" Similar to the MoJ findings, ensuring that there is commitment and active participation from local authorities and other key stakeholders would be crucial to the success of any partnership approach.

It is unclear from the consultation paper what is envisaged, for instance, whether SLAB (and potentially other bodies) are included in the scope of existing CPP arrangements by inclusion as a community planning partner in Schedule 1 to the Community Empowerment (Scotland) Act 2015. The consultation paper notes that partnership planning may be a longer-term aspiration, and we suggest that, particularly in light of the significant questions raised around scope, funding and capacity for such planning, more detailed proposals would need to be brought forward for consultation if this was the preferred policy option.

[4] Ministry of Justice, *Study of Legal Advice at a Local Level*, June 2009 (http://www.justice.gov.uk/publications/docs/legal-advice-local-level.pdf)

[5] Scottish Executive Social Research, *An Evaluation of the Community Legal Service Pilot Partnerships*, 2004

[6] Scottish Government, *Making Justice Work: Enabling Access to Justice Project – Landscape review of publicly funded legal assistance*, 2014 (https://www.slab.org.uk/export/sites/default/common/documents/about_us/research/Patterns_Supply/PFLA_landscape_review_FINAL.pdf)

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

Question 4. 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?

Private solicitors are a key part of an independent and effective legal aid system. They provide widespread geographic coverage and expertise and offer legally aided clients a choice of representative. Enabling a wide range of private solicitors to participate in the legal aid system will lead to a stronger and more effective network of providers. Ensuring that solicitors are paid at a rate that allows them to sustain a legal practice while undertaking legal aid cases is essential to a strong and sustainable legal aid system. It is not appropriate for firms to be cross-subsidising legal aid work with private client fees. Paying a fair and sustainable fee and reducing the level of bureaucracy and administration by simplifying the system will encourage and support a broad network of private solicitors to participate in the legal aid system across Scotland and across different areas of law.

We note that the Scottish Government is currently separately considering the issue of fee review for legal aid and we look forward to continuing to work with them on this important element of the legal aid system.

Question 5. Are there specific areas of law, eg domestic violence or disability issues, that the current judicare funding arrangements are serving less well?

We refer to our answer to the previous question and note that addressing issues around fees and simplification would help to address difficulties of supply and ensure that private solicitors were able and willing to provide legal aid services across a broad range of areas of law. Consideration could also be given to whether there is sufficient flexibility within the current system to assist vulnerable clients, who may have additional communication needs which the current payment system may not accommodate as well as it could.

Question 6. Are there specific areas of law that might benefit from a more targeted approach to funding solicitor services?

We refer to our answers to the previous two questions and note the role of fees and simplification to ensuring full and sustainable coverage by private solicitors. Any targeted approach to funding must take into account the need to preserve the independence of the legal profession and access to a solicitor of choice.

We are aware of challenges in the area of reciprocal enforcement of maintenance orders. We highlighted these in our response to the review and would suggest that it may be possible to take a different approach to allocating and paying these cases.

Question 7. Are there certain groups that when accessing legal aid might benefit from a more targeted approach to funding solicitor services?

We believe that the best way of ensuring effective access to legal aid is to enable a widespread and diverse network of private practitioners, supported where required by in-house solicitors. It may be appropriate for a targeted approach to be taken to address the particular needs of a specific group, for example to allow for access to solicitors through other service providers with a strong connection to a particular group. This may be helpful, for example, when considering how asylum seekers or victims of domestic abuse can be supported to receive legal aid for the range of legal issues they may be facing. However, it is necessary to consider whether a different approach is needed, or whether issues around access are being caused by a failure to adequately fund and maintain the legal aid system.

Question 8. Do you support building additional flexibility into the delivery of legal aid?

We think that the current legal aid system provides a high degree of flexibility. Because of the broad scope of legal aid and the demand-led budget, this has allowed a flexible market response to emerging need. An example of this is the increase to civil legal aid expenditure during the economic downturn, as people sought and received help for a range of issues emerging from this difficult economic climate.

iii) Legal aid as a public service

Question 9. As currently structured and delivered, do you consider legal aid a public service?

Providing access to an effective legal aid system is an obligation on the state, and has implications for the rule of law, taking it beyond the simplest view of a public service. Questions of cost benefit and best value must be taken in the context of the core benefit to society of maintaining the rule of law. As Lord Reed set out in *R (on the application of Unison) v Lord Chancellor* "the idea that bringing a claim before a court or a tribunal is a purely private activity, and the related idea that such claims provide no broader social benefit,

are demonstrably untenable."[7] In addition to providing a fundamental basis for the rule of law, ensuring access to justice, including the ability to receive independent legal advice and to use the courts as an independent and fair forum for dispute resolution, has considerable benefits across other areas of public service and public spending. Our 2017 research on the social return on investment in legal aid found that for all areas looked at (crime, housing, and family), there was a positive return, meaning that for every £1 spent on legal aid, the benefit to society during the period of the case and for up to one year afterwards was greater than £1 – approximately £5 for criminal and family law cases, and £11 for housing cases.[8] Other research has suggested that expenditure on access to justice has an effect on GDP overall – increasing expenditure in this area by 1% results in an increase in GDP of 0.83% over a five year period[9].

The question may be more whether legal aid should adopt the changes seen elsewhere in the public sector, and the consultation paper suggests several areas:

- 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
- Includes accessible digital services

Whether legal aid is classified as a public service or not, if there is effective practice in other areas (within public services or not), then it is important to consider whether these should be adopted. Our response above discusses user needs, and we support the development of accessible digital services, though with caution around the potential for digital exclusion. The consultation paper suggests that one of the consequences from considering legal aid as a public service is Best Value as an approach, though this is a framework that can be met within the current system. Indeed, SLAB carried out a series of Best Value reviews in 2011, on special urgency, on mental health and on immigration and asylum work and has, in common with other public bodies, mainstreamed this Best Value approach in recent years

Question 10. Are there changes that you consider would make legal aid function more as a public service?

We do not believe that further change would be required.

[7] [2017] UKSC 51

[8] Rocket Science for the Law Society of Scotland, *Social Return on Investment in Legal Aid – Summary Report*, 2017

[9] A. Deseau, A. Levai, and M. Schmiegelow, *Access to Justice and Economic Development: Evidence from an International Panel Dataset*, 2019

Question 11. Are there potential risks to looking at the delivery of legal aid as a public service?

There are structural challenges in considering legal aid as a public service in some areas of law, particularly those in which the decision of a public body is being challenged. The independence of decision-making required for individual cases is one of the reasons for SLAB as a non-departmental public body, rather than as an executive agency (though the latter model was adopted for the Legal Aid Agency in England and Wales). Also, unlike other public services, the fairness required from an adversarial court system also requires rules around conflict of interest. The network of legal aid providers nationally allows for any conflict to be avoided, while affording clients choice in their professional representative.

Part 2 – The Change Agenda

i) Scope and oversight

Question 12. Are there actions that could be taken by the Scottish Government to help maintain or strengthen the current scope of legal aid?

Maintaining a broad scope for legal aid continues to be a key safeguard for the most vulnerable in society, ensuring that every individual in Scotland has the ability to access legal advice and support when faced with challenging situations. In times of increasing pressure on public finances, continuing to fund legal aid services provides savings in other areas of public spending, by preventing the escalation of problems preventing a cascade of negative incidents. It is important to ensure that full scope is available not just in theory, but also in practice. Without a body of providers covering the full geographic spread of Scotland, but also willing and able to provide advice and representation in the full range of legal areas in scope, the legislative scope of legal aid does not meaningfully translate into access to justice for all individuals in Scotland. As a result, reforms relating to fees, support for rural practitioners, and improvement of cash-flow will be important in maintaining and strengthening the scope of legal aid.

Question 13. Are there any other aspects of the current scope of legal aid that you think should be reformed?

While the Scottish legal aid system has an admirably broad scope, there remain areas which would benefit from its extension.

Access to legal aid for group actions remains a challenge, due to the requirement that all potential members of the group must be eligible for legal aid. Access to representation at tribunals is restricted,

which fails to recognise the increasing complexity and the inherent importance of many tribunal cases. And challenging human rights abuses at the European Court of Human Rights remains out of scope, as it is not considered a matter of Scots law.

In addition, ensuring that sanction for counsel is available in criminal law cases in the Sheriff Court where these could have been taken in the High Court is necessary to ensure fairness and equality of arms.

Question 14. Are there actions that should be taken by the Scottish Government to help support and strengthen the work of SLAB?

As a public body, SLAB should be supported to be open and accountable, and to make consistent decisions, getting it right first time. This requires proper resourcing, development of procedures, and training for staff, as well as ways for users (both solicitors and members of the public) to understand and, when necessary, challenge the basis of decisions.

ii) Improving access and targeted interventions

Question 15. 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?

No. Significantly more detail would need to be provided around what a memorandum of understanding would involve, how it would be monitored and how to resolve any questions of whether the memorandum of understanding was being met. It is suggested that the memorandum of understanding could include "what solicitor firms should expect by way of service level standards in return for providing valued work". We believe that such standards should be embedded in the legal aid scheme itself rather than any memorandum document.

Question 16. What should be contained in a Memorandum of Understanding to strengthen consistency of service and user centred design?

We refer to our answer to the previous question. We do not support the introduction of a memorandum of understanding.

Question 17. 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?

As SLAB recognises, legal aid has historically been subsidised by the profession. The scheme set up in 1949 set fees at 85% of those available for private client work, subsequently increased to 90%. That link was broken and the disparity between legal aid and private client fees has increased since. Introducing commitments to undertake set numbers of cases, where each is subsidised by private client work, would place significant financial risk on firms. Additionally, the development of a 'cab rank' style model, where cases would need to be accepted, unless exceptional cause was shown, would create challenges for practitioners. Court workloads are often unpredictable and, for criminal legal aid, this challenge is compounded by unexpected requests for assistance, day or night, at police stations.

Question 18. In principle, do you support a change whereby SLAB would have a standardised range of intervention powers, in statute, across all legal aid types?

As we highlight in our response to question 45 below, SLAB already has a number of intervention powers, and we do not believe that additional powers are necessary.

Question 19. Should lay advisers be able to access funding through legal aid to provide advice?

Lay advisers can currently access funding through legal aid for the provision of advice. Section 12A of the 1986 Act provides for a register of advice providers, who can access funding for work carried out under advice and assistance, though these provisions have not been used since their enactment in 2007. Schedule 1A of the 1986 Act further provides that registration of an advice organisation is subject to demonstrating compliance with an adviser code. As such, whether through grant-funding or through existing statutory provisions, there is the ability for lay advisers to be able to provide advice through funding held by SLAB currently. Though the 1986 Act does not specify, we highlight that we would not consider lay advisers appropriate for criminal legal aid, because of the significant implications for the individual and such advice being invariably prompted by police investigation or criminal prosecution.

Public confidence in the legal aid system is crucial and it is important that there are appropriate standards in place to protect this. Legal aid solicitors are part of an effectively regulated profession with an established framework for maintaining standards and protecting the public. Ensuring analogous standards for lay advisers is an important step to protecting this confidence. One area that would need careful consideration around the wider use of lay advisers, whether through grant funding or other statutory measures, is the effect of contributions or clawback, which we believe should be applied consistently across providers to avoid unintended consequences. Similarly, we believe that if there is to be a wider role for lay advisers under the legal aid scheme, it should be possible for suitably experienced or accredited paralegals working within law firms to be able to participate.

We would also suggest, if such an extension were to be made, that consideration be given to the types of case in which lay advice could be provided. If representation is generally likely to follow initial advice in particular case types, it may be preferable for advice and assistance and legal aid to be offered by the same provider, avoiding referral and repetition for the client.

Question 20. 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?

We believe that an effective legal aid system should see all providers able to provide services effectively to people with protected characteristics (and there are obligations for service providers under equality legislation).

While we stress the need to maintain a mixed model of service provision, continuing to use both private practice and employed solicitors in the provision of legal aid, it may be appropriate to consider increasing the role of in-house solicitors to deliver legal aid. Solicitors already work within the third sector and law clinics providing advice directly and alongside other services. It may be possible to strengthen these models to increase the role that solicitors and the legal aid system play within the advice sector. Third sector organisations are often sources of particular specialist knowledge and experience in representing and supporting specific groups. They are also accountable and responsible for the professional legal advice and conduct that they provide.

These proposals will need to be carefully considered to ensure that we understand the possible impact on the current landscape, and to address concerns around the sustainability of funding models for the advice sector. In addition, the issues of independence, managing conflicts of interest, and ensuring adequate geographic coverage, including across rural areas, will need to be considered. There are particular regulatory and insurance issues to consider for solicitors working in-house.

Question 21. 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?

At the outset, there is a need to define and develop a common understanding of what the term ‘lay adviser’ means. Then consideration can be given to what the scope of their role would comprise, where they would fit into the overall legal advice and assistance/representation structure, their employability, training, responsibility, governance and accountability.

It is however not a solution to the problems that the public face when they need legal assistance, advice and representation. We have concerns about the use of lay advisers to address any perceived gap in provisions of legal advice or service. Were there to be any introduction of a role for lay advisers, that needs to be carefully considered and clearly defined.

We would also have concerns about an initial lay advice and signposting service which could effectively act as a gatekeeper to legal advice. If access to the legal aid system were restricted through the advice and signposting system, there would be a risk of individuals being diverted from the system at first contact. It would be important that any such system was monitored and reviewed to ensure that it was making appropriate referrals and providing good quality advice.

Question 22. Do you think that there would be benefits to having a telephone triage service that provided basic advice and referral assistance?

We believe that further detail around any proposals for a telephone triage service would be required. Having a telephone service to support applicants could have benefits. More robust systems of referral and signposting could allow users to navigate the legal aid system more effectively.

We do have concerns around triage through this channel, not least because of the experience of the legal aid telephone gateway in England and Wales. We also have concerns that the breadth of case types, particularly for civil legal aid, might require a degree of specialism that made provision impractical.

The independent strategic legal aid review did recommend a "new online and telephone service to signpost members of the public who need access to publicly-funded legal assistance." There is no current obstacle to SLAB, Scottish Government or other provider offering a telephone referral service under the existing statutory and regulatory framework for legal aid. The independent strategic review of legal aid also highlighted the need for a multi-channel approach that met the needs of the public, citing the approach of the Advice Services Alliance/Citizenship Foundation:

> "Legal education and information can be provided in a variety of ways that may involve passive or active engagement – through face-to face contact, via social media, by telephone or via leaflets and other written material. Diverse methods of delivery are needed to reflect the fact that people receive and understand information in a number of ways, something that may be determined by their level of education or even by their cultural or community background. Interactive approaches, properly resourced, can be particularly effective.[10]"

There is a significant difference, however, between a telephone service offering basic advice and referral assistance and one providing triage of legal services. Triage, a concept emerging from battlefield medicine

[10] Advice Services Alliance/Citizenship Foundation, *Towards a National Strategy for Public Legal Education*, 2004

in the 20th century, is the process of determining the priority of patients' treatments based on the severity of their condition. There are telephone triage systems operating for other public services, notably the NHS24 111 telephone number across Scotland. This is not an additional channel for accessing medical services but rather an 'unscheduled care service'[11], with operating hours at evenings and weekends providing cover when face-to-face services from GPs, dentists and others unavailable. There is also an online portal, NHS Inform[12], that provides healthcare information, directories of services, online self-assessment tools and the like.

One of the challenges with a triage service, both conceptually and in practice, is the element of rationing involvement in decision-making around treatment, which can conflict with the aim of providing the best outcome possible to people accessing the service. This tension is illustrated by the deployment of a telephone gateway for legal aid in England and Wales. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 established the Gateway, which provided telephone advice in debt, discrimination, special educational needs, housing and family cases. For the first three of these practice areas, it was mandatory to provide this advice by telephone; for the last two practice areas, the person was able to choose whether to receive advice face-to-face or remotely. The Gateway aimed to provide a service delivered at times to suit end users, without having to wait for or travel to face-to-face appointments, resolving legal problems more effectively – with the additional benefit of reducing stress and anxiety as a result – and reducing the costs to the taxpayer. The Gateway was evaluated by the Ministry of Justice in 2014 and by the Public Law Project in 2015 and considered by the Bach Report in 2017[13].

Fundamental concerns were raised around the operation of the Gateway's triage. Reporting in June 2019, the Equality and Human Rights commission was critical of the number of cases being referred for face-to-face help:

> "If [people seeking help with discrimination cases] are then assessed as unsuitable for telephone advice, they should be referred for advice face-to-face. Yet, of the 7,768 discrimination cases taken on between 2013/14 and 2017/18, only 18 such referrals were made. Many of the service users we spoke to said they would have liked face-to-face advice, but legal aid providers told us that the system discouraged them from making these referrals[14]"

The Equality and Human Rights Commission also highlighted other issues around accessibility. It was estimated that around 14% of service users had a mental health condition and that 5% of service users had a learning disability or difficulty. The number of service adaptations made was low, the report noting that "just 20 involved the use of the Language Line (0.26%) and just two involved the use of 'Typetalk' text

[11] https://www.nhs24.scot/Our-Services/introduction-to-the-111-service

[12] https://www.nhsinform.scot/

[13] Ministry of Justice, Review of the Civil Legal Advice Mandatory Gateway, 2014; Public Law Project, *Keys to the Gateway: An Independent Review of the Mandatory Civil Legal Advice Gateway*, 2015; Bach Commission, *The Right to Justice: the Final Report of the Bach Commission*, 2017.

[14] Equality and Human Rights Commission, *Access to Legal Aid for Discrimination Cases*, 2019

relay (0.03%)". On the basis of this experience, we would be concerned at the development of a triage element to any telephone service and would need assurance that it was not diverting people in legal need from being able to resolve their issues effectively.

Question 23. If such a telephone triage system were implemented what criteria should be used to identify the most appropriate organisations to deliver this service?

We believe that further detail would be required around how any telephone triage service would be developed, recognising some of the challenges from the deployment of a telephone gateway in England and Wales, in order to be able to determine the most appropriate organisations.

Question 24. 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?

No. The availability of face to face advice remains important to a wide range of individuals for many different reasons, not limited to vulnerability or digital exclusion, and the default position should not be to restrict it. Whatever service is provided it needs to be effective and efficient and fulfil the requirements of access to justice. Much information may be capable of being provided digitally – but on many occasions, those requiring advice and assistance may not be able to identify the crucial issue themselves.

Legal aid needs to be accessible to all and while there is significant potential for new channels of delivering services, it is crucial that these improve (or, at least, do not diminish) the outcomes for people accessing these services. Including the users of services in the design of these may assist, as may research on how these channels work in practice. It is not simply about whether people struggle to access digital services, as the example of bail hearings in immigration cases shows. The Bail Observation Project noted that of 211 immigration bail hearings observed, 50% of those heard via video link were refused bail, compared to 22% of those heard in person[15]. In a separate study, it was suggested that many people preferred videoconferencing in criminal cases, though were unaware of the disparity in outcome between virtual and physical attendance[16].

[15] Bail Observation Project, *Still a Travesty: Justice in Immigration Bail Hearings*, 2013

[16] Transform Justice, *Defendants on video – conveyor belt justice or a revolution in access?*, 2017 (https://www.barrowcadbury.org.uk/wp-content/uploads/2017/10/TJ_Disconnected.pdf)

Question 25. 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?

We support the current grant funding model available in civil legal aid and accept that there may be scope to extend targeted interventions in situations where there is a genuine gap in provision. However, we do not support a broad use of grants or contracts as a primary method of legal aid provision. Ensuring appropriate fee levels and a simplified system should encourage a broad network of solicitors willing and able to carry out the full range of legal aid work. If there are reasons why it is not possible to fully support the legal needs of particular groups or in specific geographic areas, consideration could be given to targeted interventions through different funding options. However, this should not exclude other providers from delivering that service through the standard legal aid system, in tandem with other legal aid funded programmes. This would encourage greater user choice and would not restrict the development of other businesses or services that may grow to operate in that area over time.

Question 26. Should grants and/or contracts be able to cover all aid types?

No. We support the current grant funding model available in civil legal aid, but do not think that it would be as effective or appropriate for the situations faced by those in the criminal or children's systems.

iii) Simplicity and Fairness

Question 27. Do you agree that the judicare system should be simplified?

Yes. The current legal aid system is complex and difficult to navigate, both for solicitors and members of the public. This system does not best serve the purposes of the legal aid system and simplification is critical. We have previously suggested a range of ways to simplify the system and are particularly pleased to be working with SLAB on proposals for a single aid type. Abolishing the categories and creating a single continuous grant of legal aid would make the system easier to navigate and more able to adapt to the individual needs and circumstances of clients and solicitors, resulting in less delay and confusion. Requirements to inform SLAB of material changes in circumstances and to seek sanction for certain expenditures or actions would ensure that public funds were used appropriately.

Significant simplification of the fee regime is also desirable, though we acknowledge that the issue of fees is currently being considered separately from this consultation.

Question 28. Should SLAB have more flexibility in operating the system?

Further detail on the proposals for increasing flexibility is required before meaningful comment can be made on this issue.

Question 29. 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?**

Consistency and predictability in decision-making by SLAB would be important to establish. This would reduce the time and administration spent on preparing applications and requests for review and allow for more reliable advice to be provided to clients at each stage of the process.

Question 30. Do you support a single eligibility assessment at the earliest point in the application process?

Yes.

Question 31. Are there situations when the continuation of more complex financial calculations would be required?

Yes. There will always be situations where a more complex arrangement will be appropriate. However, we strongly support the move towards simplification where possible.

Question 32. Should there be more strictly defined financial thresholds for eligibility?

Yes. This would be simpler and easier to understand and apply. However, it will be important that there is potential to make an application on the basis of exceptional circumstances to ensure that access to legal aid is preserved in cases that would otherwise be denied if this would lead to a breach of human rights.

We also believe that the financial thresholds for legal aid should be reviewed regularly. Similar to the approach to legal aid fees, we believe that there should be adjustment to take inflation into account. Failing to do so would result in fewer people being able to receive legal aid. We believe that an inflation-adjusted approach is consistent with Scottish Government policy elsewhere, including, for instance, the commitment

in the Social Security Charter to "increase the value of disability, employment-injury, carers and funeral expense benefits every year in line with inflation.[17]"

Question 33. Would you support the availability of funding to those with a common interest in legal proceedings, such as Fatal Accident Inquiries?

We would support a consultation being held into how funding should be made available to those interested in Fatal Accident Inquiries (FAIs). This would extend to include any public inquiries held under the Inquiries Act 2005. There has been no consultation into how and when legal aid should be provided in FAIs to date. The present position is somewhat piecemeal and would benefit from a significant overhaul. We doubt that families making applications for legal aid in FAIs fully understand the current legal aid application process and are likely to have difficulties in understanding the eligibility criteria for legal aid and the types of cases where funding may be available. Exactly who should be given legal aid in estranged families is also a matter on which views should be canvassed.

The issue is not merely about funding. The reasons why a FAI may be held would need to be considered. The focus for legal aid should be on the families involved and their interests.

The Ministry of Justice recently conducted a similar exercise that resulted in the publication of the Final Report: Review of legal aid for inquests.[18] Though that Report deals with the English system of a coroner, it is relevant to the FAI system in that it stresses that the purpose in holding an inquest is about seeking "to establish who the deceased was and how, when and where they came by their death". What is common to both systems is the search to find out what happened. This is important not only for the deceased relatives but also the public interest in establishing lessons to be learned to prevent other deaths in the future. Public interest as the focus for holding such FAIs may be relevant to considering when to provide legal aid.

FAIs held in Scotland may be mandatory or discretionary in terms of sections 2 and 4 of the 2016 Act. Mandatory inquiries include those that have arisen as a result of an accident during employment and arising in custody. FAIs that are discretionary are those where the Lord Advocate considers that the death was sudden, suspicious or unexplained, or occurred in circumstances giving rise to serious public concern and decides that it is in the public interest for an inquiry to be held. The range of such discretionary FAIs is open-ended. Families' views will be sought and will be considered in making recommendations as to the holding of a discretionary FAI, but in practical terms the Lord Advocate decides, though his refusal to hold such FAIs can be judicially reviewed.

[17] https://www.gov.scot/publications/charter/

[18] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777034/review-of-legal-aid-for-inquests.pdf

Legal aid is granted currently for FAIs in accordance with the civil legal aid criteria of financial eligibility and probable cause and reasonableness. Guidance on SLAB's website is provided where legal aid is sought in relation to deaths in custody[19]:

- probable cause is established if the applicant falls within the category of persons entitled to be represented at the FAI as a relative of the deceased or as a potential defender.
- reasonableness, SLAB indicate that they will look "favourably on the application subject to there not being more than one request from a family member for representation. Given that someone has died in custody it is appropriate for relatives to have their own independent representation at the inquiry to determine the facts and as such the test of reasonableness will be met."

Where there are multiple family members, there is a need to demonstrate why more than one family member needs to be represented at the inquiry, irrespective of the background to the inquiry (including deaths in custody), where it is known that requests for such representation will be made.

For all other FAIs, probable cause is satisfied where the applicant falls within the category of persons entitled to be notified of a FAI under section 11 of the 2016 Act. However, reasonableness is much more subjectively assessed on range of criteria which include:

- why the applicant needs separate legal representation at the FAI, in addition to the role of the Crown
- any potential areas of dispute with the Crown in relation to the approach taken to the FAI or the evidence to be led
- any areas of concern in relation to any other party involved in the FAI that might result in the need for representation
- any areas of FAI the applicant wants to pursue which will not be addressed by the Crown or should be pursued in a different way
- why these different areas of inquiry are appropriate and reasonable to be taken forward at the FAI, having regard to the purpose of an inquiry
- any other factors should be considered in assessing the need for representation.

Under the current arrangements, SLAB has no flexibility to decide whether to disapply or disregard the statutory requirements that operate to assess an applicant's finances. Application of the criteria may mean some families receive legal aid while others do not in the same inquiry. What that means for the public is a perception that the grant of legal aid in connection with FAIs is random.

Some issues that arise in relation to representation include:

- In the Clutha helicopter FAI, legal aid was partially granted to some of the families whereas others sought a charity to contribute to their legal costs. The fiancée of the deceased pilot indicated that

[19] https://www.slab.org.uk/providers/handbooks/Civil/part4chp4#4.89

she could not apply for legal funding until her finances "run out" but that she cannot apply for legal aid until that has happened as her salary was "significant." Though there may well be common interests as to the outcome of that inquiry, she may have had other interests than those of the relatives who died in the bar.

- A legal aid application was made on behalf of the child in the FAI into the death of the Sharman Weir to secure funding.[20] Had an application been made by the partner, it is unlikely that the financial test would have been fulfilled.

There are approximately 50 FAIs held in a year.[21] There are a number that might not require the grant of legal aid as families would not seek to be legally represented or would be funded by means of insurance policies.

A FAI should be progressed expeditiously and efficiently[22] and not delayed by the assessment process carried out by SLAB.

These all seem reasons why specific consultation on this topic should be held.

Question 34. Do you agree that those who can afford to do so should pay a contribution?

Yes, as a general principle, we support contributions from those who can afford to make them in civil legal aid. How contributions are assessed and the levels they are set at is a matter for the government to determine but should be developed with a view to clarity and certainty for the applicants, and taking into account the importance of access to justice irrespective of financial means. The discussion of the Supreme Court in relation to court and tribunal fees in the UNISON case could be used as a relevant reference when considering eligibility thresholds and contributions for legal aid:

> "The question whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Fees must therefore be affordable not in a theoretical sense, but in the sense that they can *reasonably* be afforded. Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable."[23]

[20] http://www.scotcourts.gov.uk/search-judgments/judgment?id=13c286a6-8980-69d2-b500-ff0000d74aa7

[21] https://www.unlockthelaw.co.uk/fatal-accident-inquiries-scotland.html

[22] The Act of Sederunt (Fatal Accident Inquiry Rules) 2017

[23] Paragraph 93, *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51

There should also be some proportionality between the contribution required and the type of help provided. There are also particular types of case where we think that there are substantial concerns around how contributions impact access to justice, criminal legal aid, which we outline in response to the next question, and cases where children are the applicants. At a stage that there is a commitment to incorporating the UN Convention on the Rights of the Child into domestic law, we believe that there should not be a financial disincentive to children being able to enforce these rights.

Question 35. Would you support the implementation of contributions in criminal legal assistance for those who can afford to pay?

We have significant concerns about contributions in criminal legal aid cases. Without substantial safeguards being put in place, including provisions to support the courts and ensuring that SLAB collected any contributions, we cannot support contributions in criminal legal aid. We highlighted these concerns around summary and solemn contributions during the process of legislation passing through the Scottish Parliament; and we raised these around police station advice, where contributions were ultimately removed.

Unlike civil cases, the ability for the alleged offender to pay may be adversely affected by the outstanding case against them - for example they cease to earn as they are in custody or restricted by bail conditions, or suspended from their work. Thereafter cases that have custodial or other consequences for employment such as a road traffic disqualification may affect their future income and possibility to pay. We would also highlight the consequences for the family. There are time limits within which criminal cases must progress and the consequences of failure by applicants to pay contributions risks significant delay. Solicitors may need to withdraw from acting because of non-payment, applicants may decide to self-represent (creating additional delay). Early resolution of cases, and the efficiency savings that this emphasis provides, would be jeopardised by such contributions.

The independent review of legal aid recognised a number of these challenges:

> "I recognise the severe practical difficulties that arise over collection of an individual's contribution. The failure to receive a contribution further reduces the payment a criminal defence solicitor will receive for the work which they do. In the event that a client does not pay, how is it to be recovered? Is it anticipated that the solicitor will raise court proceedings for it? There are real threats to the system if the view is taken that a failure to pay a contribution means the client no longer has representation. One can anticipate the chaos which could be caused in that situation and the costs which could stem from that in relation to wasted court time, witness expenses etc."

Were contributions to be introduced in criminal legal assistance, these must be collected by SLAB, not by solicitors. SLAB already has the infrastructure in place to collect contributions for other case types and, at the stage at which summary and solemn contributions were being considered, was to undertake collection of the latter. Collection by SLAB would also allow it to monitor the adverse impacts on the justice system from the implementation of such contributions.

Question 36. 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. Simplifying the contributions system will make it easier for applicants to understand and enable them to make informed decisions about their actions. As discussed above, it should be possible to make an application on the basis of exceptional circumstances where a simplified system might risk breaching an individual's human rights.

Question 37. 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?

We support reform of the operation of clawback to make it clearer and easier to understand. As discussed in our response to the previous question, this would enable applicants to make informed decisions, but must be subject to an exceptional circumstances procedure.

Question 38. Would you a support that there be a test on whether clawback should apply?

In principle, it would be possible to have a clear and easy to apply test for a simplified clawback system. However, further detail on any proposed test would be required.

Question 39. Do you hold any other views on how the current system of contributions and clawback could be improved?

In addition to the contributions being assessed on the basis of the applicant's financial situation at the time of application, we would also suggest the potential to introduce an enhanced contribution for those who recover or are awarded significant assets as a result of their case. This would apply, for example, in a divorce case where the applicant has limited resources at the start of the case, but receives a significant award. If the individual at the end of a case would not qualify for legal aid on the basis of the financial eligibility tests, it may be reasonable to require an additional contribution. This would reduce the burden on the legal aid fund and would also encourage solicitors to accept more cases on a legal aid basis.

Question 40. Do you consider the merits tests appropriate and transparent?

No. With any subjective or qualitative test, there will be challenges in ensuring consistent and appropriate decision making. We do not think that having a merits test is inappropriate, but we would encourage consideration of how to improve decision making to ensure that the application of the test is consistent, predictable, and can be understood by solicitors, clients, and the public.

Question 41. 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?

We consider that a system of stage reporting similar to that already in place would provide sufficient assurance of the ongoing suitability of legal aid funding for a case. We do not feel that repeated merits tests beyond the level of stage reporting would be necessary. It adds complexity to the system where simplicity must be the main aim.

Question 42. 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?

We would support an increase in the types of legal aid that could be granted by a solicitor without SLAB's prior approval, on the assumption that the conditions and eligibility tests are clear and consistent, reducing the scope for retrospective challenges to be made. In general, solicitors are well placed to assess whether it is appropriate to grant legal aid in a case.

A high trust model, similar to that in the Netherlands, could have significant benefits to providers and to SLAB. We understand that the current scheme of legal aid requires around 3.5 million accounts decisions to be undertaken each year by SLAB, to ensure that public funds are protected and that cases are managed appropriately.

Question 43. In general, what controls do you think should be put in place to protect the Legal Aid Fund from inappropriate use?

Legal aid is met from public funds and must command the confidence of the public. We believe that the powers held by SLAB to monitor and protect the Legal Aid Fund are fit for purpose and work effectively.

Question 44. Would you support the introduction of any merits test on what is currently the advice and assistance scheme?

No. Because of the scope of the advice and assistance scheme, we believe that there is sufficient benefit to the recipient of advice and assistance to justify the current arrangements.

iv) Enhanced Statutory Powers and Best Value

Question 45. 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?

No. We do not believe that this is necessary, as SLAB already holds a range of statutory powers and broad discretion to act. Section 2 of the 1986 Act provides SLAB with the power to "do anything… which it considers necessary or expedient for securing the provision of legal aid and of advice and assistance in accordance with this Act."

Most of the proposals raised by the consultation paper fall within its current powers:

- Community planning - SLAB attempted this approach in 2004 but did not progress beyond pilot
- Telephone services - SLAB has previously established a Solicitor Contact Line to provide advice in criminal cases and could do so in a civil or children's context, either employing staff direct or through its CLAO network
- Integration with advice services – section 12A of the 1986 Act allows SLAB to maintain a register of advice agencies that can admit clients to advice and assistance under the legal aid scheme, though this has not been used
- Grant-funded interventions - SLAB already has substantial grant-funding powers and has used these, sometimes successfully, such as the Scottish Women's Rights Centre and sometimes less so, such as the Immigration Advisory Service at Dungavel
- Contracted interventions – SLAB has the power to enter into contracts for criminal legal aid and children's legal aid, though this has not been used

There may be good reasons why existing powers have not been used, though we believe that it is important to articulate why the existing range of powers are not fit for purpose before providing additional powers.

The areas where SLAB does not have significant discretion are around the various different aid types, where there are restrictions placed by the framework of advice and assistance, ABWOR and legal aid, across criminal, civil and children's work. If new powers are to be provided to SLAB, we believe that this area should be the priority, to ensure that the applications and accounts processes become less bureaucratic and more accessible to the public and to providers.

Question 46. What checks or controls would you consider necessary if SLAB had statutory powers to operate more strategically?

We do not believe that SLAB requires any additional statutory powers.

Question 47. Do you consider changes to the composition and structure of SLAB's Board necessary to help support a more strategic role?

No. Section 1 of the 1986 Act provides that a Board of at least 11 and not more than 15 persons are appointed, with five of those persons requiring specific professional qualifications or experience[24]. Up to two-thirds of Board members require no specific qualifications or experience, which we believe sufficient to allow for recruitment to meet any needs, including duties around gender balance once the Gender Representation on Public Boards (Scotland) Act 2018 is implemented.

Question 48. Do you support that SLAB should register and quality assure all those providing services paid by the Legal Aid Fund?

Firms providing criminal, civil and children's legal aid require registration and are subject to peer review. These arrangements work effectively and we support their continuation as stands. If there were to be wider use of lay advisers in the legal aid system, either under existing statutory powers or in different ways, we believe that it is important to have broadly analogous standards for such provision, ensuring that the public receive a quality service and that legal aid retains public confidence.

[24] Section 1(4) requires "at least two members of the Faculty of Advocates… at least two members of the Law Society; and… at least one other person having experience of the procedure and practice of the courts."

Question 49. Do you agree with the Review recommendation that all quality assurance reviews and reports on both lawyers and third sector advice services be published?

No. The current cycle sees every registered provider peer reviewed over a six-year period. A peer review assessment conducted several years previously may not be an accurate assessment of the current standard of the provider.

Question 50. 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**

We strongly support reforming the way that outlays are managed. The current system requires solicitors to carry the cost and the risk of outlays, often for considerable periods of time, without certainty of or control over full reimbursement. Abatements are common, and many experts will not deliver their reports before payment is received. The relatively high level for reimbursement, especially when firms may be carrying outlays across several cases at any point in time, results in cash flow concerns and does not reflect a private client reality.

These three proposals would help address some of the current concerns. It would be important to ensure that there was scope to allow for an expert not on the preferred supplier list to be instructed, and to apply for an exception to the fee table, or an uplift, if required in exceptional circumstances. This framework may raise issues relating to clawback. However, most settlements will proceed through the solicitor. If the solicitor recovers the money, the solicitor could reimburse SLAB for the outlays of the case. We would consider a statutory framework to give SLAB these powers to be very desirable.

Question 51. Are there types of expert reports and other reports which could be subject to more control than others?

There are a range of common outlays, which may be managed in different ways, either together with one of the above proposed approaches, or independently of wider reform. The following examples suggest different approaches to suit different circumstances.

Birth, Marriage and Death Certificates

The Registers of Scotland is a government agency. With the Scottish Courts and Tribunals Service, where a party has emergency legal aid or a legal aid certificate an exemption form is put forward and the Scottish Courts' 'bill' for whatever fee it be, writ fee, motion fee etc is exempt.

If a party was subject to advice and assistance or alternatively had a legal aid certificate or emergency legal aid a similar reciprocal arrangement with the Registers could be put in place so that no fee is chargeable where a certificate is sought.

Doctors' reports

It is doubtful whether a reciprocal arrangement such as an exemption form would work with GPs where a medical report is being sought, but one answer would be to lower the reimbursement level to over £50. That presumably would cover most GP reports.

Sheriff Officers' fees

There is perhaps a greater discussion to be had about Sheriff Officers' fees in the future. There should be a provision for Sheriff Officers submitting a fee note to SLAB directly for payment. Clearly there would have to be either emergency legal aid or a certificate in place. The Sheriff Officer should have that information and be able to submit an invoice directly to SLAB for payment.

Shorthand writers

Many of the civil courts in Scotland have digital audio recording facilities, though these are often not used, and a shorthand writer engaged instead to record proceedings. Though there can be additional costs, for instance, if transcription of the audio recording is required, we believe that there is a significant overall saving from using the digital audio recording facilities already available.

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