



glasgow bar association
established 1959

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INTRODUCTION

RESPONSE BY THE GLASGOW BAR ASSOCIATION

TO THE SCOTTISH GOVERNMENT'S CONSULTATION -

REFORM OF LEGAL AID

The Executive Committee of the Glasgow Bar Association (GBA) welcomes this opportunity to respond to this consultation on behalf of its members. The GBA is the largest association of Solicitors in Scotland, representing Solicitors in the West of Scotland and acting on behalf of our clients throughout Scotland. Glasgow Sheriff Court is the busiest Court in Scotland. It has also been billed as the busiest Court in Europe. Glasgow has the highest population pro rata of the most socially deprived and vulnerable members of Scottish society within its jurisdiction.

The Aims and Objectives of the Glasgow Bar Association are: -

1. To promote, represent and protect the rights and interests of its Members in the practice of law; and by extension those of its

members' clients and therefore the wider public including the most vulnerable members of society.

2. To promote access to legal services and to justice.
3. To consider and, if necessary, formulate proposals and initiate action for law reform.
4. To consider and monitor proposals made by other bodies for law reform and draft legislation and to make comments, recommendations and representations thereanent to the appropriate quarters.
5. To arrange conferences and lectures and otherwise to provide opportunities for its Members and others to study and keep up to date with current and proposed law practice and procedures.

This consultation originates from the Martyn Evans Review - Rethinking Legal Aid, An Independent Strategic Review. We note the Scottish Government (SG) seeks to embrace some recommendations and disregard others, such as the recommendation to abolish the current Scottish Legal Aid Board (SLAB).

That is your privilege, but as we have already seen, the law is ever changing and evolving, as is society, and ignoring or disregarding particular aspects which do not suit a current political agenda may ultimately do a dis-service to the legal landscape and society as a whole.

We welcome the Scottish Government's commitment to the continuation of the scope of legal aid provision for all matters of Scottish law. What vexes us as a profession is the ability to provide that with budgetary constraints placed upon us by successive governments.

This Consultation seeks to ask "the big questions" about reforming legal aid and asks many questions about what the future landscape of this provision will look like. We will endeavour to respond to the questions in the response paper attached, but have found that without additional information being provided, we are unable to respond in the detail we would have liked. Our question to this government is **ARE YOU PREPARED TO ADEQUATELY FUND AN INDEPENDENT LEGAL PROVISION FOR THOSE MOST VULNERABLE MEMBERS OF OUR SOCIETY?**

We believe that the mark of a civilised society is how it treats its most vulnerable members of society. An independent legal profession must have

the ability to challenge the machine of government, uphold the rule of law and safeguard civil liberties and human rights.

The government has deliberately separated reform of the system as detailed in this consultation from issues relating to payment. As one hand washes the other, we believe that the issues are mutually inclusive. We cannot complete this consultation without making reference to this issue. We believe that successive, systemic governmental underfunding of provision has been the root cause of accessibility issues. We welcome the introduction of the expert advisory panel in relation to future fee structures and reviews of same. We welcome an increase in our fees. However, we comment that a 3% increase, which has not been backdated, announced shortly before the Scottish Legal Aid Board's annual report confirmed a reduction of over 8% in the spend for their year ending 2018, does not demonstrate good faith on the part of government. The government is aware of the social benefits to society as a whole from the provision of a judicare system. The government will also be aware of the heat map illustrations produced by the Law Society of Scotland (LSS) detailing absence of provision in geographical areas of Scotland and projections that this provision will diminish further with the retirement of senior legal professionals. The cost of administration of the Scottish Legal Aid Board is disproportionate to their grants. In 2007/2008, the costs were £13.2 million. In 2016/2017, the costs were £11.8 million. In 2017/2018, the costs were £12.03 million. The Martyn Evans' Review indicated there is a projection of a reduction in Legal Aid spending of £75 million in the next 10 years if the current trends continue. (Page 15.)

The Consultation attempts to link the Christie Commission with legal aid provision. We submit that there is no link between what that Commission was tasked with and extending this to adapting judicare to a public service. This is a government construct.

Inevitably, as the law develops and society modernises and technology improves, systems require to adapt to meet those changing needs. There is a patchwork of provision. We acknowledge the hard work done by organisations such as Citizens Advice Bureaux and Law Centres. We acknowledge that there were political motivations in instituting Public Defence Solicitors Offices and Civil Legal Assistance offices but they are more expensive to administer and are more of a burden on the taxpayer than funding the current judicare system of individual solicitors. The Government has already explored contracting in relation to Criminal Legal Aid provision. This is discussed in the Martyn Evans' Review. (Page 76.) As professionals, we are concerned about the public's perception of a lack of impartiality if we are employed directly by the state whose decisions our clients are seeking to challenge. A lack of information about what a Memorandum of

Understanding would be prevents us from engaging meaningfully in any dialogue about that. The concern we have is that it would ultimately lead to less favourable terms and conditions for us, which will impact upon the provision for the client. The current landscape whereby members of the public do not have choice of legal provision in their own town demonstrates a chronic failure by successive governments to fund this provision. We do not need the government to wield a hammer to crack a nut. Only 2% of the population will require this type of assistance and the regulation of provision must be proportionate. It cannot be right that members of our population in the Borders, Highlands and Islands cannot have a solicitor of choice to represent them. It is unacceptable that if you live in Argyll and Bute, you require to consult with the CLAO in Edinburgh.

In 1999 when the modern Scottish Parliament was instituted, the basic salary of an MSP was £32,422.00. Now it is £65,579.00. This is a 102% increase in salary. The fee structures for Solicitors are not even inflation linked. We vehemently reject the conclusion made by Martyn Evans that there is no evidence to support an increase in the level of our fees. We have generally found that any modernisation of fee structures produces a saving to government and a reduction in the fees payable to solicitors. Chronic underfunding is leading to the gap in provision which currently exists. The solution is to provide reasonable remuneration to the professionals undertaking this work. If this government and future governments do truly value the work undertaken by Solicitors in the judicare system, then reflect that in the rates of remuneration. It cannot be acceptable that an interpreter will receive a better rate of remuneration for their services in Court than the solicitor acting for the accused.

Finally, we would welcome any visit by an MSP to Glasgow Sheriff Court to illustrate the commendable work done by our members in representing our clients, who we believe are always at the centre of the work we do for them.

The Consultation Document Responses

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

Please give reasons for your answer.

We agree that the voice and interest of the user of the system should be at the centre.

However as the consultation identifies the system of legal aid currently operating in Scotland compares very well internationally. The current system has been in place for approximately fifty years and has worked reasonably well during that period. The legal aid system in Scotland maintains a wide scope of eligibility for both criminal and civil cases with very few exceptions in terms of area of law. Accordingly it is not entirely clear that there requires to be a such a significant change in the manner in which legal aid is delivered. Notwithstanding that, improvements can be made to the system and it is agreed that the voice and interest of the user should be at the centre of these improvements.

The current system has the interests of the user at the centre. Although it is suggested in the consultation that the onus is on a solicitor who has decided to progress a case to seek appropriate cover this is not done on the whim of the solicitor but is done on behalf of the user who has provided instructions to progress the case. There are no “unmanaged and unplanned” decisions that are dependent on the provider.

Within the current system the user has very little direct contact with the Scottish Legal Aid Board. The present system involves the user attending with a solicitor and an application being submitted to SLAB on behalf of the user and thereafter the solicitor deals directly with SLAB to process the application. There is no obligation upon the user to deal with SLAB directly. It is important to remember that the users of legal aid are amongst the most vulnerable and disadvantaged in society and it may often be the case that

they would prefer the current model to continue and that they do not wish to deal directly with SLAB.

It is accepted that the voice of the user is not at the centre of the system. The user has very little influence in the areas of law where legal aid is available and also has no voice in terms of the criteria by which legal aid is granted and the systems which are in place. There are likely to be areas of the law where the user would wish legal aid to be made available, such as for minor road traffic offences but it is not available due to policy decisions made by the SG which are unlikely to change despite the views of the user.

• **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

Scale choice 2.

It is not clear how enhanced approaches to quality assurance embeds the user voice into the design and delivery of a legal aid service. The user voice and experience already have a significant role in the quality of the service provided. In a free market economy the service provider will attempt to provide a quality service in order that the client will be retained and also so the client may pass on through word of mouth to other members of the public the quality of the service provided.

Legal aid solicitors conduct a significant amount of work in public. Court appearances are conducted in public forums where members of the public are able to observe the work undertaken by a solicitor. Furthermore, this work is scrutinised by the court. Solicitors are also subject to regular inspections by the Law Society of Scotland who monitor compliance with the Code of Conduct, CPD obligations and the financial rules. The SLAB also monitors the solicitors compliance with the Code of Practice, CPD obligations and quality assurance through the peer review system.

Further information would be required before it could be ascertained whether “primary legislation establishing a unified system for quality assurance across legally aided solicitor and advice sector services, focusing on incorporating consumer considerations such as taking

account of the particular service delivery structure”, would be of any benefit whatsoever.

It is accepted that the views of the user are important and that the user will be able to provide information about the quality of the service provided and that these views are of assistance.

However, care must also be taken to be aware of the service user who is simply unhappy about the outcome achieved rather than the quality of the service provided. There may also be situations where the user is reluctant to discuss private legal matters.

2. Indirect engagement through consumer panels

Scale choice 3.

In view of the fact there are around 100,000 users of legal aid in a year it may be more effective to have a consumer panel acting on their behalf. This would have the advantage of the users needs and legal aid being reviewed on a regular basis.

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

Scale choice 4.

There is no doubt that there is benefit in discussing the merits of the system with the service providers. They have significant experience in providing this service over a number of years and will be able to identify issues and provide solutions as to how the system may work more effectively. The criticism of this method is that it fails to place the voice of the user at the centre although their interests would be protected.

- **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?**

No.

Please give reasons for your answer

This system would again place further duties on the service providers despite criticisms of an already bureaucratic system and who are already underpaid for the work they do and would be unlikely to receive further remuneration.

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.

Please give reasons for your answer

The current model with publicly funded private solicitors works well and has done so since the introduction of legal aid. Although it is suggested that the system has limitations insofar as the services are not consistently available and that 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 this is primarily due to significant issues in funding.

There does not appear to have been any thought applied in terms of how the mixed model would benefit the service user. Issues are raised that there may be an oversupply in certain areas. It is not clear how an oversupply may be an issue for the service user as this will provide them with a greater choice. However, despite this being highlighted it was felt appropriate that the PDSO would be introduced in areas where there was already a significant number of solicitors who provided legal services in that geographical area and in that area of law. Had there been more planning put in place these offices and solicitors may have been more effectively placed in other areas of the country where there is a shortage.

Consideration may also be given to whether a user who has received a grant of legal aid may make a top up payment. Presently, if legal aid is granted the whole case must be funded by legal aid but there may be occasion when a user wishes to fund the use of an expert privately or pay for additional services from their solicitor.

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

Yes.

Please give reasons for your answer

It is already accepted that the judicare model is not serving well the users of civil legal aid. This has resulted in the creation of the CLA office. This is also driven by geographical area and it is a much more significant issue in more rural areas of the country. However, again, this is an issue which could be addressed by increasing fees. There are a number of solicitors who provide this service on a private basis and would be more willing to do so for legal aid rates if there was an increase in funding.

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

Yes.

Please specify which areas and give reasons for your answer

There are undoubtedly specific areas of law that would benefit from a more targeted approach to funding but the whole system requires a significant injection in terms of funding solicitor services.

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

Yes.

Please specify which groups and give reasons for your answer

There are certain groups of people who may benefit from a more targeted approach. The review makes reference to certain issues suffered by members of the public who suffer from a disability and that the lack of flexibility in the system creates additional work for the service provider. There would also be a targeted approach to funding solicitor services for people who do not speak English and who require the assistance of an interpreter.

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

Yes

Please give reasons for your answer

We agree that the system should be more flexible on a case by case basis. Due to the significant and complex rules which apply to legal aid there are certain situations, when although funding is available for a specific type of case and the user meets both the means test and interests of justice test, due to certain circumstances, legal aid may not be available. More generally, we would submit that legal aid is flexible in that it can cope with changes in the law to allow funding to be made available in certain areas.

iii) Legal aid as a public service

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

No.

Please give reasons for your choice

We would submit that legal aid is a publicly funded service but we do not believe it is a public service due to the fact it is only accessed by 2% of the public. There are also a number of members of the public who do not qualify for legal aid on account of their financial circumstances. It is difficult to identify legal aid as a public service when it cannot be accessed by all.

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

Yes.

Please give reasons for your answer.

Members of the public who do not access legal aid have a very low understanding and opinion of legal aid in comparison to how they perceive the service provided by their GP. There is also a perception that legal aid is only accessed and available to members of the public who are unemployed and who struggle financially. The Scottish Government should do more to promote legal aid and the services which are available through legal aid.

Unfortunately, the only time legal aid receives any publicity is when solicitors and politicians raise issues about the level of fees which impacts upon the public mindset about legal aid lawyers and detracts from the service provided.

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

Yes.

Please give reasons for your answer

If legal aid was to be considered a public service it would be subject to Best Value principles. This would place further obligations on legal aid firms in relation to the structure and method by which their services are delivered rather than upon the effectiveness of their service. Within the review it is also suggested that all publicly funded legal assistance services would be subject to performance audit by the Accounts Commissioner and by the Auditor General for Scotland and that all quality assurance reviews and reports of lawyers under publicly funded legal assistance should be published. This would result in legal aid service providers being made subject to much greater public scrutiny than solicitors who undertake private work. This may impact upon the ability of legal aid firms being able to attract solicitors to undertake this type of work.

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. The GBA agrees that the current scope of Legal Aid must be maintained. The current provision of Legal Aid allows for a diverse range of issues to be considered. It is unclear what other actions are contemplated by the Scottish Government to “help support and strengthen the work of SLAB”. Further details would have to be disclosed prior to a meaningful response can be given. However, it should be noted that to date the administration at the SLAB is a well-resourced, well paid organisation.

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

Any review of areas of law that are assisted by the availability of Legal Aid is welcomed by the GBA. However, that is met with the caveat that any such review seeks to engage service users such as Solicitors meaningfully. The overriding issue with our members is that of simplification of the legal aid process, in particular in family contact cases.

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

Their decisions should be consistent and the organisation more accountable. Protocols for decisions, staff training and regular reviews will assist. More transparency in decision making and review processes will improve matters.

(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?**

The GBA is opposed to any concept of a “Memorandum of Understanding” (MOU) being implemented and enforced up on its members and service providers.

It is unclear as to the rationale behind such a proposal. The SLAB has existing powers that control the access to the use of the fund and access to the files of service providers to ensure compliance. Providers already have to acquiesce to conditions imposed by the SLAB prior to being able to receive funding.

There is a misapprehension that those providers that receive funding do so without having to undertake work. On the contrary service providers are an invaluable resource at the front line of legal provision in Scotland.

It is of concern to the GBA that any such Memorandum be classified as a prerequisite. It is difficult to understand the necessity for such a document to be prepared. Further, there is deep concern within our membership of the requirements that would be contained within such a Memorandum and consequently the GBA calls for the SG and the SLAB to provide further information to providers as to the precise requirements that would be imposed in such a document.

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

The GBA opposes any concept of a so-called MOU being implemented. Further it is noted that that the content of the MOU would “strengthen consistency of service”. The GBA calls upon the SG to clarify how words in a document are to assist those receiving assistance achieve consistency in service. Such terms are vague and imply that receivers of assistance to date are not receiving an adequate service.

- **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?**

A MOU will have no impact on any level, to the legal sector ability to respond to an emerging legal need.

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

The GBA does not support the proposal that SLAB would/should have a standardised range of intervention powers, in statute, across all legal aid types. This would appear to be a broad-brush approach rather than a targeted strategy to address areas where there are gaps, or perceived gaps, in service provision. The fundamental issue that cannot be ignored is that of the availability of funds and in the rates of the funding. It is of interest to note the use of terms such as “better planned intervention”, however like with all areas of legal provision the overriding issue is that of funding. Will the “exclusive funding arrangements” be sources of additional funding? How

does the SG propose funding any new interventions? Is this new money being diverted to the SLAB? The questions being asked of respondents are vague and it is difficult without further detail to provide a more descriptive response.

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

It is of concern that the review asks whether lay advisors be able to access funding through legal aid. Legal advice in principle should be given by trained and qualified Solicitors. Those Solicitors are subject to Codes of Conduct, Practice and regulated by their professional body.

It is submitted that lay advisors should be allocated funding should the SG provide them, with the appropriate funding, but it should not be from “legal aid”. It is submitted any funding of lay advisors should be from a separate source of grant funding.

- **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?**

The GBA welcomes any additional source of funding that will be provided by the SG for solicitors to have the ability the costs of their services met in relation to “civil legal issues”. Any funding should not be restricted to an organisation but should be open and available to individual solicitors or firms to provide representation and advice to victims of crime, minority groups etc. The GBA welcomes any assistance qualified solicitors and members can provide to those in third sector organisations, however, reiterate that this all comes back to the issue of the source of the funding. The funding of these must not be diverted from the existing “budget” of the SLAB. Funding must be separate and provided by the SG.

- **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?

The GBA does not support the proposition that SLAB should be allowed to employ lay advisers. The GBA is not convinced that such a step would be an appropriate use of public funds and in any event is unnecessary. No further information has been provided as to what “information” these advisers would be providing and there has been no evidence proffered that there is a need for such a system to be implemented. Further, there is concern that non legally qualified “advisors” would be essentially the first point of contact for members of the public seeking “legal advice”. The potential for a conflict of interest is apparent between the provider of funding for legal issues and the system designed to “advise to aid early resolution”. Such a system is unnecessary.

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

The GBA believes that there should not be a “telephone triage service that provides basic advice and referral assistance”. It is submitted that there is no gap in the market for service users in attaining “basic advice”. The issue comes back to the arguments of lack of funds being made available to service users in taking the next steps after the “basic advice”. The restrictions are on the levels of availability of funds for Civil Legal Aid, contributions to legal aid funding and the overall remuneration rates for service providers.

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

As stated above the GBA is opposed to such a “triage service”. There has not been documented evidence that there is a gap in the availability of advice for members of the public. If one were to be implemented such an organisation must be distinctly separate from the SLAB.

- **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?

Many of the members of the GBA have their own websites that provide a plethora of information for potential clients. These websites contain different ways in which those wishing to take the next step can contact a lawyer. Some members offer “Skype calls”, call backs etc. whilst freephone numbers have been in existence for decades. Members of the GBA have consistently had at the forefront of their practices and business the best interests of their clients which also includes convenient options for them in using technology.

- **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?**

The GBA does not accept that any form of contracting will address the issue of any perceived gaps in advice in certain geographical areas. There appears to be a knee jerk reaction to the shortfall in assistance in small geographical areas. The main issue with our members and colleagues around the country is simply the low level of remuneration, the hourly rates for solicitors providing civil legal assistance and legal aid. There is a reason why there are so called “legal deserts”. It is not economically viable for some to provide advice at the prescribed decades old rates of pay. Rather than implement costly new schemes, if the SG allocated further resources to increasing the fees of solicitors and increasing the rates of eligibility of applicants, then this would be of assistance in delivering legal representation to all users and applicants.

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

It is submitted that there is currently no shortfall in the availability of solicitors in private practice willing or able to undertake Criminal Legal Aid work in Scotland.

iii) Simplicity and Fairness

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

Yes

Please give reasons for your answer

Being simpler will be more client friendly, it should improve efficiency and the legal aid system will then be more economical to administer.

- **Should SLAB have more flexibility in operating the system?**

Unsure

Please give reasons for your answer

We are unable to give an informed response to this question without further information about what is being proposed.

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?

Consistency in the decision making process by the SLAB is essential in allowing us to be more efficient, better advise our clients, and will promote quicker decision making, will be less stressful for the applicants and will promote access to justice,

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

In matters where urgency of advice and representation are established.

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

Yes

Please give reasons for your answer

This will give clarity at the earliest opportunity and simplify the process.

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

Yes

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

Yes, one size does not fit all. Where a client is self-employed or incapax, or the nature and extent of an applicant's income and assets is unclear, further examination will be required.

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

Yes

Please give reasons for your answer

This will give clarity in assessment and simplification of assessment will be more economical to administer. However, there should be the ability to make an application based on exceptional circumstances and hardship to allow an individual's particular circumstances to be taken into account. These thresholds should be reviewed annually, to take into account inflation, as is done by the SG for benefits.

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

Yes

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

The interests of justice will need to be weighed up here, considering the public interest versus the applicant’s own interests. It may be that restricted funding for parts of the process, such as cross examination of expert witnesses is allowed. We promote the principle of equality of arms in the legal process.

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

Yes, preserving the status quo for Civil Legal Aid, Adult applications for Children’s Legal Aid but abolishing means testing for any child applicant. See below regarding Criminal Legal provision.

Please give reasons for your answer

In principle, we accept this proposition but would prefer the SLAB to be responsible for the collection of all contributions. It is harder to argue in favour of the proposition when the case relates to criminal prosecutions as there are access to justice arguments and the principle of equality of arms comes into play with the Police and Crown being state funded and not subject to cost limitations. There are strong arguments for proportionality to be exercised in contribution amounts compared to subject matter.

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

No

Please give reasons for your answer

In our experience, the majority of applicants in receipt of criminal legal aid are eligible due to their income. There has to be a balance between human rights, access to justice and being financially punished to defend yourself against prosecution by the state. We would want the SLAB to be responsible

for collection of all contributions. For both of these sections, the SG has to weigh up the cost of the collection system as opposed to the financial benefit gained from the contributions.

- **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

Please give reasons for your answer

Simplification would be most welcome. We experience delays in assessments for those in work on a low income or where an applicant is self-employed which are disproportionate to the legal dispute, causing clients to abandon applications, become stressed and anxious and invariably results in applicants being deprived of access to justice. There should however be capacity in the system to undertake a more detailed assessment to account for an applicant's particular circumstances and to avoid hardship.

- **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

Please give reasons for your answer

We welcome simplification and consistency of decision making. There should not be inconsistencies in its operation. We do however support a continued hardship test as one size will never fit all situations.

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

Yes

Please give reasons for your answer

We support the principle of simplification as this will give clarity to the applicant and their advisor. However, we would ask that the legal profession is consulted about what any test should be. It is impossible to give an informed answer to this question.

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

Greater clarity and consistency in decision making would assist. The government may wish to consider varying the current regulations which prevent a solicitor making a private arrangement at the conclusion of a case for payment of their fees, rather than the accounts being processed through the fund. There could also be an additional contribution at the case end proportionate to any recovery or preservation made. The current system prevents access to justice because solicitors are prevented from claiming on outlays until certain thresholds are met and an account will not be paid by the Scottish Legal Aid Board until a determination has been made about recovery.

- **Do you consider the merits tests appropriate and transparent?**

No

Please give reasons for your answer

The merits test should be a simple and quick one to determine. There should be consistency in decision making. This is not currently the case with the Scottish Legal Aid Board. The facts will illustrate how many decisions they refuse at first instance and are then granted on review. This does not promote access to justice. It is time consuming, ultimately costs more and is very stressful for applicants.

- **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?

No

Please give reasons for your answer

We accept that the SG wants to be able to control budgets and spending. The current system in civil legal aid of case reporting meets this role and can be extended to criminal legal aid. We favour simplification.

- **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 support a high trust model. Solicitors are ideally placed to make these assessments and it will reduce administration costs at the Scottish Legal Aid Board. Clarity in eligibility tests and automatic grants will ensure access to justice

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

We believe the current obligations imposed by the Law Society of Scotland and the SLAB, for Codes of Practice, Peer Review, Firm applications and individual applications ensure that the fund is protected. Legal Aid Solicitors are more highly regulated for an advice and assistance case worth £35.00 than commercial solicitors undertaking multi-million pound transactions.

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

No. The SG does not want to reduce scope. The current system has checks and balances because of the initial limit of authorised expenditure. Criminal Advice and Assistance has all but been abolished because of the regulations which subsume any such grant into a subsequent criminal legal aid grant.

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?**

This question lacks the appropriate definition to allow it to be answered definitively.

However,

- a) If the suggestion is that the SLAB be given enhanced statutory powers to allow it to alter the detail of amounts paid in solicitors block fees/ hourly rates then this Association may be able to support that measure simply because a continual difficulty arises when clear inconsistencies are identified in practice. The difficulty is this: SLAB is constrained by legislation and cannot alter the fine detail of how it disburses its funds even when SLAB itself wants to, (and may be in agreement with the profession). The SLAB must return to Government for statutory approval which is a cumbersome and slow process and therefore the SLAB is not capable of tailoring the system to respond to particular issues. An example could be that the SLAB has on various occasions vaguely indicated it wishes to adjust the values of block fees in solemn cases to more effectively reflect the onerous responsibilities and pressures on solicitors (and as the profession sees it in some examples - including hourly rates in the High Court and S76 pleas -wholly inadequate payments) yet it cannot simply adjust this detail within the overall budget without recourse to parliament.
- b) If the suggestion is that the SLAB be given enhanced powers to map out and implement the future direction of Legal Aid in Scotland in the sense that more powers for that purpose are devolved by Government to that organisation then the Glasgow Bar Association would be

strongly opposed to this. The SLAB is already in a powerful position given its clear and strong routes to Government and we believe already it has an extremely significant role in tailoring how legal aid as a whole is approached. The GBA certainly does not feel there is the same opportunity to exchange information with Government and although the Law Society of Scotland has a statutory role which it performs ably, practitioners still feel at a considerable disadvantage when explaining the various practical and geographical issues that have beset the Legal Aid funded section of the profession and most importantly their clients. It would be a serious error to assume that the SLAB as the administrator of funds therefore also represents the solicitors who draw on those funds. It is often seen (unsurprisingly given it is a large quasi-governmental body and the profession is largely made up of very small to medium sized firms) as having a completely different set of values and therefore a different agenda from the profession.

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

The answer to this question is contained in the answer above. Put simply: there should be a statutory requirement on the SG to consult widely and regularly with the profession on the ground. This should continue of course to include the LSS. But their role should be complemented and enhanced by opening the Government's doors (so far completely closed), to the bodies that represent and accurately reflect the legal professionals dealing with the myriad, geographical and local issues which can impact nationwide: namely this countries network of bar associations.

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

Yes

Appointment should be by election.

The board of the SLAB is a body that appears relatively remote to many practitioners in our Association and so far has not been seen as a significant vehicle for professionals on the ground to have input into the SLAB. Perhaps the election of a number of representatives from the profession would remind the profession of its importance.

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

No

Solicitors are already quality assured by a rigorous series of SLAB inspections, peer reviews and LSS inspections. This Association has previously pointed out that the imposition of extremely high levels of bureaucracy from above are already placing an intolerable burden on firms. There is no requirement whatsoever for a quality assurance scheme which would only increase SLAB's policing duties while undoubtedly being unable to, in any meaningful way, measure what matters to the client - the solicitor's actual legal performance, be that in court or in negotiation. Bear in mind that the extensive paperwork required, rigorous time recording demanded, and hugely energy sapping process of applying for Legal Aid along with the many other demands that have been allowed to creep down have largely destroyed the value of Legal Aid work and many firms are already in crisis – and that is before the limited level of payments are taken into account. A summary case paying a fixed fee of £499 or even £295 at justice level can involve many hours of unnecessary paperwork that interferes with the effective delivery of service. A solemn case, paying less than £50 an hour, likewise.

- **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

See above. As an organisation we agree with very little of the Review's recommendations and consider it a completely missed opportunity.

- **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;

Scale choice 1.

The danger of a preferred supplier list is that it simply creates a closed group who will benefit from increased work and be under the patronage of the SLAB. It is anti-competitive. It could be, to coin a common phrase, yet another “race to the bottom”. It is hardly in the interests of a fair trial for an accused to have a limited range of experts available. There is already a significant problem finding experts because of the perception of SLAB’s limited rates of reward.

2. deal directly with the experts to arrange payment;

Scale choice 5.

There is no reason why the SLAB should not pay experts directly. It would be welcomed. It would also allow the SLAB to raise quality control issues directly with experts if it feels the need.

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

Scale choice 1.

This is one of those ideas that looks good on paper but is guaranteed to cause chaos and injustice in practice. The SLAB would be in greater danger of pushing experts out of supplying them because of uneconomic rates. In what way would it be in the interests of an accused to have their defence predicated on a limited pool of what no doubt will ultimately become low-price and questionable quality experts dependent on staying on an approved semi-Government list to obtain work? In what way is it equitable to say to a solicitor you can only defend this person if you use this expert?

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

If the SLAB was to take direct responsibility for paying experts then the organisation would be in a stronger position to deal with this issue.